

Performance Evaluations Are Not Legitimacy
Judgments:

A Caution About Interpreting Public Opinions Toward
the United States Supreme Court*

James L. Gibson**

ABSTRACT

It is commonplace for the mass media to report that the U.S. Supreme Court is losing the support of the American people. Such reports often rely on citizens' performance evaluations: judgments of how well the Court is doing its job. Not only is dissatisfaction widespread and seemingly growing, but it also seems to be characterized by partisan and ideological polarization. But, as scholars have long taught, performance evaluations are not the same thing as institutional legitimacy. Indeed, the point and value of legitimacy is that constituents will stand by a legitimate institution even when it is performing poorly—a concept often described as a “reservoir of goodwill.” In this Article, I explicate the conceptual and empirical differences between performance and legitimacy, based on a May 2016 nationally representative survey of the American people. I find, with others, that performance evaluations are grounded to

* I very much appreciate the support of Steven S. Smith, Director of the Weidenbaum Center at Washington University in St. Louis, and The American Panel Study, without which this study could not have been undertaken. I also thank Lee Epstein, Dan Sicorsky, and J. Brandon Duck-Mayr for their most helpful comments on an earlier version of this paper.

** James L. Gibson is the *Sidney W. Sowers Professor of Government*, Department of Political Science, Washington University in St. Louis. Additionally, he is a *Fellow*, Centre for Comparative and International Politics and *Professor Extraordinary in Political Science*, Stellenbosch University (South Africa).

some degree in partisan differences, but to a greater degree in ideological differences. The institutional legitimacy of the Supreme Court, however, does not at all reflect partisan polarization, and to only the slightest degree does it reflect ideological polarization. These data describe public attitudes at only a single point-in-time. As the Court enters into a dramatically more politicized context, only time will tell whether its institutional legitimacy can survive.

Perhaps the most salient aspect of contemporary American politics is its degree of polarization.¹ Anyone who has been even remotely near a television set during the last year of the U.S. presidential election will require no proof whatsoever of this empirical claim.

At first glance, it seems that the federal judiciary is being sucked into the vortex of polarized views. Although perhaps not the most salient issue in the 2016 presidential election, the future of the Supreme Court was certainly not ignored by either candidate—or the electorate. And, as I write this, it is clear to even the most casual observer of American judicial politics that the politics of confirming Supreme Court nominees under the Trump presidency are quiet likely to remain toxic.

Moreover, reports on public opinion seem to indicate that public attitudes toward the Court have themselves become polarized. For example, a 2015 Pew Report announced “Negative Views of Supreme Court at Record High, Driven by Republican Dissatisfaction.”² According to Pew, it appears that a large proportion of the American people are dissatisfied with their Supreme Court, and that levels of dissatisfaction reflect

¹ The literature on polarization is vast. See, e.g., Shanto Iyengar, *E Pluribus Pluribus, or Divided We Stand*, 80 *Pub. Op. Q.* 219 (2016).

² *Negative Views of Supreme Court at Record High, Driven by Republican Dissatisfaction: 68% of Conservative Republicans See Court as Liberal*, *Pew Res. Ctr.* (July 29, 2015), <http://www.people-press.org/2015/07/29/negative-views-of-supreme-court-at-record-high-driven-by-republican-dissatisfaction/2/>.

[2017]

Performance Evaluations

73

partisan differences.

Scholarly research, however, is not so certain polarization is taking place. For instance, in 2007 I concluded (from an analysis of 2005 public opinion data) that the legitimacy of the Supreme Court in the eyes of the American people was *not* closely related to ideological or partisan self-identifications.³

The crux of the polarization debate turns on what specific attitudes toward the Court are being measured. For decades now, following Easton's seminal work, I have distinguished between what is termed "diffuse support" and "specific support."⁴ To simplify matters, I refer to these two concepts as "institutional legitimacy" (or "institutional support") and "performance evaluations." Performance evaluations are exactly that: evaluations of how well the Supreme Court is doing its job. Institutional legitimacy is a bit more complicated.⁵ Professor Tyler provides a useful definition of the concept:⁶

Legitimacy is a psychological property of an authority, institution, or social arrangement that leads those connected to

³ James L. Gibson, *The Legitimacy of the U.S. Supreme Court in a Polarized Polity*, 4 J. EMPIRICAL LEGAL STUD. 507, 507 (2007).

⁴ DAVID EASTON, A SYSTEMS ANALYSIS OF POLITICAL LIFE 249 (1965).

⁵ For a review, see James L. Gibson & Michael J. Nelson, *The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, 10 ANN. REV. L. & SOC. SCI. 201 (2014).

⁶ Just to be as clear as possible, the legitimacy I am addressing is what is sometimes termed "sociological legitimacy," for example, Michael L. Wells, "Sociological Legitimacy" in *Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011 (2007), which is an empirical concept, not a normative one. For a consideration of whether the U.S. Supreme Court can have too much legitimacy, see James L. Gibson & Michael J. Nelson, *Can the U.S. Supreme Court Have Too Much Legitimacy?*, MAKING LAW AND COURTS RESEARCH RELEVANT: THE NORMATIVE IMPLICATIONS OF EMPIRICAL RESEARCH 169 (Brandon L. Bartels & Chris W. Bonneau eds., 2015).

it to believe that it is appropriate, proper, and just. Because of legitimacy, people feel that they ought to defer to decisions and rules, following them voluntarily out of obligation rather than out of fear of punishment or anticipation of reward. Being legitimate is important to the success of authorities, institutions, and institutional arrangements since it is difficult to exert influence over others based solely upon the possession and use of power. Being able to gain voluntary acquiescence from most people, most of the time, due to their sense of obligation increases effectiveness during periods of scarcity, crisis, and conflict.⁷

Although it is true that institutional legitimacy is to some degree dependent on the institution's performance evaluations, I make both a conceptually and empirically distinction between the two.⁸ Indeed, were they not, then legitimacy would be of little value to an institution. As I have previously noted, "legitimacy is for losers," by which I mean that legitimacy is a mechanism by which losers in policy fights can come to accept their loss.⁹

The purpose of this Article is to investigate contemporary attitudes toward the Supreme Court based on data from a survey conducted in May 2016 with a representative sample of the American

⁷ Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 375 (2006).

⁸ A debate rages in the political science literature over exactly how dependent legitimacy is upon satisfactory performance evaluations. See e.g., Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 184 (2013); James L. Gibson & Michael J. Nelson, *Is the U.S. Supreme Court's Legitimacy Grounded in Performance Satisfaction and Ideology?*, 59 AM. J. POL. SCI. 162, 162 (2015); Dino P. Christenson & David M. Glick, *Chief Justice Robert's Health Care Decision Disrobed: The Microfoundations of the Supreme Court's Legitimacy*, 59 AM. J. POL. SCI. 403 (2015).

⁹ James L. Gibson, *Legitimacy is for Losers: The Interconnections of Institutional Legitimacy, Performance Evaluations, and the Symbols of Judicial Authority*, in MOTIVATING COOPERATION AND COMPLIANCE WITH AUTHORITY: THE ROLE OF INSTITUTIONAL TRUST 81, 83 (Brian H. Bornstein & Alan J. Tomkins eds., 2015).

[2017]

Performance Evaluations

75

people.¹⁰ In particular, I am concerned with the degree to which Supreme Court attitudes are polarized by partisanship and ideology. In this investigation, I make a very important distinction between institutional legitimacy and performance evaluations, and argue that it is crucial that we do not take performance evaluations to be indicators of institutional support. Performance evaluations are indeed connected to ideological self-identifications, and less so to partisanship, but the Court's institutional legitimacy shows no signs of partisan polarization, and only the weakest signs of ideological polarization.

MEASURING SUPREME COURT ATTITUDES

Measuring performance evaluations is quite straightforward. In the May 2016 TAPS survey, respondents were asked: "Do you approve or disapprove of the way the following are doing their jobs?" The "U.S. Supreme Court" was on the list, with available responses ranging from "strongly approve" to "strongly disapprove."

Because institutional legitimacy is a more abstract concept, we typically use multiple indicators to measure it.¹¹ In the TAPS survey, the respondents were asked to indicate their degree of agreement or disagreement with the following propositions:

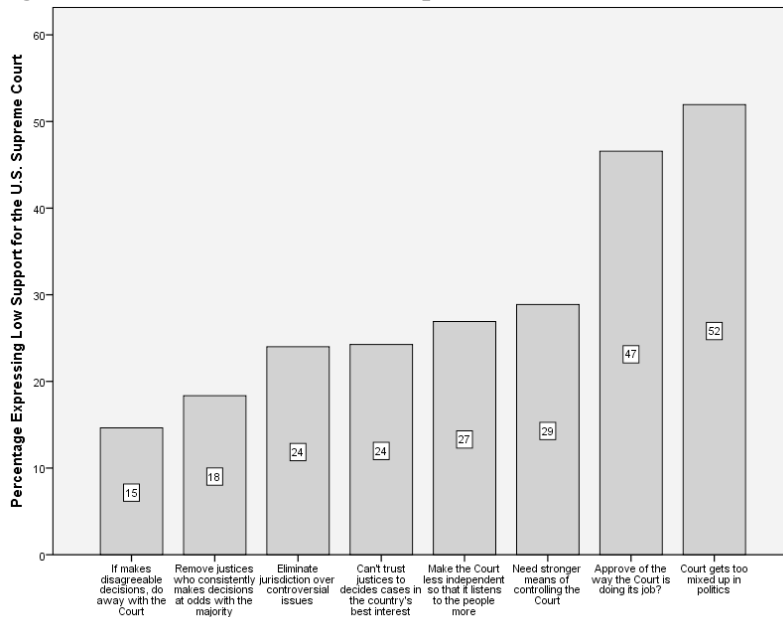
- If the U.S. Supreme Court started making a lot of decisions that most disagree with, it might be better to do away with the Court altogether.

¹⁰ This paper relies on a survey I commissioned on The American Panel Study (TAPS), a monthly online survey. TAPS panelists were first recruited as a national probability sample in the fall of 2011 by Knowledge Networks for the Weidenbaum Center at Washington University. Individuals without internet access were provided a laptop and internet service at the expense of the Weidenbaum Center. See generally *The American Panel Survey (TAPS)*, WASH. UNIV. ST. LOUIS, <http://taps.wustl.edu> (last visited Feb. 24, 2017) (explaining more technical information about the survey). The data for this study come primarily from the TAPS survey of May 2016.

¹¹ For a discussion of measuring institutional support, see James L. Gibson et al., *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354 (2003).

- The right of the Supreme Court to decide certain types of controversial issues should be reduced.
- The U.S. Supreme Court gets too mixed up in politics.
- Justices on the Court who consistently make decisions at odds with what the majority want should be removed from their position.
- The Court ought to be made less independent so that it listens a lot more to what the people want.
- It is inevitable that the Court gets mixed up in politics; we ought to have stronger means of controlling the Court.
- Justices are just like other politicians; we cannot trust them to decide cases in the best interests of our country.

Figure 1. Attitudes Toward the Supreme Court, 2016



[2017]

Performance Evaluations

77

Note:

“Low” support is the percentage of respondents expressing opposition to the Supreme Court on the seven diffuse items, with “don’t know” or “uncertain” responses treated as supportive. For specific support (performance evaluations), the percentage reported pertains to those who “strongly” or “somewhat” disapprove of the way the Court is doing its job.

Source: TAPS 2016, *supra* note 10.

Figure 1 reports the sample’s replies to both the performance evaluations and institutional support (all seven measures) questions. Specifically, it shows the percentage of respondents expressing low support for the Court. The performance question is the second from the right, and it indicates that 47% of the respondents tell us that the Supreme Court is not doing its job very well. It is just this sort of finding that lead many to believe that the Supreme Court has a tenuous and potentially rocky relationship with its constituents.

Nearly all the measures of institutional support report dramatically smaller figures for the proportions not supporting the Court. For instance, only 15% agree that the Court ought to be done away with if it continually makes decisions with which most people disagree. The single exception to this tendency is for the item stating that the “Court gets too mixed up in politics”: 52% of the respondents agree with that statement. This most likely reflects at least in part the political activities of the justices,¹² and other instances in which the Court, by its actions or the actions of others, does indeed get too mixed up in politics. On most of the measures of institutional support, the data show that opposition to the legitimacy of the Court

¹² See, e.g., Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, N.Y. TIMES (July 10, 2016), <https://www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html> (explaining Justice Ginsburg’s criticism of then-presidential candidate Donald Trump).

is small and is about one-half of the figure for those thinking the Court is doing a poor job.

A considerable body of literature has emerged investigating the connection between performance evaluations and institutional support.¹³ From the point-of-view of legitimacy theory, there must be a difference; the whole point of legitimacy is that it provides a “reservoir of goodwill”¹⁴ that the institution can draw upon when its constituents are dissatisfied with its decisions and other aspects of its performance.

In one of the few multi-nation studies of public attitudes toward national high courts, Gibson, Caldeira, and Baird reported correlations of diffuse and specific support that, according to my arithmetic, average to 0.33.¹⁵ Gibson, Caldeira, and Spence discovered that the legitimacy of the Supreme Court was not affected by its ruling in *Bush v. Gore*,¹⁶ even among the losers in that case (e.g., Democrats and blacks).¹⁷ Of course, legitimacy should not be entirely independent of performance evaluations, but danger lurks when performance and legitimacy converge too much.

In the TAPS data, some relationship does indeed exist between the two constructs. On average, about 3.3 of the 7 diffuse support statements were endorsed by the respondents. (This figure counts those who replied with “don’t know” or “uncertain” responses as non-supportive replies.) Using the criterion of endorsing at least 4 of the 7 measures, Figure 2 reports the relationship between performance evaluations and diffuse support.

¹³ See *supra* note 8 and accompanying text.

¹⁴ Easton, *supra* note 4 at 249.

¹⁵ James L. Gibson et al., *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 352 (1998).

¹⁶ *Bush v. Gore*, 531 U.S. 98 (2000).

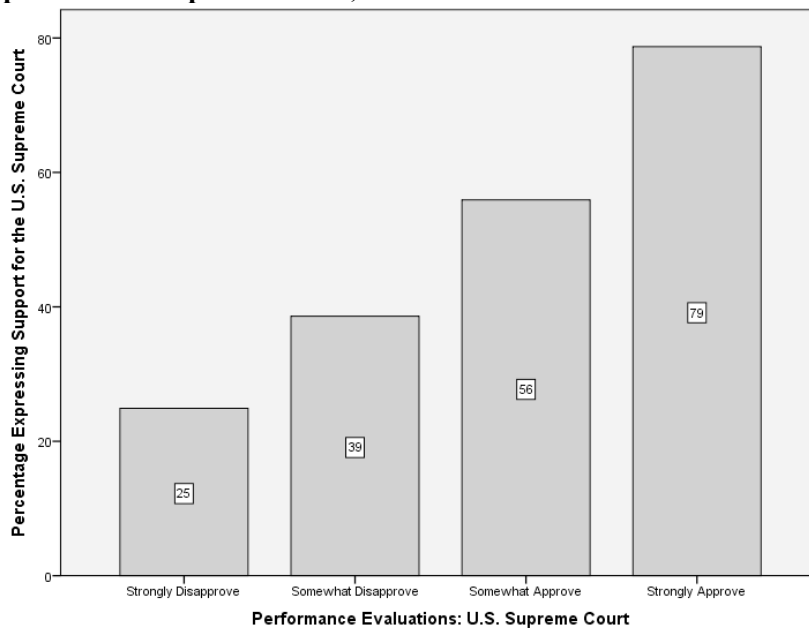
¹⁷ James L. Gibson et al., *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 543 (2003).

[2017]

Performance Evaluations

79

Figure 2. The Relationship Between Specific and Diffuse Support for the Supreme Court, 2016



Note:

N = 1,265

Difference of means test: $p < .000$

Bivariate correlation: $r = .39$

Source: TAPS 2016, *supra* note 10.

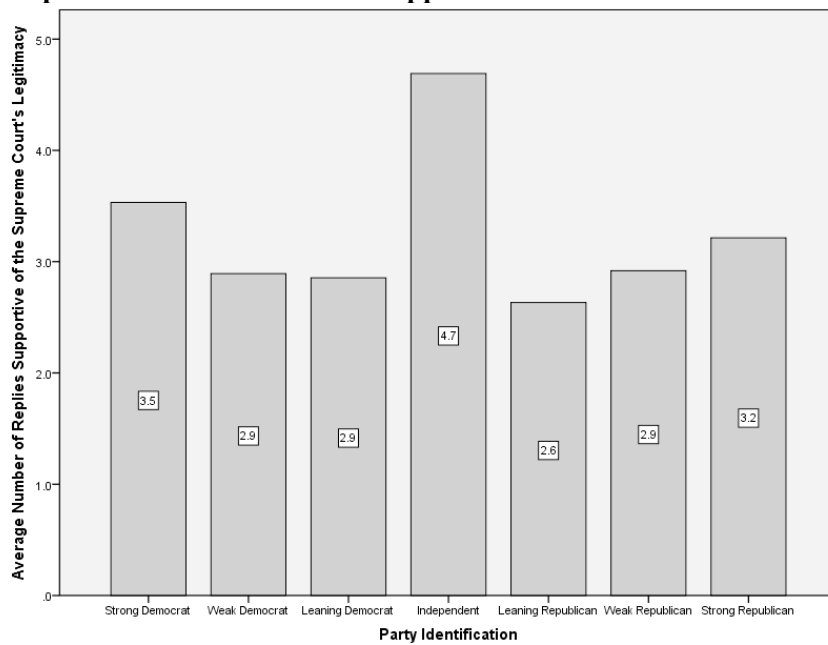
The data in Figure 2 support two major conclusions. First, a considerable relationship exists between the two variables: those who think the Court is doing its job well also tend to extend legitimacy to the institution. Second, however, the relationship is far from perfect:

those who disapprove of the performance of the Supreme Court still express relatively high levels of institutional support. This is clearest among those respondents somewhat disapproving of how well the Court is doing its job. Nearly four out of ten Americans (39%) nonetheless express higher than average support for the institution. Even one-fourth (25%) of those strongly disapproving of the Court's job performance still proclaim considerable support for the institution. Specific and diffuse support for the Court are clearly related, but among those disapproving of the Court's performance, a substantial reservoir of goodwill seems to exist.

PARTISAN AND IDEOLOGICAL POLARIZATION OF SUPREME COURT ATTITUDES

The basic polarization hypothesis is that attitudes toward the Supreme Court can be predicted from one's partisan and/or ideological identifications. Testing the hypothesis is fairly straightforward. Figure 3 reports the basic relationship between institutional support and partisan identifications; Figure 4 reports the relationship using ideological self-identification as the independent variable.

Figure 3A. The Relationship Between Partisan Identifications and Supreme Court Institutional Support



Note:

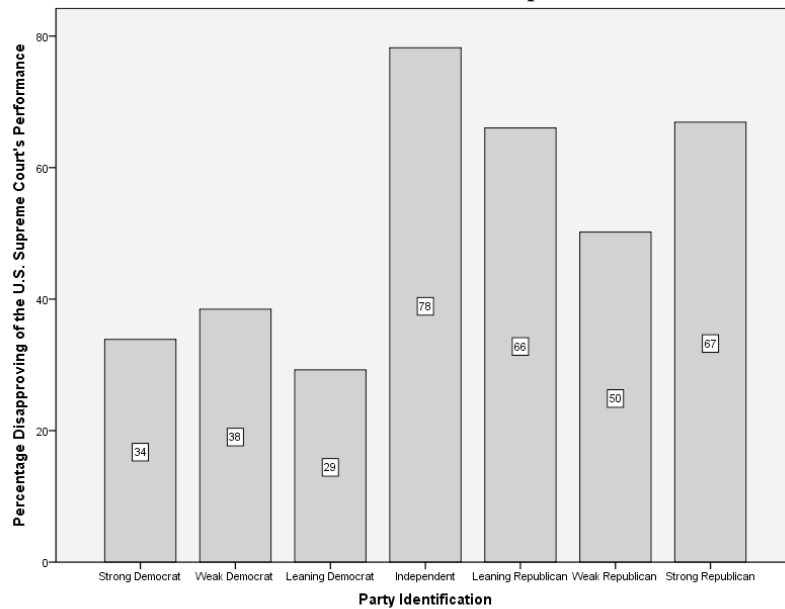
N = 969

Difference of means test: $p = .002$

Bivariate correlation: $r = -.04$

Source: TAPS 2016, *supra* note 10.

Figure 3B. The Relationship Between Partisan Identifications and Evaluations of the Performance of the Supreme Court



Note:

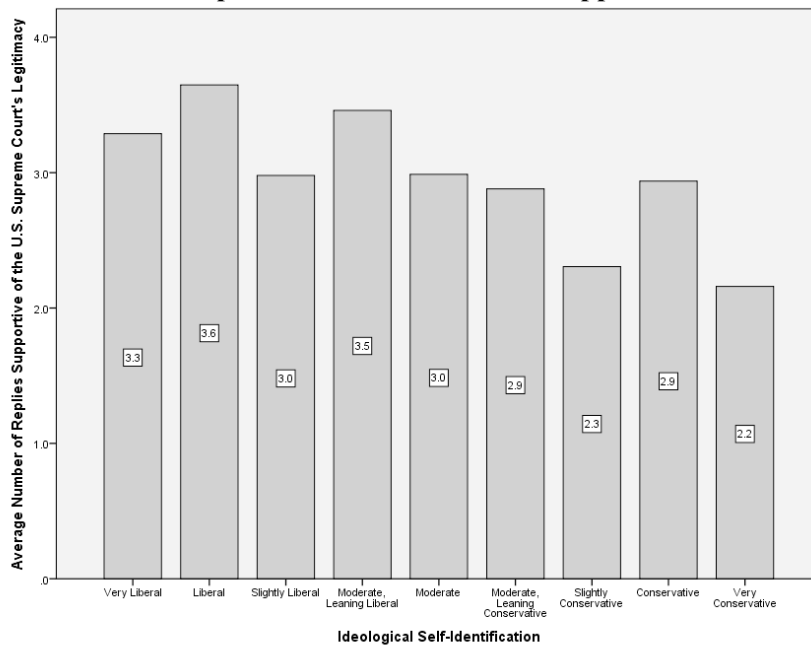
N = 768

Difference of means test: $p < .000$

Bivariate correlation: $r = -.27$

Source: TAPS 2016, *supra* note 10.

Figure 4A. The Relationship Between Ideological Identifications and Supreme Court Institutional Support



Note:

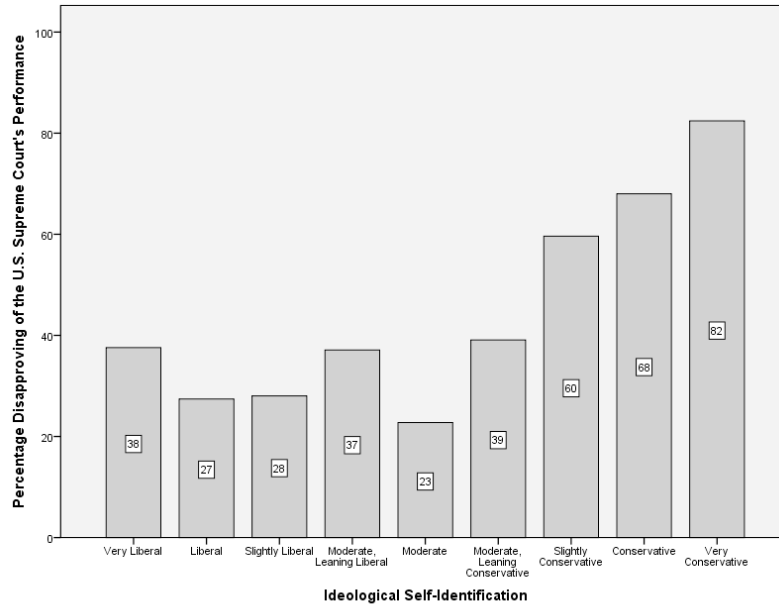
N = 1,516

Difference of means test: $p = .000$

Bivariate correlation: $r = -.14$

Source: TAPS 2016, *supra* note 10.

Figure 4B. The Relationship Between Ideological Identifications and Evaluations of the Performance of the Supreme Court



Note:

N = 1,213

Difference of means test: $p < .000$

Bivariate correlation: $r = -.37$

Source: TAPS 2016, supra note 10.

Although the relationship between partisan identifications and institutional legitimacy is statistically distinguishable from zero ($p = .002$ —see Figure 3A), the degree of correlation is entirely trivial ($r = -.04$). This can easily be seen by comparing strong Democrats, who on average support 3.5 of the legitimacy statements, and strong

[2017]

Performance Evaluations

85

Republicans, who support 3.2 of the statements. The proper conclusion from Figure 3A is that Supreme Court legitimacy is not polarized by the partisanship of its constituents.

Contrast this lack of relationship with that shown in the second part of Figure 3, which depicts the connection between partisan identifications and performance evaluations. Here, the correlation is more substantial ($r = -.27$). To see the strength of this relationship, compare the attitudes of strong Democrats and strong Republicans: 34% of the former disapprove of the performance of Court; for the latter, the figure balloons to 67%. The general conclusion this figure supports is that partisan polarization characterizes public views of the contemporary performance of the Supreme Court, but it does *not* characterize the public's willingness to extend legitimacy to the institution of the Court.

A slightly stronger relationship is depicted in Figure 4A; ideological self-identification is a significantly better predictor of institutional support than is partisanship. Here, the relationship is $-.14$, which is not very strong, but is certainly stronger than the correlation between partisanship and legitimacy. Those who are very liberal extend more legitimacy to the Court than those who are very conservative, to be sure, but across all of the categories of liberalism and conservatism, the differences in attitudes toward the Court are relatively small.

That is not true of the relationship between ideological identification and performance evaluations. These two attitudes are more strongly connected than any in the analysis reported here: $r = -.37$. Indeed, it is impressive to see just how disgruntled very conservative people are with the Supreme Court: 82% judge the Court to not be performing its job very well. This contrasts with only 38% of those identifying as very liberal giving low marks to the Court.

Three conclusions arrive from Figure 4. First, some slight evidence of ideological polarization exists in Supreme Court legitimacy. Second, that polarization pales in comparison to the

polarization on performance evaluations. Third, to the extent that there is polarization in Court attitudes, it occurs along ideological, not partisan, lines.

Confidence in this last conclusion actually requires one more analytical step. Because partisan and ideological identification are inter-correlated, multivariate statistical analysis is required. Because I am interested in the total effect of these variables, rather than the effect that is independent of all other possible control variables, I do not require a fully specified model of the two dependent variables. Table 1 reports the results of the statistical analysis.

Table 1. Ideology and Partisan Predictors of Supreme Court Attitudes

	Performance Evaluations		Institutional Support	
	Coefficients	Significance	Coefficients	Significance
Partisan Self-Identification	-.07	.030	-.00	.977
Ideological Self-Identification	-.27	.000	-.12	.000
Intercept	.65	.000	.66	.000
R ²	.13	.000	.03	.000

Notes:

All variables in this analysis range from 0 through 1.
 “Coefficients” are unstandardized regression coefficients from an OLS analysis.
 N = 749

Source: TAPS 2016, *supra* note 10.

[2017]

Performance Evaluations

87

The analysis in this table first confirms that partisanship and ideology are far better predictors of performance evaluations than of institutional support (as revealed by the R^2 statistic). Second, partisanship has absolutely nothing to do with institutional support. Third, ideological self-identification is connected to institutional support, but weakly, and certainly in contrast to the relationship between ideology and performance evaluations (-.12 versus -.27). Finally, performance evaluations are considerably more closely connected to ideology than to partisanship.

DISCUSSION AND CONCLUDING COMMENTS

The most certain conclusion to draw from this analysis is that partisan polarization does not characterize popular attitudes toward the Supreme Court as an institution. If one wants a sign of polarization, one should turn to ideology, not partisanship. But even here, only evidence of the weakest ideological polarization has been adduced in this Article. When it comes to the institution itself, Americans of all stripes broadly support the Supreme Court.

The same cannot be said for performance evaluations. Big chunks of the American populace are not happy with their Supreme Court. To a slight degree, this reflects partisan differences; to a much stronger degree, this reflects ideological differences. Strong conservatives in particular are quite disgruntled with the performance of the Supreme Court.

One obvious criticism of the empirical evidence adduced in this study is that it is static: it represents a snapshot of public opinion at only a single point in time. In the longer term, one could spin a story from these data that spells danger and peril for the Court. At the present, evaluations of the Court are connected to ideology; as partisan sorting in all phases of American politics takes place, it may not take much time for ideological differences to bleed into partisan differences. More important, performance evaluations today, which are indeed grounded in ideological differences, may ultimately

contaminate attitudes toward the institution itself. No theory of legitimacy suggests that a badly performing institution can maintain its institutional support *ad infinitum*.

Adding fuel to this argument is that, although the Court today appears to some scholars to be moderate in its policy making,¹⁸ it is quite likely, given the Trump presidency, to become more ideologically extreme in the near future, which can, it seems, erode the institution's basic support. How long this might take, no social scientist can say. That there may be danger for the Court in the near future, however, seems reasonably likely.

Finally, I return to the basic caution that motivates this paper. Performance evaluations are not the same thing as institutional legitimacy, and should not be understood as such. Despite growing disapproval of how the Court is doing its job, institutional support shows few signs of erosion. Not no signs, but few signs. Its reservoir of goodwill is, at present, intact.

¹⁸ Bartels & Johnston, *supra* note 8 at 196.