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The Public's Preferences in Supreme Court Rationale

William Svob

Thesis for the College of Arts and Sciences and Honors Program

3-25-22

## Introduction

Public approval of the Supreme Court has been decreasing in recent years. Given the literature's consensus that Supreme Court rulings coincide with popular opinion more often than not, the decrease in popularity cannot be explained away by assuming the justices have made a series of widely despised rulings. This raises questions about what exactly the public wants the Supreme Court to do. There is an abundance of research covering the many factors that influence a justice to rule in a particular manner, but there is little written about what the average American believes should influence the Court. This study is intended to fill this gap by testing the connections between the rationales used by the Supreme Court and the changes in the Court's popularity over the years.

There is already documentation of the political mood of both the American populace and the Supreme Court justices, as well as the approval of how the Court has performed its duties. By determining the rationales used in the Court's most well-known cases and comparing it to changes in Court popularity, the impact of a rationale on the public's feelings towards the Court can be better understood. The dependent variable is the Court's popularity, and the independent variables are the year of the case, the public's mood, the Court's political partisanship, and the rationales used. After creating a chart with these variables, I ran a regression to determine which factors were statistically significant in changing Court popularity. The results showed that only the year the case was decided and the public mood that year had a significant impact on Court popularity.

## Literature Review

There is a significant amount of literature researching the connection between the Supreme Court and public opinion. Because justices are not directly elected, there is a degree of separation between the justice and the electorate that does not exist with Congress members. This raises questions over to what extent legal doctrines held by the justices are agreed with by the public. Legal doctrines are defined as ideological stances on how the law should be applied. For example, stare decisis is the doctrine that precedent set by previous court rulings should be followed. A justice ruling to uphold a previous ruling despite having partisan reasons for overturning it would be an example of a Supreme Court ruling being based on legal doctrine. My intention is to study if the public shares the legal doctrines the Court uses to make decisions.

Rather than having only a single guiding principle, Supreme Court justices make rulings based on a variety of motivations. Judicial independence allows justices to rule based on their own ideology, implying that legal factors need not play a large role (Bailey 2008). However, justices may also rule in accordance with certain legal norms because they are socialized by law school and the legal community (Bailey 2008). Justices write on how legal doctrines like precedent shaped their decisions in private documents like memos, further indicating that justices value legal principles (Lax 2011). Three legal doctrines are frequently relied upon by justices: stare decisis, judicial restraint, and strict interpretation of the 1<sup>st</sup> Amendment. Most justices are likely to defer to one legal doctrine over their personal politics. For example, Antonin Scalia ruled that flag burning was protected under free speech, despite personally wanting to put flag burners in jail (Bailey 2008). It is worth noting that justices evoke legal doctrines to justify decisions in their written opinions. While casting a vote can be done for a variety of motives, creating a persuasive legal opinion requires more solid reasoning (Lax 2011). Out of sixteen justices studied, stare decisis proved significant for thirteen, judicial restraint for twelve, and the

1<sup>st</sup> Amendment for fifteen. Furthermore, previous Supreme Court justices have regularly deferred to existing precedent in search and seizure cases (Epstein 2013). Justices have legal ideologies that override personal politics. This creates questions over if citizens who agree with the rulings of justices do so out of shared legal interpretation, or because their policy preferences are met.

Despite the historical stance of legal formalism, that the law is a tool applied neutrally (Harris 2019), justices in recent times may be allowing partisan politics to become a dominant influence over their decisions, even taking account for race and other identities (Harris 2019). For salient (high profile) cases, such as those that make the front page of the *New York Times* a day after the ruling, Supreme Court justices are more likely to vote in accordance with party politics over other influences like public opinion (Casillas 2010). An explanation for this is that in cases dealing with controversial ideological questions, justices have greater motivation to adhere to their policy preferences. Several recent trends have increased the role partisan politics play in judicial decisions. Our current liberal justices have only been appointed by Democrats and the conservative justices have only been appointed by Republicans (Hasen 2019). Examples of justices deviating from the ideology of the president that appointed does not happen to the extent it once did (Hasen 2019). As justices become more partisan, it raises the question of if the public's rationale for agreeing with the Supreme Court has become identical to those of the justices.

Besides party partisanship and legal doctrine, another influence on judicial decisions is public opinion. Non-salient cases have been found to be the most susceptible to being influenced by public opinion (Casillas 2010). Justices are less likely to have ideological interest in non-salient cases, making public opinion weigh more (Casillas 2010). There is a risk of media and

interest groups highlighting unpopular rulings in non-salient cases, making irrelevant cases controversial whereas salient are bound to be divisive anyways. (Casillas 2010). One study examined the frequency of public opinion agreeing with Supreme Court decisions by taking ten cases from the previous decade where the justices voted in line with their ideology, and asked volunteers how they would have voted in those cases, how they perceived the Court's partisan makeup, and where their own ideology lined up on a seven-point liberal-to-conservative scale. The answers of 69% of those interviewed fell within one standard deviation of the Court's positions. Furthermore, 41% of respondents described the Supreme Court's ideology as "all right," with the rest describing the Court as slanting too far one way or the other (Jessee 2013). A significant section of respondents (13%) misperceived the ideology of the justices, considering the Court too liberal despite being further left than the Court, or considering it too conservative despite being further right than the Court (Jessee 2013). The Supreme Court's rulings typically match the majority opinion, but the frequent misperception of the Court's ideology indicate that even people who agree with the ruling might do so for different reasons than the justices.

A significant cause of the overlap between public and justice opinion, as well as partisanship in the Supreme Court, is the process that selects justices. Congressmen will often confirm justices if their constituents like them. In one example, "Despite being virtually unknown, Carol Mosley Braun defeated incumbent Senator Alan Dixon in the Illinois Democratic primary, principally campaigning against his vote in favor of Clarence Thomas (Kastellec 2010)." Data gathered during that 1992 election show that the Clarence Thomas confirmation was a factor in how people voted. If a state heavily supports a nominee, Senators from that state are more likely to confirm them even when accounting for ideology, party, and the quality of the nominee (Kastellec 2010). More specifically, "roughly 55% public support in

a state gets a high-quality nominee to a 50-50 chance of a yes vote from that state's senator. A low-quality nominee needs roughly 65% public support to have the same chance (Kastellec 2010).” Outside these example, Supreme Court terms with high turnover see increased similarity between justice votes and public opinion (Blackstone 2008). This can be explained by the fact that public opinion selects presidents, who in turn nominate justices (Blackstone 2008). There is much evidence suggesting that public opinion does not just match the Court's decisions, but that it influences the latter as well. From 1956–99, the Court issued more liberal votes on cases when the public mood was more liberal (Blackstone 2008). The proportion of liberal reversals shifts with public opinion, even when justices do not change (Casillas 2010). A theory for how public opinion shifts judicial decisions is called “rational anticipation.” Justices must consider how officials will interpret their rulings and how the decisions will impact the Court's legitimacy and legacy when justices write opinions (Blackstone 2008, Epstein 2013). Public opinion impacts how justices will rule, but given the judicial knowledge gap between a justice and the general public, it is still unknown if overlap between the public's and the Court's goals are identical to the reasons why they find a particular ruling desirable.

It is one part of the question to ask what motivates Supreme Court decisions. The other half is asking what does the public *want* to motivate justices? Surprisingly, there is evidence that the public is aware that judicial decisions are made based on factors other than legal principle. The perceived legitimacy of the Supreme Court remains unaffected by knowledge that ideology and bargaining play a role in cases (Gibson 2014). There is a belief that justices can be both ideologically motivated while still being principled and sincere in their decisions (Gibson 2014). This supports the conclusion that the public still wants the Supreme Court to follow legal principles to some extent but does not see partisanship as antithetical to that goal. That may be

changing soon with the recent increase in political polarization. People on both the left and right believe the Court is legitimate more often when it rules in a way that supports their policy preferences (Hasen 2019). This trend has coincided with a gradual decrease in the Court's approval ratings. According to Gallop Polls, the Supreme Court had 62% approval in 2001, which dropped to 49% in 2017 (Hasen 2019). The consequence of this change in the political culture may indicate that the public is becoming more of a mind that justices should value partisan loyalties even at the expense on non-partisan legal principles.

Overall, the literature appears conclusive that public opinion agrees with the Court's decisions more often than not, and even plays a role in deciding case outcomes. There is a divide over whether legal principle, political partisanship, or personal reasons (legacy, relationships with colleagues, predicted implementation of decisions, etc.) have the largest influence, and when. There is little written over how much the public shares the legal doctrines of the justices. This gap in the literature can be explained by the difficulty of studying why people agree or disagree with a ruling, as well as the typical knowledge gap between the layman and a justice. Understanding why the public agrees or opposes Court rulings is integral to knowing to what extent the Court is separated from the citizens. A study examining the overlap between what motivates the decisions of justices and what motivates public reactions would need to identify the cause of Supreme Court cases and what decides public approval of those outcomes.

### Theory

The hypothesis being tested is that Supreme Court cases decided by legal principles cause the Court's popularity to decrease. The dependent variable is the Supreme Court's popularity, and independent variables are the year the case happened, the political mood of the year, the partisanship of the median justice for that year, and the different rationales justices use to make

rulings. Legal principles are defined as non-ideological tools or methods applied by justices to interpret cases. What separates legal principles from other rationale is that the former should be able to guide a justice's actions regardless of partisanship. For example, stare decisis is an adherence to the Court's previous rulings regardless of whether the precedent was conservative or liberal. Supreme Court popularity refers to the percentage of Americans who believe the Court is correctly fulfilling its role.

An assumption in this theory is that the general public would be less supportive of rulings based on legal principles because most people have not been socialized to value those principles. By the time someone is nominated to be a Supreme Court justice, they will have been socialized by the legal community and law school to use various legal principles in their rulings. Because those outside the legal field will not have the same experience, they may be more inclined to favor other rationale for deciding cases. Another assumption is that the public is aware that Supreme Court decisions are driven by a rationale. Drastic changes in the Supreme Court's public approval in recent years implies that the public is invested in the Court's activities. It is more reasonable to explain changes in the Court's legitimacy as a difference in values between justices and average Americans than to assume the Court has recently been making widely unpopular decisions.

### Data and Methods

To test my hypothesis, I first took one hundred salient Supreme Court cases from 2000-2020. If a major news publisher like the *New York Times* or *Washington Post* was covering the case while it was being decided, then I deemed the case salient enough to count. I favored salient cases, especially landmark cases, because they possess a high profile that increases visibility to people outside the legal profession. This increases the likelihood that the case's

ruling had an impact on the Court's popularity the year it was decided. To discover what rationale decided the ruling, I read each case's syllabus and majority (or plurality if no majority was met) opinion. While justices rarely cite only one reason for making a decision, there was nearly always one rationale that was heavily represented in each opinion that made it clear that it was decisive. I made note of when the deciding rationale fell under the classification of legal principle, or when the rationale fell under any number of other categories.

Despite there being many kinds of legal principles, I did not divide them into separate categories when charting cases like I did for the other potential rationales. This is because *stare decisis* was represented much more frequently than any other legal principle. This is likely because there is much precedent to comply with and following precedent is highly valued by judges for the sake of maintaining consistency in the justice system. Therefore, trying to measure the differences in how each legal principle impacts the Court's popularity would be unlikely to yield useful results given the cases available. Also, because the question my research is addressing is whether the public wants the Court to rule based on judicial norms instead of other reasons, contrasting the different legal principles that represent judicial norms would not be relevant. The rationales I classified as legal principles are:

**Stare decisis:** While precedent is almost always cited to some extent in Court opinions, I classified cases as being decided by *stare decisis* only when compliance with a previous ruling directly answered the issue in a given case. Although *Obergefell v. Hodges* is often listed as a case of judicial activism where the Court loosely interpreted the Constitution, the majority opinion states that the justices based their ruling on previous Supreme Court cases that found marriage to be a right protected by the 14<sup>th</sup> Amendment. Because a previous Supreme Court ruling was explicitly stated to have decided the current case, *stare decisis* is the rationale.

**Judicial restraint:** I made a distinction between judicial restraint and stare decisis for cases where the Court stated that governments had a free hand to legislate on an issue because the issue was not specifically addressed in any legislation or common law. In *Schuette v. Coalition to Defend Affirmative Action*, the Court ruled that the government of Michigan could ban affirmative action in public employment and public education because no law forbade such a ban.

**Strict interpretation of the 1st Amendment:** This legal doctrine specifically refers to the protection of free speech and counts as a legal doctrine because justices often use it as a rationale even when it conflicts with their political preferences. Cases decided by erring on the side of protecting a type of speech are counted under this principle. The Court ruled that the Westboro Baptist Church's protest at a funeral did not violate any law and was protected by free speech in *Snyder v. Phelps*.

**Rational basis review:** This principle states that the government has the right to legislate on matters rationally related to legitimate interests, even if the legislation itself is stupid. Therefore, courts are bound not to strike down laws that address an interest so long as they are not unconstitutional on other grounds. The Court ruled that executive orders banning entry from certain foreigners are not unconstitutional in *Trump v. Hawaii*, because national security and the entrance of foreigners is a legitimate government interest.

**Anticommandeering doctrine:** This principle is related to the 10<sup>th</sup> Amendment and requires the Court to strike down federal laws that coercing state governments. For example, the Court ruled *Murphy v. National Collegiate Athletic Association* that a federal law forcing states to ban certain forms of sports betting was unconstitutionally commandeering local governments.

While all of the above doctrines were grouped together as “Legal Principle” in my regression, I separated the other rationale into separate categories because they did not fall under the same umbrella. The other rationales are as follows:

**Judicial activism:** This rationale was my baseline that I compared the impacts of all other independent variables to. It refers to cases where justices make a ruling based on the social impacts the decision will have. The Court supported the affirmative action program in *Grutter v. Bollinger* with the specific rationale that a more racially diverse student body would be better for the country.

**Political value:** Judgements based on a political value refer to a decision made to uphold an institution that is valued on ideological grounds. The political value that decided *Hamdi v. Rumsfeld* was checks and balances, as the Court cited their role in checking executive power when it comes to indefinite detainment of American citizens. The political value category is a broad classification for rationales that meet ideological preferences instead of judicial norms.

**Non-judicial:** This refers to when the Court decides that they do not have the power to decide the issue in the case. *DaimlerChrysler Corp. v. Cuno* was a challenge to a state taxation and spending policy, and the Court ruled that this topic falls outside federal jurisdiction.

**Definition:** Definition cases are when the ruling comes down to how the Court defines a single word. It is more narrow than strict statute interpretation because definition cases are less about applying tests or analyzing topics addressed by a statute and more about whether a specific legal term matches what is being described by the facts of the case. In *Scheidler v. National Organization for Women (2003)*, the Court ruled that the NOW’s definition of extortion was

inaccurate because Scheidler was not depriving them of property. Therefore, the grounds used by the NOW to sue Scheidler were wrong.

**Strict statute interpretation:** The Court uses strict statute interpretation when the opinion emphasizes how a party's actions fall under the wording of a specific statute. When President George W. Bush attempted to establish a military commission to try someone in *Hamdan v. Rumsfeld*, the Court ruled against the President because the statutes addressing wartime powers such as the Authorization for Use of Military Force or Uniform Code of Military Justice did not authorize him to do so. That case is not a political value case because institutions like separation of powers or federalism were not invoked, only the texts of the relevant statute. This case is also not a definition example because the issue was not what falls under a military commission, but whether the President had the power to create such a body at all.

**English history:** Because of America's past as an English colony, this country inherited much of its common law from the British Empire. The *Boumediene v. Bush* ruling was decided by how English courts had handled English laws regarding habeas corpus for foreigners in territories outside England proper but still within the British Empire. I chose to distinguish cases based on English precedent from stare decisis in legal doctrines because stare decisis in the context of the United States Supreme Court is meant to apply to previous rulings from the Supreme Court of the same country.

I limited my cases to ones that were decided between 2000-2020 for two reasons. First, that time range was when I could get the clearest data regarding how popular the Court was. Second, limiting the cases to a specific timespan decreases the possibility that the regression's results will be confounded by the possibility of the American public having differences across generations in what they prefer the Court to do. To measure the Supreme Court's popularity at a

given time, I used a Gallup poll. Gallup asked respondents about twice per year if they approved of the Court's handling of its job and recorded the percentage of people who approved, disapproved, or had no opinion. Because of the timing of the poll, answers were gathered closely after the conclusion of the salient cases I chose for my sample, increasing the likelihood of those cases impacting the respondents' answers. I used the approval percentages to measure how the Court's popularity shifted.

Two more independent variables that require explaining are mood and partisanship. Mood refers to if the public was more conservative or liberal during a year. Political scientist James Stimson developed a model for assigning a number to the public's political mood per year, which I used in my regression. A larger number means the public was more liberal that year. Partisanship places the Supreme Court on an ideological continuum by assigning a number value to the median justice during a year. This model, called Martin-Quinn scores, was developed by Andrew D. Martin and Kevin M. Quinn. The purpose of accounting for the political feelings of the public and Court is to determine that the results were not skewed by a liberal public agreeing with a liberal Court regardless of the rationales justices used.

The regression using these variables is displayed below.

SUMMARY OUTPUT					
<i>Regression Statistics</i>					
Multiple R	0.586209				
R Square	0.343641				
Adjusted R Square	0.278005				
Standard Error	4.737101				
Observations	100				
<i>ANOVA</i>					
	<i>df</i>	<i>SS</i>	<i>MS</i>	<i>F</i>	<i>Significance F</i>
Regression	9	1057.379	117.4866	5.235558	1.02E-05
Residual	90	2019.611	22.44012		
Total	99	3076.99			

	<i>Coefficients</i>	<i>Standard Error</i>	<i>t Stat</i>	<i>P-value</i>	<i>Lower 95%</i>	<i>Upper 95%</i>	<i>Lower 95.0%</i>	<i>Upper 95.0%</i>
Intercept	633.5252	192.8794	3.284566	0.001456	250.3365	1016.714	250.3365	1016.714
Mood	0.85952	0.197689	4.347831	3.61E-05	0.466775	1.252264	0.466775	1.252264
Partisanship	0.871829	2.434788	0.358072	0.721128	-3.9653	5.70896	-3.9653	5.70896
Legal Principle	-0.08797	1.276882	-0.06889	0.945228	-2.62472	2.448781	-2.62472	2.448781
Political Values	1.53365	1.754101	0.874323	0.38427	-1.95118	5.018478	-1.95118	5.018478
Strict Statute	0.003869	1.758192	0.002201	0.998249	-3.48909	3.496824	-3.48909	3.496824
NonJudicial	0.462499	3.014019	0.153449	0.878388	-5.52538	6.450373	-5.52538	6.450373
Definition	0.104053	2.295764	0.045324	0.963949	-4.45688	4.66499	-4.45688	4.66499
English History	-2.85146	3.020267	-0.94411	0.347641	-8.85175	3.148825	-8.85175	3.148825
Year	-0.31673	0.098638	-3.21101	0.001835	-0.51269	-0.12077	-0.51269	-0.12077

## Results

The results of the study do not support the hypothesis. Using cases decided by judicial activism as a baseline, only the year the case took place in and the public mood of that year were statistically significant in affecting the Court's popularity. The other independent variables had p-values that were too large.

There are multiple potential explanations as to why none of the rationale played a significant role in the Court's popularity. It is possible that the public is too divided over which rationale the Court should rely on (and for which types of cases) that there is no consensus to be

found. It is also possible that too many people do not feel strongly positive or negative about whether the Court uses a rationale at all.

Explanations for the two statistically significant variables is easier to infer. For the year, polls show that faith in institutions like the Supreme Court has been on the decline recently. The changing of the year may not affect Court popularity on an individual level, but it may reflect the long-term ongoing trend of the public turning against the Court. Public mood could have a couple of implications. It could indicate that the public only cares about rulings matching their political feelings or that one side of the political spectrum generally has more confidence in the Supreme Court.

### Conclusion

This study indicates that the type of rationale used by Supreme Court justices, whether based on legal principle or others, plays little role in determining how much of the public will approve of the Court. There was a decent probability that a change in Court approval after the application of a rationale could be caused by factors unrelated to that rationale. Of the independent variables tested, only two of them (which were not any kind of rationale) had significant links to the dependent variable. While this closes one area of study, it does raise new questions about why Americans feel a certain way about the Supreme Court. It is worth examining how the passage of time impacts the Court's popularity, and what about public mood specifically indicates how the public will support the Supreme Court. This study helps to narrow down the possible influences that drive public opinions about the Supreme Court.

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