

The American Public's Preferences over Judicial Philosophies

Albert H. Rivero and Andrew R. Stone

Department of Government, Harvard University

Introduction

Scholars of the judiciary devote considerable attention to the public's views over the proper behavior of judicial actors. Recent research finds that an important determinant of an individual's support for the Court is the perception that judges are "different from ordinary politicians, in part because... they are principled in their decisionmaking" (Gibson and Caldeira, 2011). Yet existing research on public attitudes toward judicial behavior tells us little about what type of legal principles the public wants and expects judges to employ when making decisions. In this paper, we explore whether the American public holds preferences over the legal philosophies judges employ when making their decisions in cases involving constitutional principles.

Previous Research and Theoretical Expectations

Public Attitudes and Principles of Judging

- The courts care a great deal about their legitimacy in the eyes of the public, which depends in large part on how the public understands how they behave (Dahl, 1957; Epstein and Knight, 1998).
- Existing research suggests that the American public views judges as "different from ordinary politicians, in part because... they are principled in their decisionmaking" (Gibson and Caldeira, 2011).
- We expect that the American public thus holds preferences over the legal principles judges apply when making their decisions.
- We also expect these preferences to shape individuals' attitudes toward judicial behavior and judicial institutions, much in the same way that they do for judges and other political elites.

What Legal Principles Might the Public Care About?

- In particular, we expect that the public thinks about the principles of judging in the same way that judges, elected officials and the media talk about these principles.
- A primary axis of division in judicial philosophy centers on *how many* factors judges should consider when deciding cases.
- In particular, some judges (Bork, 1971; Scalia, 1997) argue that relatively few factors should affect judicial decision-making ("originalism") while others (Breyer, 2005; Liu, Karlan and Schroeder, 2010) argue for consideration of a wide variety of factors ("pragmatism").
- We thus expect Americans to hold views over judicial philosophy that fall along this dimension.

Data and Methods

To investigate the public's preferences over the legal principles and philosophies that judges employ when ruling on cases, we included a module of questions in the October 2017 Harvard/Harris Poll.

The Survey

- Monthly nationally-representative survey of 2,305 respondents (opt-in, weighted to a target sampling frame).
- Administered soon after the start of the Court's term (October 14-18) and assessed Americans' attitudes toward the judiciary, the Supreme Court and the cases the Court would hear in its upcoming term.

Measuring Attitudes on Principles of Judging

- Prompt: "You will see a series of principles Supreme Court justices may use when deciding cases about constitutional rights, such as freedom of speech, equal protection under the laws, or the right against self-incrimination."

- Present respondents with ten principles of judging (see Table 1).
- Principles drawn from literatures on judicial behavior and the popular press' discussion of judicial decision making.

Table 1: Principles of Judging

1. The plain meaning of the constitutional text to a modern reader;
2. The intent of those who wrote the constitutional provision;
3. What most Americans thought the constitutional right meant when it was adopted;
4. What previous Supreme Court decisions on the topic have said;
5. Whether the government has a strong reason for restricting the right, such as national security;
6. Whether the right involved political activity;
7. Whether a state or the federal government is accused of violating the right;
8. The likely consequence to society of ruling one way or another;
9. What other countries do in similar circumstances;
10. What is consistent with current public opinion

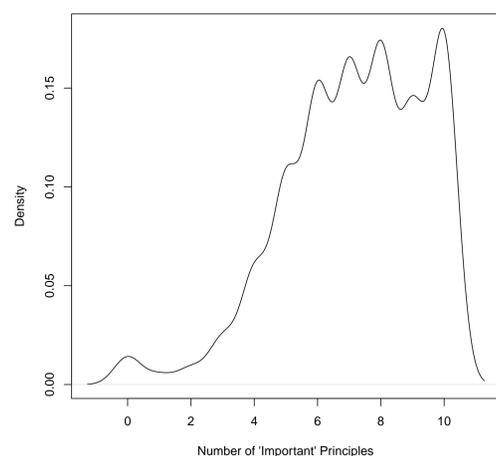
Our Analyses

- Descriptive:
 1. Do Americans hold preferences over how judges apply legal principles?
 2. Are these preferences arranged in any discernible structure?
- Exploratory:
 1. What explains the structure of Americans' preferences over legal philosophy?
 2. Are these preferences consequential for attitudes toward judges and the courts more broadly?
 - Justice Favorability
 - Preferences over Judicial Activism

Descriptive Results

We first present the descriptive patterns in Americans' evaluations of the ten principles of judging. Figure 1 is a density plot of an additive index of respondents' responses to the ten principles of judging questions. Respondents who denoted that they thought a principle was important received a 1 for that principle, and 0 otherwise. The descriptive results suggest substantively important variation in the number of legal principles the American public thinks that judges should employ when making their decisions.

Figure 1: Distribution of Respondents' Views on Principles of Judging



We then conducted an exploratory factor analysis on responses to these ten questions. Our results reveal one primary factor that explains a considerable proportion of the variation in our data, with potentially two other factors of interest. The eigenvalue for the first factor is 3.29, and the eigenvalues for the second and third factors are 1.46 and 0.92.

We identify the first factor as identifying respondents on an originalism–pragmatism dimension. The pragmatism factor has a clear interpretation as it correlates at 0.60 with the additive index of respondent's answers to the ten individual questions. We thus interpret this factor as measuring whether respondents want the justices to consider a wide variety of factors or relatively few factors when making constitutional rulings.

Table 2: Factor Loadings on Philosophy Questions

Principle	Pragmatism	Factor 2	Factor 3
Plain meaning	0.14	0.58	0.25
Intent of framers	-0.18	0.78	0.15
What most thought when adopted	0.25	0.69	0.06
Stare decisis	0.19	0.52	0.16
Strong reason (e.g., national security)	0.10	0.22	0.73
Political activity	0.59	0.17	0.37
State or federal	0.02	0.16	0.79
Consequences	0.42	0.18	0.55
Other countries	0.84	0.05	0.00
Public opinion	0.83	0.13	0.10

Exploratory Results

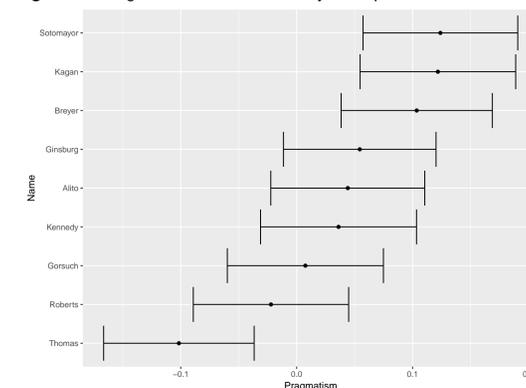
We first explore the potential determinants of our pragmatism measure. Table 3 presents the results from a linear regression of our pragmatism factor on respondent party ID and ideology. We find that judicial pragmatism is associated with both party and ideology, but not particularly strongly. For example, a one-unit movement toward greater Republican identification (on a seven-point scale) is associated with only a 0.05-point decrease in pragmatism, which is one-twentieth of a standard deviation.

Table 3: Predictors of Judicial Pragmatism

	Pragmatism
Party ID	-0.054*** (0.012)
Conservatism	-0.179*** (0.022)
Constant	0.579*** (0.042)
N	2160
Adj. R-squared	0.086
F Statistic	102.834*** (df = 2; 2157)
Note:	*p<0.1; **p<0.05; ***p<0.01

We now turn to examining the relationship between our pragmatism dimension and attitudes toward the individual justices. Figure 2 presents estimated coefficients for our pragmatism variable (on the x-axis) from a series of linear regressions predicting levels of justice favorability on a four-point scale. Notably, attitudes toward Justice Thomas, the justice on the current Court most closely associated with originalism, are those most negatively associated with an individual's pragmatism score.

Figure 2: Pragmatism and Favorability of Supreme Court Justices



Finally, we explore the relationship between views over judicial philosophy and preferences over judicial activism. We measure respondent preferences over judicial activism across eight issue areas by asking respondents whether they thought the Court should stay out of the issue or hear cases on that issue. Table 4 reveals a strong association between judicial pragmatism and support for judicial activism.

Table 4: Relationship of Pragmatism and Judicial Activism

	Activism
Pragmatism	0.238*** (0.063)
Party ID	-0.113*** (0.036)
Conservatism	-0.418*** (0.063)
Knowledge	0.250*** (0.030)
Constant	5.498*** (0.191)
N	2160
Adj. R-squared	0.160
Note:	*p<0.1; **p<0.05; ***p<0.01

Conclusions

- The American public holds structured attitudes toward how judges apply legal principles when making decisions.
- These preferences are not purely a function of partisanship or ideology, and help explain attitudes toward individual justices and the activism of the Court.
- Implications: Court legitimacy may hinge not only on the outcomes courts reach but also the rationales judges give for their decisions.
- Next steps: explore the linkages between these preferences, perceptions of how judges behave in specific cases and support for the Court.