

2017-04-27

The story of Supreme Court politicization: The mass public v elite divide

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THE STORY OF SUPREME COURT POLITICIZATION

The Mass Public v Elite Divide

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Abstract

This paper explores how throughout American history, a divide in opinion has formed between the class of political elites who occupy positions of power within our government, and the average American. Historical analyses have shown that the Supreme Court has been repeatedly politicized to benefit politicians and activists alike, though evidence shows that there is very little support for these types of behaviors in the public at large. Furthermore, a survey was conducted to ascertain whether the observed divide still exists within modern America, which provides insight into the current political stand-off that has taken place over who will the seat on the Supreme Court vacated by Antonin Scalia. Ultimately, the results reaffirm the existence of a two track incentive structure as it relates to the Supreme Court and nomination politics.

This method allows us to examine historical developments and buttress them with modern data analyses to improve upon vague arguments solely concerned with nonpartisanship as it relates to the Judiciary in the modern era. It becomes clear that, in spite of realignment and institutional change, patterns of court politicization do not abate.

INTRODUCTION

In the twenty first century, we have seen renewed evidence that the judicial branch has moved away from its apolitical ideal, morphing into a quasi-partisan football, with both parties maneuvering to ensure an ideological majority on the bench. While this process has been ongoing, the politicization of the branch has become far more extreme in the last quarter century. For example, in early in 2016, following the death of Associate Justice Antonin Scalia, Senate Republicans announced that they would hold no hearings on any potential nominee that President Barack Obama might put forth to fill the newly vacated seat on the court, with majority leader Mitch McConnell (R-KY) indicating that the decision was taken to ensure the people's voices were considered in the nomination and appointment of Scalia's successor. The move was unprecedented, and sent ripples through the American political system. In a New York Times article written shortly after this announcement, David Herszenhorn characterized the move as a "startling turn;" the first instance of such a blatantly partisan maneuver to block a candidate from reaching the Supreme Court (Herszenhorn 2016, 2). Indeed every nominee since 1955 has had public hearings in front of the Senate Judiciary committee, excluding two whose names were withdrawn before a public hearing was held, making Obama's nominee, Judge Merrick Garland, the first nominee in over sixty years to not testify at a hearing before the committee (Fiske & Gorman 2016, 1).

However, this type of behavior is not an anomaly in the current State of American politics. Following Donald Trump's stunning victory in the 2016 Presidential election, the script was flipped, placing Senate Democrats at odds with a potential nominee to the Supreme Court. Prior to any formal announcement of a nominee by the Trump White House, Politico reported that Senate Democrats would filibuster whoever was put forth to fill the court's

yearlong vacancy, which would be only the second time in modern history that the Senate had mounted a filibuster against a nominee (Everett et al. 2016). Politicians frequently cite the will of the people as the basis for these actions, but is that truly the case?

Throughout the history of the Supreme Court, there has been a fundamental disconnect between the political class of individuals that occupy the legislative and judicial branches of government and the average American citizen who possesses far less insight into the Constitution. The justices who have decided cases for the nation have often been venerated and held above politics; they were heralded as impartial arbiters of the law, though ironically the positions they held were inherently political. Justices are nominated by politicians, confirmed by politicians, swear in politicians, and decide the issues of the highest political salience, putting them at the forefront of ideological debate in this country. The Constitution imbues the Supreme Court with the power to effect change in the United States, which has led to the body being targeted by the political elite, who have often harnessed this ability for change - to institute and enact political agendas. So, is the recent surge in polarization that we have seen surrounding this hallowed institution a consequence of a change in the American electorate or rather the result of decisions made by politically active citizens who have sought to exploit the court to further their own aims?

Traditional answers have often focused on the individual as the driving force being Supreme Court outcomes. Many argue that the strength of the President directly correlates to whether a nominee to the Supreme Court is successfully confirmed, while others point directly to partisanship, stating that party alone is a strong enough predictor of how Senators will vote. Per this view, opposition or support of a nominee flows directly from what party they identify with, with same party Senators voting for confirmation, with opposite party Senators voting

against. Similar to this argument is the idea that the ideological distance from the President determines the ways in which Senators will ultimately decide to vote, though the substantive differences between this and the prior argument are very minute, if they exist at all.

Alternatively, some scholars say the final decision is influenced by the individual characteristics of the nominee, namely whether they are qualified for the position, the number of years of experience they have in the judicial branch, and their individual ideology. And furthermore, others argue that it is the effect of interest groups that create Supreme Court outcomes, though these arguments are largely based on partisan, ideological foundations and in this way are not that different from earlier explanations.

These explanations are piece-meal in nature, and do not distinguish the forest from the trees. It is foolhardy to focus solely on the individual characteristics of certain persons involved in the nomination process, while neglecting the influence of other actors who might potentially sway outcomes in unforeseen ways. This paper on the other hand, argues that all of these previously named actors have an influence on the Supreme Court nomination politics, though they must be examined as a substantive group to truly recognize the aggregate effect that is exhibited by the sum influence of all relevant individuals connected to the process. This group, the American political elite, is the driving force behind recent trends of the politicization of the Supreme Court nomination process, however outcomes are not ideologically driven as scholars have long argued. Rather, they represent a concerted effort to influence the political agenda through the jurisprudence of those already on the court, and by creating a highly selective and partisan process of choosing who eventually takes a seat on the Court. Through political calculations, members of the political elite use the Supreme Court and the nomination process

to bring about desired changes to the American legal and political system, circumventing the legislative process entirely.

However, what is important to distinguish is that this type of brinksmanship is not the desired outcome of the American public. So often we hear Presidents, Senators, activists, and lobbyists invoking the name of the American people to justify the actions that are being taken, though in the case of the Supreme Court, though this is a false narrative. Elites exhibit control over the judicial agenda, while neglecting the interests of average Americans who strongly prefer a nonpartisan, nonideological, functioning Supreme Court. In this way it becomes abundantly clear that there is not a broad consensus behind the obstructionist and explicitly political actions taken by both parties in the Senate, but rather there are two distinct ways of viewing the issue; the political elites see an opportunity to score political points and further their agendas, while the mass public would prefer the process to be less ideological and more focused on the qualifications and characteristics of each nominee.

Evidence suggest that this divide is nothing new, and in fact, has existed since the very beginning of the American experiment. If one conducts an analysis of American history, there are a plethora of highly salient instances of court politicization, with each one serving as a stepping-stone. While the framers of the constitution had a specific aim in mind when they created the Judiciary, in practice it has always been the target of politicians who attempted to erode its legitimacy, control its agenda, or attempt to render decisions a fait accompli by manipulating the nomination process. However, it was not just politicians who used the court in this way, with several key Justices using their powers as jurists to expand and augment the power of the Supreme Court to truly transform it into a policy making body. In each of these instances, there was very little public support for the actions undertaken, demonstrating the

existence of an intellectual divide between those who gained from using the court as a partisan body and those who found it anathema to Democracy. These two groups were the American political elite, and the American public.

Additionally, this divide has persisted throughout all the critical realigning periods in American history. In this way, court politicization serves as a source of continuity within processes of both electoral and institutional change. Thus, these behaviors are a rare constant in a history filled with a multitude of examples of political upheaval and partisan turnover.

A survey conducted in early 2017 pertaining to the Supreme Court and its nomination process both quantifies and validates this finding, solidifying the notion that there is a divide between what actions we see political elites undertake, and what their constituents truly desire. Regardless of political affiliation, on both partisan and nonpartisan questions, a broad consensus appeared amongst the five hundred individuals who were surveyed. As previously expressed, this consensus ran counter to the agendas being currently pursued by politicians in the Senate who desire to use nominees to the Supreme Court to indirectly exert agenda controlling authority over the court's docket and decisions. Importantly, the historical and contemporary examples are not describing two different tales of court politicization, but rather they fit together like puzzle pieces. The current political standoff is a result of historical developments, and without them, might not have even existed.

These findings have far reaching consequences for the field of political science, as they contradict some of the most commonplace assertions about modern America, specifically data showing increasing trends of partisanship throughout the country. While members of the political classes (politicians, activists, etc.) may be moving farther apart on some of the central issues facing the country, this is not in of itself a reflection of trends within the American

electorate. Rather, there exists a certain subset of issues in which a majority of Americans are very close together, in spite of their political beliefs, their race, their age, or where they come from.

Following the Presidential election of 2016, many saw the nations as deeply divided and wrought by bitter political disagreements. This research shows that there may be more agreement amongst partisans than pundits or politicians previously believed, which is perhaps missed due to the teamsmanship of political parties and the horse race coverage of elections that focuses on winners and losers. Evidence showing that Democrats, Republicans, and Independents has tremendous value given the current state of American politics, as it demonstrates there is more room to forge a common consensus than previously believed. It also offers hope that the current impasse over nominees to the Supreme Court may soon abate, allowing the Judiciary to perhaps move towards its apolitical ideal.

This paper explores the determinants of the historical variations in the role of the court in the American political system and examines the ways in which the current political climate is both emblematic of and a result of developments that have taken place in the United States throughout its 241-year existence. While a change in public opinion may have had a minute effect on the growth and evolution of the Supreme Court, the driving force behind the major alterations in judicial philosophy and changes in the nomination process have been championed and undertaken by individuals whose interest and involvement in the political realm was far outside the norm of the average American.

There are two key aspects of the courts history that are discussed within the paper, the first of which is that incremental developments in the courts power have taken place throughout the history of the United States, with each new change building upon the previous expansions

of the courts power. This is done by tracing the evolution of the court through preexisting literature, and connecting each moment back to the overarching theme of the paper, which is that political interests have been central to the shaping of the highest legal institution in the land. In doing so, it becomes evident that instances of court politicization are woven throughout American history, and that the elite vs mass conflict we witness today is by no means a new occurrence.

The second part of the paper focuses on the current standoff over Supreme Court nominees and is augmented by contemporary survey research. This case study will help to connect the historical aspects of the paper with the present political predicament. Ideally each of the modifications in the structure of the Supreme Court and the nomination process will mirror the current political situation, with the aims of political elite trumping the will of the people, resulting in a system that reflects the desires of those with the highest political acumen. This will demonstrate that this is not a purely historical development, but rather one that still hold deep relevance today.

In order to clarify what this paper is, it is also profoundly important to establish what this paper is not. This paper does not seek to make distinctions between the actions of either American political party, nor does it make any assertions regarding the policy positions of partisans within the United States. The argument of this paper is nonideological in nature; the political elite encompasses elected officials, activists, judges, and other individuals who have extensive knowledge of the American political and legal system and participate in the established political apparatus on a highly frequent basis. This group encompasses individuals from a range of political parties, whether they are Republicans, Democrats, Whigs, or even Federalists, demonstrating that this is not a tactic that is utilized by a single party when it is in

power, but rather by a range of individuals with different political positions, across almost two and a half centuries of American history. The most important implication of this is that changes in politics in the United States have not led to tectonic shifts in the way the political elite interact with the Supreme court; at every watershed moment in the courts history, it is evident that this same dynamic plays out over and over again. The agenda of a handful of influential politicians and activists triumphed either irrespective of or in spite of the dominant position of American citizens at the time, further driving the politization of the United States Supreme Court.

Furthermore, this paper does not purport the existence of a disconnect between upper and lower class Americans and it does not draw conclusions based upon some notion of the divide between Americans based on socioeconomic status. Scholars have long argued that the United States is a “classless” society, and indeed, the notion of class struggle is foreign to most Americans. Frederick Storbel and Wallace Peterson argue as much, writing that America never experienced the “static, hierarchical structure of class that Europe knew under feudalism.” Rather the two assert that American society was “generally more open and experienced greater mobility than was true of European society,” resulting in a nation which has very limited experience with class conflict (Storbel & Peterson 1997, 3). While political differences do exist across income levels, for the purposes of this paper, the group constituting the political elite is not analogous with those individuals comprise the “upper class” due to their levels of wealth or income. Thus, the elite v mass public conflict being explored by this paper is not a story of class warfare, but instead a narrative of individuals using the court for an instrument of often unpopular social and political changes.

Literature Review:

There are three main schools of thought when it comes to Supreme Court nomination politics – that the process is either a) a function of the characteristics of the nominees b) a function of American public opinion or c) a function of ideology and/or institutional structures of American political insiders. Each explanation offers compelling evidence, and presents theories that are largely valid, though each fails to capture the entire picture. In actuality, it is not one or the other, but more accurately a blend of the three that includes other factors such as institutional arrangements or actions beyond individual control.

Judge Characteristic Centric:

The arguments that focus on the characteristics of judges examine the ways in which different aspects of Supreme Court nominees determine whether these individuals are confirmed or denied. Examples of such characteristics are the judge's qualifications, their ideology, and the ideology of the outgoing Justice whose seat they might potentially fill. Furthermore, past decisions are often examined to determine if the nominee has a history of "legislating from the bench."

A large body of work exists that examines the dynamics that surround nominations of political appointees, specifically analyzing Senator's motivations for voting individuals up or down. However, unlike cabinet nominees, previous research has shown that around eighteen percent of Supreme Court nominees have been rejected, far more than the miniscule number of other political appointees to be rejected (Cottrill and Peretti 2013, 15). These authors go on to make a key determination, noting that "judicial decisions can help or hinder politicians in their electoral and policy aims," which suggests that the process of selecting the next justice for the Supreme Court is inherently a political matter, rather than the nonpartisan exercise the framers

may have intended it to be. In this way, the authors argue that the ultimate determinant of a judge's confirmation or rejection is a function of that particular judge's ideology, as opposed to the ideologies of Senators.

In terms of qualifications, when one considers the nominees to the Court who failed to attain confirmation by the Senate, it might be assumed that those twenty individuals were obviously unfit or else somehow unqualified for service on the Supreme bench. Yet, on the contrary, scholars have found that "not one of the twenty was probably any less well qualified for service than some of those who have won confirmation," with many of the failed nominees being eminently well qualified for the position to which they were nominated (Goff 1961, 357). Per this argument, the qualifications of nominees are largely considered to be irrelevant in the final vote calculus of confirmation. Therefore, if qualified nominees are frequently rejected, what then can explain nomination politics?

Scholars such as P. S. Ruckman, Jr. have argued that this phenomenon may be the result of a subset of nominations that are far more salient and important to the court's future than the average nomination, and these are aptly referred to as critical nominations. In his piece, Ruckman maintains that while all nominations to the Supreme Court are important, some involve much higher stakes, resulting in far more bitter confirmation fights. In these instances, he argues, the outcome of the Senate's decision can have a direct impact on the interest of certain groups with great political relevance. That is, in a few specific situations, considerations of a nominee's character and qualifications, as well as the political circumstances surrounding a nomination, can be "overshadowed or at least equaled by considerations focusing on the seat which is to be filled" (Ruckman 1993, 795). In this way, an individual nominee's qualifications might not be considered as important as the direction of the institution, which may explain why

qualified nominees are so often rejected by the Senate.

Ruckman finds that these critical nominations come about when there is a chance that one party may gain an upper hand in the Supreme Court, meaning they will change the ideological balance of the court. Specifically, the data shows that 60% of all unsuccessful nominations have involved attempted opposite party replacement, meaning the party in control sought to replace a departing judge who was confirmed by the opposing party. This is a stark difference to occasions where there is “continuous party representation,” meaning the party putting forth a judge also put forth the name of the outgoing justice, wherein only 13% of nominations have been unsuccessful (Ruckman 1993, 797). In this case, the characteristic in question again relates to the ideology of the nominee, however contrastingly, in this instance the nominee’s ideology is only relevant when compared to that of the departing justice’s; if the gap is too significant, this can often lead to a rejection. This seems to prove that the ideological balance of the court is one of the most important aspects of the nomination process, suggesting that politicians and partisans actively oppose nominees who represent a change to the political status quo.

More relevantly, Ruckman also writes that “nominations which potentially establish a new partisan majority on the Court certainly qualify for a category of nominations in which attempted opposite party replacement would have noticeable impact,” (Ruckman 1993, 798) which was the case with the more moderate Merrick Garland potentially replacing the far more conservative Antonin Scalia. However, if Ruckman’s argument holds true for this contemporary example, it would suggest that, contrary to Senate Republican’s repeated assertions, ignoring Garland’s nomination was in fact not what the American people wanted, but rather a calculated maneuver to maintain a political advantage – a strategic move to protect

the interests of the political elite.

Consistent with these theories, scholars have also found an increasing trend for what many refer to as “legislating from the bench,” or judges using their positions to enact their policy preferences in law. If the President’s nominee is confirmed, one of the most important characteristics they must possess is veneration for the law, or a commitment to abstain from judicial overreach. However, Trevor Thomas argues that this is in fact becoming the new norm for American Jurists, with partisan preferences and ideological considerations now taking precedent over the former norm of partisan balance (Thomas 2011, 25). To Thomas’ point, recently judges have been wading into political matters more frequently, which many consider to be a contradiction given the supposed nonpartisan nature of their positions. This behavior is often seen as incredibly harmful to democracy, and it is often very hard for a nominee to be confirmed if they lack an adequate respect for the constitution.

However, in a larger sense, the literature also suggests that partisanship extends beyond the nomination process, which is inherently political, to federal courtrooms across the country, giving credence to the notion that judges are becoming instruments of political change. Using the position of an unelected judge in this way perverts the democratic systems that are in place in the United States, and is a prime example of the political classes hijacking the judicial branch to carry out political agendas.

Public Opinion Driven:

Arguments that center on the specific characteristics of individual nominees often fall short as they cannot adequately explain the reason for certain anomalous cases where extremely qualified Judges have either been unexpectedly denied or confirmed. In these instances, the

argument is often that the observed outcome is a function of public opinion – that is the way the public uses its voice to exert pressure on their elected representatives. Consequently, Jonathan P. Kastellec, Jeffrey R. Lax and Justin H. Phillips have attempted to explore the effect of public opinion on nomination politics, endeavoring to find a connection between the public’s preferences and the way a Senator ultimately votes on a nominee to the court. The authors note that the effect of public opinion on nomination politics is often overlooked, indicating that the factors mentioned above are the primary focus of most theories that have been put forth by political scientists. However, their research does produce compelling evidence that public opinion may have a significant effect on the way senator’s vote.

The results of the study by Kastellec et al., lend themselves to a more comprehensive model of nomination politics that includes public opinion as a significant and possibly highly influential factor. They find that public opinion, on average, “matters more than any predictor other than the senator’s own ideological differences with the nominee” (Kastellec et al. 2010, 768). These findings indicate that public opinion should play a major role in determining whether a judge is ultimately approved to sit on the Supreme Court, but does include the corollary that a Senator’s own ideological differences with the nominee are often more important, serving as cause for a ‘yea’ or ‘nay’ vote in front of the full senate, regardless of the public’s stance.

Their conclusions suggests that the process is not completely driven by the political elites, and find robust support for the notion that public opinion plays a role on the way senators interact with nominees, though notable exceptions to their findings exist. For example, Kastellec et al. note that partisanship and the political environment matter greatly to the outcomes of Supreme Court nominations, writing that “senators tend to approve nominees of a

president of the same party and of a president who is ‘strong’ in that his party controls the Senate and he is not in his fourth year of office” (Kastellec et al. 2010, 768). Thus, the authors acknowledge that, in addition to a Senator’s ideological distance from a nominee, political realities and partisan calculations can override the effect of public opinion when it comes time to vote. Given that the United States Congress has become far more polarized in the last half century, it is not a stretch to imagine that in the modern Senate, examples of senators ignoring the wishes of their constituents in favor of supporting the party line have become commonplace.

Additionally, outside groups like lobbyists can have a significant impact on the nomination process. Highly salient campaigns against nominees have taken place, with the most notable examples being the cases of judge Robert Bork, who’s nomination was defeated, and that of now Justice Clarence Thomas, who barely survived the testimony of Anita Hill to take his seat on the bench. Instances like these have led to a reevaluation of the ways in which lobbying efforts alter senator’s stances on the judges who are put forth to occupy the highest court in the land. Gregory Caldeira and John Wright studied these phenomena, examining the coalitions of activists that used their influence to both support and oppose these nominees. Overall, they find that interest group lobbying had a statistically significant effect on senator’s votes on both Bork and Thomas, with lobbying activity for the nominee is predicted by the “organizational strength of supportive groups at the state level.” Put simply, this means that groups target senators from states where they have a significant presence in terms of members and activists (Caldeira & Wright 1998, 513). In this way, groups can ensure their efforts have the maximum effect, though again the authors write the effect interest groups have is also mitigated by the ideology and the partisanship of the senators.

More importantly however, Caldeira and Wright indicate that lobbying groups serve as a proxy for public opinion. Their results demonstrate that interest group lobbying provided important information to senators “above and beyond what they might have gleaned from public opinion polls and constituency demographics,” meaning grassroots lobbying campaigns are essential to communicate constituents preferences to their senators (Caldeira & Wright 1998, 521). However, in this instance, lobbyists are using public opinion as a political tool; this same type of lobbying does not occur for all nominations, it only occurred during two of the most salient, controversial nominations in the history of the Supreme Court. Ultimately, this demonstrates that political elites are still using nominations to further their political aims, though in this case they prime and mobilize public opinion to work in their favor.

Insider Driven:

As was just noted by Caldeira and Wright political insiders like lobbyists can have a direct impact on Supreme Court nominations by appealing directly to elected officials and mobilizing public opinion in favor of their chosen cause. While public opinion can undoubtedly have an effect, in most cases it appears to be overruled by partisan and ideological stimuli, indicating that perhaps the strongest determinant who is and is not confirmed comes down to the personal politics and beliefs of the insiders involved in the process of nominating and voting on potential justices. This group includes activists and lobbyists alike, however politicians far and away are the most important members of this group as their decision-making processes quite literally formulate the ultimate result.

A model exists explaining the calculus of Senate votes on nominees to the Supreme Court, focusing on three main areas of importance - the qualifications of the nominee, strength of the President at the time, and the parties of each Senator as well as the President. This

paradigm argues that, firstly, the qualifications of a nominee are incredibly important, for a wholly unqualified nominee would be rejected out of hand, finding that the likelihood of a yes vote increases as individual nominees are more qualified (Shipan 2008). Yet as previously noted, qualifications are poor predictors of confirmation, as nominees of the highest quality are often rejected.

On the question of Presidential strength, previous work suggests that the President's strength is also key to the successful nomination of judge to the court, as those President's who are perceived to be "lame ducks" or inept at managing congress are very unlikely to garner significant support for their nominees. Ostensibly, as a President's strength grows, so too does the probability of a Senator voting for that President's nominee, and this holds true across both parties.

Lastly, and most importantly, the parties of each Senator and the party of the President are of paramount importance to nominee's odds of being confirmed. The paper found that "not only that a senator is more likely to vote for a nominee if the president and senator are from the same party, but also that this effect is heightened in recent years" (Shipan 2008, 67). The converse also holds true, indeed Senators who are not of the President's party are far more likely to oppose a President's nominee, regardless of the qualifications of that candidate. On the whole, Shipan concludes that Senators are far more likely to vote against a nominee than they were in the past, indicating that increased partisanship and an increase reliance on the ideology of nominees at least partially explain this change, though Shipan is silent on whether Senators are swayed by or even consider public opinion before voting on candidates for the Supreme Court.

Separately, there is a significant amount of work in game theory that focuses on the

ideological space in which a President can select a nominee for the Supreme Court. David Rohde and Kenneth Shepsle write that President's have formerly had a fairly free hand in selecting extreme nominees for federal courts, due to the fact that one appointment has very little potential to result in legitimate policy change. However, this is not true of the Supreme Court, where one appointment can potentially shape policy for a number of decades following the Senate votes the individual onto the court. Focusing on the points needed to end a filibuster, Rohde and Shepsle construct an interval, between the forty-first and sixtieth senators, which they refer to as the gridlock interval. They write that, as the Senate has become more polarized, and in effect as the Supreme Court has become more politicized, the locations of the gridlock interval endpoints have become more extreme, and the gridlock interval has thus grown (Rohde & Shepsle, 2007). This increase in polarization, and as a result, the increase in the distance between the gridlock intervals may explain why the process of nominating and confirming a new supreme court justice has become so difficult, yet it is important to emphasize that this explanation also focuses on ideology as the chief impediment to confirmations, rather than a change in the American electorate.

Consequently, in his piece for the Center for the Study of the Presidency, Matthew Hitt similarly focuses on the power the chief executive of the United States can exhibit on the process of nominating a justice to the Supreme Court. Of course, the President plays a central role in selecting the nominee to be considered by the Senate, but Hitt argues this does not capture the full breadth of influence the President has on who ultimately fills a seat on America's highest court. The President has the ability to select a wide variety of nominees, ranging in experience relevant for the job, and this ability is a function of what Hitt refers to as the "constraints" on the President. These constraints are limits to the ideology and experience

of any potential nominees, as an individual who lies too far outside the norm, or more technically, the median point of the Senate. Ultimately, the President may strategically choose less experienced nominees, in the event that a highly experienced nominee is less likely to be successfully confirmed (Hitt, 2013).

Hitt's findings consistent with those of Shipan, with Hitt adding that while selecting nominees that are highly qualified maintains its importance, selecting nominees who have had more relevant experience with the judicial branch, the President will experience greater success with his or her appointments. Further, the president's ability to appoint these experienced nominees is, as stated earlier, a function of the constraining regime of the Senate. In explaining why relevant experience has become so relevant, Hitt points to a watershed moment in history - the appointment of Chief Justice Earl Warren by Dwight Eisenhower. Warren had been the former Attorney General of California as well as the Governor, but lacked any experience as a judge. The Warren Court would become one of the most liberal in history, prompting future President's to consider a potential nominees past before taking action. This again reveals that politicians want justices who are predictable, whose decisions are nearly preordained, indicating the supremacy of ideological calculation in the nomination and confirmations of Supreme Court Justices.

Although this may be true, the duration of nomination battles are also highly enlightening when considering the ideological entrenchment that surrounds all aspects of the United States Supreme Court. Charles Shipan, Brooke Thomas Allen & Andrew Bagen focus on institutional arrangements and the incentives of a President when choosing a nominee for the Supreme Court, finding that "a focus on duration can illuminate the conflicts that underlie appointments," regardless of the outcome (Shipan et al. 2014, 4). They find that it is in a

President's interest to act quickly to appoint a judge to fill a vacant seat on the Supreme Court, not because it would make sure the court functioned the way it was intended to or was able to efficiently process the incredibly important cases on its docket, but rather because "the sooner the president can act, the sooner his preferences may be represented on the Court" (Shipan et al. 2014, 5).

The authors also find that when the President must work with a Senate controlled by the opposing party, he or she will take a longer time to settle on a nominee, in part to ensure they have a firm understanding on the nominee's ideology, but also to consider the way the Senate will react to his or her choice and gauge the probability of a successful nomination. Shipan et al. argue this is so important to a President, because they would like to move the court more in line with their ideological preferences, rather than those of the Senate, finding strong support for the claim that partisan and policy preferences do in fact matter during the nomination stage (Shipan et al. 2014). While the nomination process is inherently political, these findings reinforce the idea that the Supreme Court is and has always been treated in a way consistent with other more political governmental institutions. As previously stated, the President's calculations revolve around the nominee's ideology, and the likelihood that the nominee will be confirmed and deliver decisions in line with the President's agenda. This again suggests the Court is a tool of the political elite, being used to enact policy change.

Finally, Lee Epstein, Jeffrey A. Segal and Chad Westerland affirm all of these points, explicitly focusing on the increasing importance of ideology and partisanship in the Supreme Court nomination process. Epstein et al. write that it is inevitable that elected politicians will have opinions, and these personal beliefs will inherently affect whom they select to sit on the Supreme Court and whether that individual is eventually confirmed or

rejected. They assert that while ideology has always been central to the nominations process, both on the parts of Senators and nominees, its importance has been substantially increasing over time, using the case of Robert Bork as an example. The authors constructed coefficients to express how important ideology has been in evaluating potential Supreme Court Justices, and found that the coefficient jumped from -1.71 before Bork to a significantly more substantial - 6.33 for all nominees after and including Bork, though they maintain this pattern had been building for quite a long time, pointing to the nomination of Justice Harlan in 1955 as another notable example (Epstein et al. 2007, 631). These data suggest that ideology is without a doubt the most important determinant of Supreme Court outcomes, but moreover demonstrate that the increasing reliance on ideology is a trend that has been steadily increasing over time, regardless of which party is in power.

Consequences:

It becomes clear then that the Supreme Court is a quasi-political institution, and some scholars have argued it was always intended to be. In a piece for the George Washington University Law Review, Maeva Marcus writes that the Supreme Court is a political institution “in every sense of the word,” and moreover that it was always intended to be (Marcus 2003, 95). In her piece, she remarks that, from the very beginning of the republic, members of congress and President alike have brought justices into the political fray, indicating that the Judiciary Act of 1789 proves that Congress always intended justices to be political actors, rather than the nonpartisan arbiters of truth many believed the framers intended them to be (Marcus 2003).

Thus, the body of previous work that exists overwhelmingly suggests that the process of

nominating and confirming a Supreme Court Justice is incredibly political and politicized. Ideology and political calculations play the biggest role in all facets of the process – who to choose, when to nominate them, how they are voted on, and once they are on the court, much is made of how they will rule in the nations most controversial cases. However, little work has been done to examine what has been driving the politicization of the Court, and why overtly partisan maneuvers and rhetoric have become the norm in nomination politics, rather than the anomaly the nations founders intended them to be.

All of this obstructionism and partisanship begs the question, is this type of radical brinksmanship really what the American people would have wanted? Or is this simply another case of political elites controlling the judicial agenda? Through an in depth analysis of the most important moments in American judicial history, it becomes clear that the latter is the case.

Ultimately, the history of the Supreme Court has been marked by this type of ideational divide - the disconnect between the political have's and the have not's has always been evident throughout every watershed moment in the court's history. This elite versus mass public conflict has shaped the development of the court, from its founding all the way to the modern day. To the political elite, the court serves as an instrument of change that is intrinsically linked to the political process, and legal challenges have increasingly become used to further partisan agendas. However, this view of the court is anathema to large portions of the American populace, who still desire a non-partisan court capable of separating questions of legality from questions of ideology.

SECTION I: THE HISTORY OF INSTITUTIONALIZED POLITICIZATION

Part A: The Early American System

For many, this history of the Supreme Court starts with the establishment of judicial review by Chief Justice John Marshall in 1803. That famous case, *Marbury v. Madison*, serves as the bedrock of the courts functionality in the political arena in the United States, but at the time it too represented and unpopular action taken to benefit a political party that was quickly losing its grasp on power. Indeed the decision to even establish judicial review represents a political maneuver on the part of John Marshall. At its conception, the US Supreme Court was envisioned as an impartial body that would exist solely to interpret law rather than create it by statute as it often does today. Alexander Hamilton, co author of the famous *Federalist Papers* and advocate for an independent judiciary wrote in *The Federalist 78* “the judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment (Hamilton, *The Federalist 78*).”

Hamilton insisted that the sole purpose of the Judiciary would be to interpret the laws, making it far inferior the both the Executive branch, which controlled the military, and the legislative branch, which maintained control of commerce and appropriations; so long as it remained separate from the other two branches, it was inherently harmless to American liberty.

This was the commonly accepted view of the Supreme Court from 1789 roughly until the decision in the *Marbury* case in 1803, and under this view, the justices were merely the agents of the people. Popular sovereignty was the only acceptable theory for American government in 1789, so Marshall’s decision to alter this framework to create an institution capable of acting on its own would have been considered controversial at this period in time

(Presser 2002). Indeed future President James Madison was opposed to the idea of judicial review, as he believed that such a power would give the judiciary de facto superiority over the legislative branch, which Madison believed was unacceptable and contradictory to the intentions of the delegates at the Constitutional Convention (Harrington 2003, 87). However, in spite of this popularly held belief, the Chief Justice would take steps to create a court capable of overturning the decisions of both the Executive and Legislative branches if they conflicted with the constitution – in essence giving unelected judges the ability to overturn the will of the American people. Scholars have paid little attention to the political nature of the Court's decision-making in its first decade (Marcus 2003), however the decision in *Marbury* was, without a doubt, a politically motivated decision.

The fundamentally controversy associated with Marshall's decision was that through the exercise of its power of judicial review, which has included the authority to examine the constitutionality of the decisions and laws of the federal executive, the federal legislature, and the state governments. Furthermore, scholars have indicated that they believe the framers to have contemplated judicial review as being within the powers of the third branch of government (Secola 1988), but at the time of *Marbury v Madison*, the court was very much a political entity and indeed found itself in the middle of a political conundrum. The federalists, a party to which Marshall belonged, had just lost the White House, and there was an issue regarding the delivering of commission to appointees of the previous President, John Adams. The *Marbury* case represents the first time the court was used by a class of political elites to further their agenda in spite of the common will.

Marshall, by ruling that Marbury was entitled to his commission, but refusing to deliver a writ of mandamus, ensured he was appeasing all parties involved, and avoided appearing to

overtly play favorites with members of his own party. However, this was not the controversial part of the decision – Marshall then declared the Judiciary act of 1789 to be unconstitutional, as it added to the courts original jurisdiction, leaving the law null and void. By doing so, Marshall in essence created judicial review, and delineated a power to the Court that had not been expressly given to it in the United States Constitution.

This aspect of the decision, the ability to declare actions of the elected branches of government, went against the fundamental beliefs of Americans at the time. Indeed, as Hamilton had written, the widely accepted purpose of the Supreme Court of the United States was to pass judgment on issues brought before it, not to decide which laws would be allowed to stand. The argument can be made that the founders of our nation had always intended for judicial review to eventually come into existence, and indeed many have (Secola 1988), however this is contradictory to what we know about the beliefs of the people in this early period of American history. Many individuals at the constitutional convention were wary of a central court for just this reason, they feared that unelected justices with lifetime appointments could wreak havoc on the system of governance they had worked so hard to create, and for this reason the court's power was expressly limited, ensuring it was the weakest of the three branches of government. Therefore, in expanding the power of the court in this way, Marshall was going against the will of the American people, who had placed faith in the court with the hopes that it would serve as a purely judgmental body as Hamilton had reassured them it would.

This decision by Marshall was one that helped him further his own agenda, not for one political party or another, but rather to ensure the court's longevity and legitimacy, in spite of the out cry that ensued after his invalidation of a congressional statute. In the Bridgeport Law

Review, Joseph Secola validated this assertion, writing that, “as Marshall saw it, the Constitution embodied enduring principles that could be adapted to various crises and problems in the nation's future” (Secola 1988, 29). It becomes clear that John Marshall was attempting to create an institution capable of protecting the Constitution for many years to come, and the only way to truly do this was to imbue the Supreme Court with the ability to strike down laws that they felt conflicted with the supreme law of the land, even if that decision was antithetical to how many Americans wanted the court to function.

Marshall often referred to the “people” as his source of authority enabling the Supreme Court to carry out its decisions, however several of his decisions would cause widespread outrage across the United State. If the decision in *Marbury* left people perturbed, the courts ruling in Marshall’s other most famous case, *McCulloch v Maryland* would leave Americans fuming at the court’s overreach. In this period, State’s rights were incredibly important, as their experience as a unified nation was limited. In *McCulloch*, the fundamental conflict was between the authority of the Federal government, who had established a central bank, and the authority of the state of Maryland, who had attempted to levy taxes upon that bank. This situation was monumental in that it was one of the first ever instances of a State’s decision coming under federal review. The magnitude of the case was palpable; sensing this, the court extended the duration of oral arguments to one week while allowing both the prosecution and defense an additional lawyer (Ray 2016).

Writing for a unanimous court, Marshall found that that Congress had the power to incorporate the bank and that Maryland could not tax instruments of the national government employed in the execution of constitutional powers. Furthermore, Marshall expressed that Congress possessed unenumerated powers not explicitly outlined in the Constitution, and that

any federal laws made under the jurisdiction of the Constitution were supreme, and superseded any state law or ordinance. However, allowing the Second Bank of the United States to exist was not the main complaint of individuals in the aftermath of *McCulloch*; many Americans felt that this decision was an attack on states rights, which were considered essential to maintaining the freedom and liberty that had been hard won from the British during the Revolution. Indeed, many concluded that the doctrine of Congress's implied powers that had been established by Marshall in this decision would strip away much of the State's sovereignty, and render them wholly subordinate to the political will of the national government (Ray 2016).

It again becomes evident that in this instance, the court was being used as a device to further a goal of a member of the political elite, at the expense of the common American. While one might argue his decision was in the institutional interest of the Court, John Marshall was a federalist; a member of a party that believed the national government should be highly centralized and superior to that of each individual state. Though this decision was not taken by a politician, Marshall had served as the Secretary of State under the previous administration, meaning his past was explicitly political. His decision in *McCulloch* again represents a furthering of a political agenda, in spite of the commonly held views of average Americans. Under Marshall, both the Supreme Court and the national government of the United States would garner broad decision making authority, and would see their power significantly expanded, which would have been anathema to the values that many of the framers, and a majority of American's held at the time. Furthermore, by ruling against the state of Maryland, he implicitly stripped states of some of their power, granted to the by the tenth amendment of the Constitution. States rights were seen as a bulwark against tyranny from the federal government, and reducing these protection show that this decision was taken in spite of the

commonly held beliefs of the American people.

We can infer the position of most Americans on this issue, by considering the direction of the Federal government at the time. While this is a flawed system, considering the disenfranchisement of broad swaths of the American electorate at the time, the previous two Presidents in power before this case was tried were Thomas Jefferson and James Madison, the authors of the Kentucky and Virginia resolutions, which espoused the importance of States rights, and the need for states to nullify actions of the federal government which they found to be unconstitutional. Furthermore, their party, the Democratic Republicans, won a decisive victory in 1816 and maintained power while the *McCulloch* was being tried, from which we can conclude that states rights were far more important to the average American than the powers of the federal government. Taken together, it becomes clear that John Marshall was furthering a political aim by expanding the power of the Federal government and diminishing states rights in *McCulloch*, again highlighting the mass public v elite conflict that has been so central to the courts history. This would serve as the foundation for the courts future politicization; once it became clear that the court could be used to enact policy change without having to worry about electoral repercussions, the way the court operated, and who comprised its membership, were fundamentally altered.

Marshall's decisions came during some of the most uncertain times in American history. The young democracy lacked guidance, and it was up to leaders like the Chief Justice to create rules and precedents where there had been none before. Marshall took on such a politicized role in this period because he believed it was necessary for the institution, and the nation as a whole, to have a Supreme Court that was not limited in its ability to protect the principles laid out in the constitution. It was during America's first real period of political

upheaval – the transition of power from federalist to Whigs – in which we see the beginning of the trend towards court politicization, and this would become a recurring pattern throughout American history. In periods where there is the most uncertainty in both the legislative and executive branches, political elites often view the judicial branch as a favorable alternative to congress and the President as they can bypass lawmakers and create new policy through their decisions. Thus, while the trend of politicization has been slowly increasing over time, we see the most salient surges during periods of upheaval in the United States, whether it be a transition of power, a war, or even a financial crisis.

Part B: The Reconstruction System

After the Civil War, the American political system had to undergo a significant alteration. The trauma and destruction the war caused led to a significant reevaluation of the way government institutions functioned, including that of the Supreme Court. The Court's reputation had been significantly damaged during the conflict, as many had seen its efforts to hold the government accountable as unfavorable to the war effort. For instance, when Lincoln suspended the writ of Habeas Corpus, Chief Justice Roger Taney issued a ruling that Lincoln lacked the authority to undertake such an action – a decision that Lincoln flatly ignored. Thus, following decisions like this, Senators wanted to ensure that the decisions issued by the Supreme Court would be in their interest – the elite interest – and would not serve to undermine their efforts at reconstruction.

In this period, the court became regarded a purely political institution, the membership of which, senators believed, should be geographically dispersed and politically reliable (Friedman 1983). Again, we see the Court being used as a device for political change; in this

case it was used to protect the programs passed by the North and ensure that the United States survived one of the harshest periods in its existence. In the aftermath of the Civil War, the issues before the Court primarily related to war and Reconstruction, both of which were considered to be of crucial importance to the survival and character of the nation that Congress would often take steps to ensure the Court could not invalidate its laws. As Friedman indicates, the constitutional pressures of the period created a strong incentive to gain ideological control of the Court (Friedman 1983).

In this way, the Supreme Court became an extension of Congress during reconstruction, with its membership deliberately reflecting the ideological make up of the legislative branch so that policies that may have been challenged and found unconstitutional remained intact. This is clearly an example of the hijacking of the courts decision-making authority to enact substantive policy change in the United States, and this did not go without notice. The Court sank to a low level of esteem in the eyes of the public (Friedman 1983), as a plethora of statements of disrespect and hostility were leveled at the court for making decision that appeared to be flatly partisan, demonstrating that the American Public was not satisfied with the direction of the court, nor the way it had been employing its powers.

Similarly, we see a perverting of the nomination process in this period. To further guarantee that the Supreme Court would continue to deliver decisions that were considered to be acceptable by congress, Senators demanded that nominees to the Supreme Court had orthodox views on issues relating to Reconstruction (Friedman 1983), in essence dismissing the notion that justices should be nonpartisan, preferring instead individuals who they knew would behave in the way they intended, which also made the courts decisions far less controversial in this period – as they were all but preordained. The use of a Reconstruction litmus test in this

period demonstrates that the political elite in post civil war society recognized the Supreme Court was necessary to enact the changes they found necessary, and therefore politicized the judiciary and used it to advance political causes as it saw fit. This was far removed from what the mass public wanted, as it was rife with sectional tensions, and still reeling from the effects of the Civil War.

Moreover, positions on the court were given out to political allies, in recognition of service to the President, or the nation, and this was generally not seen as improper (Friedman 1983). Again, we see that by expressly involving political actors in the Federal judiciary, it by definition ceases to become a nonpartisan body that exists above the fray of politics, but rather becomes a body expressly engaged in the political matters of the day. In doing so, the political classed deprived the common American of the protections the Judiciary was supposed to provide – if decisions were seen as against the national interest, they were essentially precluded by congress, eliminating the courts ability to protect the Constitution.

However, as the memory of the Civil War waned, and issues relating to reconstruction began to disappear, the court regained some of its lost independence, and was able to become functioning separate from the political realm once more. This change, which coincided with a greater reliance on the Court's role in society, bred a change in the way Justices were viewed. Towards the turn of the century, the importance of a "judicial temperament" came about, affording the President more political freedom in choosing his nominees, as well as diminishing the role the Senate played in judging the nominees ideology (Friedman 1983, 60). This new type of justice, unencumbered by political necessities, was able to act free of congressional constraints, which would produce the next great movement of judicial exploitation in American history.

However, this ebb and flow of political contention over Supreme Court nominees that characterized the nineteenth century was due largely to the volatility of the system. An upheaval like the Civil War is unprecedented in American history, and enacting reconstruction policies was one of the most difficult tasks in the history of the legislative branch. Thus, we see increasing levels of politicization as the Court becomes a more promising alternative to the status quo of legislative gridlock. Again, while the trend of politicization is always upward rising, in periods such as these we see a greater reliance on the courts alternative ability as a policy making body and therefore more incentive to treat the court as a political institution. As we saw with the early 1800's and Marshall, trends of politicization increase in periods of political and institutional disruption and change; however, it is remarkable that given such a shock to the system, the ways in which the political elite interacted with the Judiciary changed comparatively little. Again, this demonstrates that through the evolution of American institutions and values, court politicization remains a constant.

Part C: The Era of Sociological Jurisprudence

At the turn of the century, there was a fundamental change in the way Supreme Court Justices began to view the constitution. Before, Justices had decided cases based upon what they believed the Constitution could allow, with varying degrees therein, but the logic of each decision was always couched in Constitutional doctrine. However, this new epoch of American jurisprudence would be marked by a type of decision-making that at its core was a device of political change.

The concept that is embodied in sociological jurisprudence is that the courts can change the meaning of the Constitution at will by altering their interpretation of the document, with the

goal being to keep up with the views of the dominant group in society (Secola 1988). In this way, the Constitution is not as important as the prevailing social and political climate, as Justices view it as their obligation to ensure the Constitution reflects modern society. While John Marshall used the Court as an instrument of change, to both bolster and enhance the powers of the federal government and the judiciary, his decisions reflected what he believed the Constitution would allow; they never went so far as to reflect what direction he perceived society to be headed. In this way, such a judicial philosophy would have been anathema to Marshall, as it would “nullify the written Constitution and make the Supreme Court's power unlimited” (Secola 1988, 30).

The Justice most associated with the philosophy of Sociological Jurisprudence is Justice Oliver Wendell Holmes, who sat on the Supreme Court from 1902 to 1932. For Justice Holmes, the law was not a set principle to be read and understood; instead it was dynamic and ultimately a method of achieving progress (Secola 1998, 34). However, the issue with Sociological Jurisprudence is that, when applied through the powers of Judicial Review, it turns the Supreme Court from a judgmental body into a policy making body, which is an idea that is derided by the majority of the American populace. When the Court can interpret the Constitution according to what the Court perceives to be the dominant group of society, it has a free hand to institute its policy preferences on the people of the United States, thereby surpassing the will of the people as represented by Congress and the President. Additionally, because Justices are appointed and have lifetime tenure, this means that members of the Supreme Court have nothing to fear in terms of electoral repercussions for their actions.

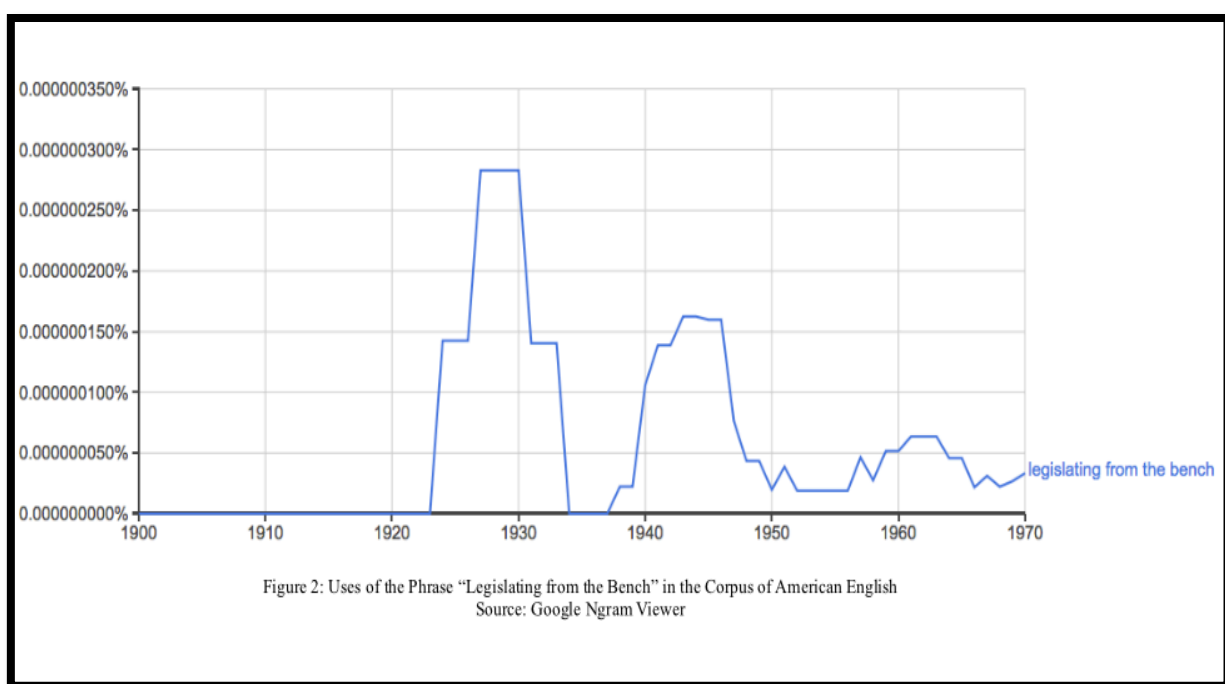
Ultimately, this represents one of the clearest abuses of the Supreme Court for political purposes. While Sociological Jurisprudence purports to adhere to the opinions of the dominant

groups of society, it ultimately disregards the wishes of the American people while doing so. The political elites that comprise the court were not elected, and therefore did not genuinely speak for the people of the United States; rather they were using their positions to institute changes that they found to be necessary, regardless of the opinions of the American people. In this sense, the Court abandons its policing function, whereby they ensure there were no acts of overreach by the other two branches of government, and in essence bypasses the legislature and the executive to make the constitution reflect their version of society. It is evident that acting in this way was not only anathema to the American people, but would have been anathema to the scores of Justices who had come before.



As you can see in Figure 1, the usage of the phrase "Sociological Jurisprudence jumps, staring in the early 1900's and hitting a peak in the early 1920's, and another in the early 1930's, both under Justice Holmes tenure. However, we also see a rise in the number of times the phrase "legislating from the bench" is used in this period. Referring to figure 2 (below), there is a similar spike in the usage of this this phrase in the early 1920's, lasting until after

Holmes left the Court in the early 1930's, showing a slight correlation between the two. This phrase has an inherently negative connotation, and demonstrates that, in this period, the increased amount of judicial activism that took place under justice Holmes and other advocates of Sociological Jurisprudence was in fact received negatively by the American people, indicating the agenda the Court was pursuing ran counter to what average American citizens believed the court should be engaging in. Once more, this shows the fundamental disconnect between the mass public and the political elite on the way the judicial branch operates, with the Supreme Court again being used



to further political agendas by certain powerful individuals.

It is also in this period that we see Roosevelt's famous court packing scheme, in which the President attempted to alter the size of the court so that justices would continue to uphold his New Deal programs that he felt were paramount to American in the aftermath of the Great depression. A series of 5 to 4 decisions that had gone against the Roosevelt administration had left

Democrats throughout the country looking for a way to restrain the court and ensure that the decisions delivered by the highest court in the country would be both predictable, and favorable to the Roosevelt coalition. This led to the belief that the Court could be curbed with an act of congress, in essence stripping the Court of its independence and diluting its ability to rule against policies the President and Congress believed were wholly legitimate (Leuchtenburg 1966).

Ultimately, the plan would never be put into action as the famous “switch in time that saved nine” would give Roosevelt a much needed legal victory, but the Court Reform Bill that Roosevelt sought to pass was a blatant example of the politicization of the Supreme Court by the political classes. The normative purpose of the Supreme Court, to protect the citizens of the United States, was almost explicitly undermined in order to further the political agenda of the individuals in power. This was one of the most widely criticized moments of Roosevelt’s administration, as infringing upon the sovereignty of the court is viewed as detrimental to democracy, and this is likely why it has never been attempted again in the decades following. Additionally, the unpopularity of the plan serves as a testament to the fact that it was a self-serving policy intended to facilitate policy change for the president and members of his cabinet.

During this period of institutional change, the level of politicization of the court reached a new zenith. In this circumstance the judiciary was threatening to derail a legislative agenda that was seen as integral to the recovery of the United States during the Great Depression, and this directly correlates with the increase politicization. Similarly to the two previous examples of the first transition of political parties (from federalist to Democratic Republican), and the Civil War, the Great Depression was a watershed moment in American history. As these examples prove, during periods of high institutional stress or crisis, the Supreme Court represents continuity and can be used to bypass turmoil in the elected branches of government to enact policy reform. In this case, the President’s attempts to pack the court represented an effort to dilute the Court’s authority in

order to prevent the New Deal policies from being declared unconstitutional. Controlling the court became a priority of the Roosevelt administration, creating a greater incentive to politicize the court so that its decisions would be more predictable and would see the New Deal policies in a more favorable light. Thus, while the process of court politicization has been incremental throughout Americana history, the largest spikes are correlated with moments of high stress in the system.

Sociological jurisprudence however, would not be abandoned as the infamous court-packing plan had been, and the United States would see similar activist tactics used by the Warren Court during the 1950's and 1960's. The Warren Court was one of the most Liberal Courts in history and truly revolutionized the rights everyday American's were given at this period in time, though large portions of the population took issue with the Warren Court's apparent activism. Though many of the Warren Courts decisions had massive significance for certain groups of Americans, public opinion repudiated the Warren Court's style of activism (Luban 1999). As a liberal court, Warren and the associate Justices of the court took the opportunity to use the judiciary as a way of bypassing the slow legislative progress of Congress and the President to put in place fundamental rights they believed all were entitled to, including decisions related to voting rights, desegregation, and criminal rights. I do not endeavor to decide whether these decisions were right or wrong, however, it is clear that this is yet another example of the Political class using the Supreme Court as a body to institute definitive policy change throughout the United States, in spite of what public opinion said about their actions. Indeed most everyone now agrees that judicial activism and that judicial restraint is preferable, with some going so far as to suggest that the Warren Courts decisions should be ignored (Luban 1999).

Earl Warren and his colleagues were pursuing a rights revolution and obviously used

their positions of power to further these aims. Ostensibly, their decisions have had a positive impact on American society, but at the time they was an incredibly large movement against the Supreme Court. A campaign was started to impeach Earl Warren (See figure 3 below) resulting from the widespread outcry against the Warren Court's decisions, again indicating that there was a disconnect between the agenda being pursued by the elites occupying the Supreme Court, and the general public who felt the Court was overstepping its bounds.



Once again, this instance on politicization came during an instance of discord and dissonance within the American system. During Warren's tenure, the country was locked in the midst of intense debate over issues that were highly controversial at the time, namely segregation, civil rights, and the rights of those accused of or convicted of crimes. Unlike the past examples, this upheaval was caused by domestic discontent, rather than a war or a financial crisis. However, this period was rife with partisanship and gridlock, again making the

court a favorable alternative for putting new policies in place. Not only did the Warren Court act in a highly political matter, groups like the NAACP chose to use litigation to end discriminatory policies like school segregation as the individuals involved in the organization knew their efforts would have fallen on deaf ears in Congress. Using the court's ability to establish precedents as an alternative to the deliberative processes of the legislative and executive is yet another example of the court being politicized during times of political upheaval to further the agenda of the political elite.

Part D: The History of Modern Politicization

Perhaps the most salient example of the politicization of the Supreme Court came during the Presidency of Ronald Reagan. In 1987, Robert Bork was nominated to fill a seat on the Supreme Court, and in this instance, there was a massive campaign launched to halt Bork from ever taking a seat on the Supreme Court, though this campaign was different from that of Clarence Thomas who would later be successfully confirmed. In Thomas' case, a scandal was the reason so much opposition had been generated, but in the case of Bork, it was his ideology that alarmed the Senators who held the fate of his nomination in their hands.

Many scholars have argued that the Bork nomination and ultimate rejection was a watershed moment for Supreme Court politics. The main change to the judicial nominating process was that the sole basis for the candidate's rejection was his political viewpoints, rather than his qualifications, though at the time of the hearings, the argument was made that the selection process had already been politicized before the senators even saw Bork. (Rose 1989). For a branch of government that was supposed to be immune from questions of partisanship and ideology, this was certainly the first time it had come up in confirmation hearings in the

twentieth century.

However, the Senate has long judged candidates for the Supreme Court on the basis of what they believe, as rejections of Supreme Court nominees in the nineteenth century were often political but almost never expressly ideological (Dannelski 1989, 920), whereas in this instance they were expressly political. However, in addition to rejecting Bork because of his ideology, there were other political aims at play when the Senate rejected Bork to fill the seat left by Justice Lewis Powell – namely that Powell was the courts median and was the swing vote on cases that were split 4-4. In fact, many liberal activists and politicians feared that the appointment of a Reagan conservative like Judge Bork could potentially push the courts median far to the right, resulting in a significantly conservative court for the next several decades (Blasecki 1990, 531).

Though, in the mobilization of resources against Judge Bork, we again see the conflict between the political class and the mass public play out. Recognizing that the court is an instrument for policy change, liberal law makers attempted to obstruct the Republicans from getting a stronger ideological majority on the court, for they realized this would set back their policy aims. It becomes evident that this was the grounds for Bork's rejection, as in 1981, when the American Bar Association (ABA) provided its recommendation for Bork to sit on United States Court of Appeals for the District of Columbia Circuit, it unanimously provided the Judiciary Committee with its highest approval rating for federal circuit or district court nominees – a rating of “exceptionally well qualified” (Myers III 1989, 402). Bork was then confirmed by a unanimous voice vote and received his commission as a federal judge. No significant opposition was raised to Bork at this point, simply because his appointment was less salient and his position gave him less power, and for this reason the political elite did not need

to oppose him in the grandiose way they did when he was nominated to the Supreme Court seven years later, when he again received the highest approval rating from the ABA (Myers III 1989).

It is evident that the public did not have as strong an opinion on Judge Bork as the political classes did, as they saw him as a speed bump in the process of achieving policy change through litigation. Lobbyists and interest groups had to spend incredibly large sums of money to win the public over and prime them into believing that opposing Judge Bork was the right course of action, so that they could successfully prevent a Conservative from undoing legal precedents liberal activists had worked so hard to put in place. Indeed there were interest groups fighting to get Bork confirmed, with both sides engaging in included newspaper advertisements, television ads, mass mailing campaigns, enlistment of prominent public figures to endorse or discredit the nomination, letters to newspaper editors and editorials, public opinion polls, public rallies and protests, bumper stickers, lapel buttons, petitions, charges, and counter- charges (Myers III 1989, 406).

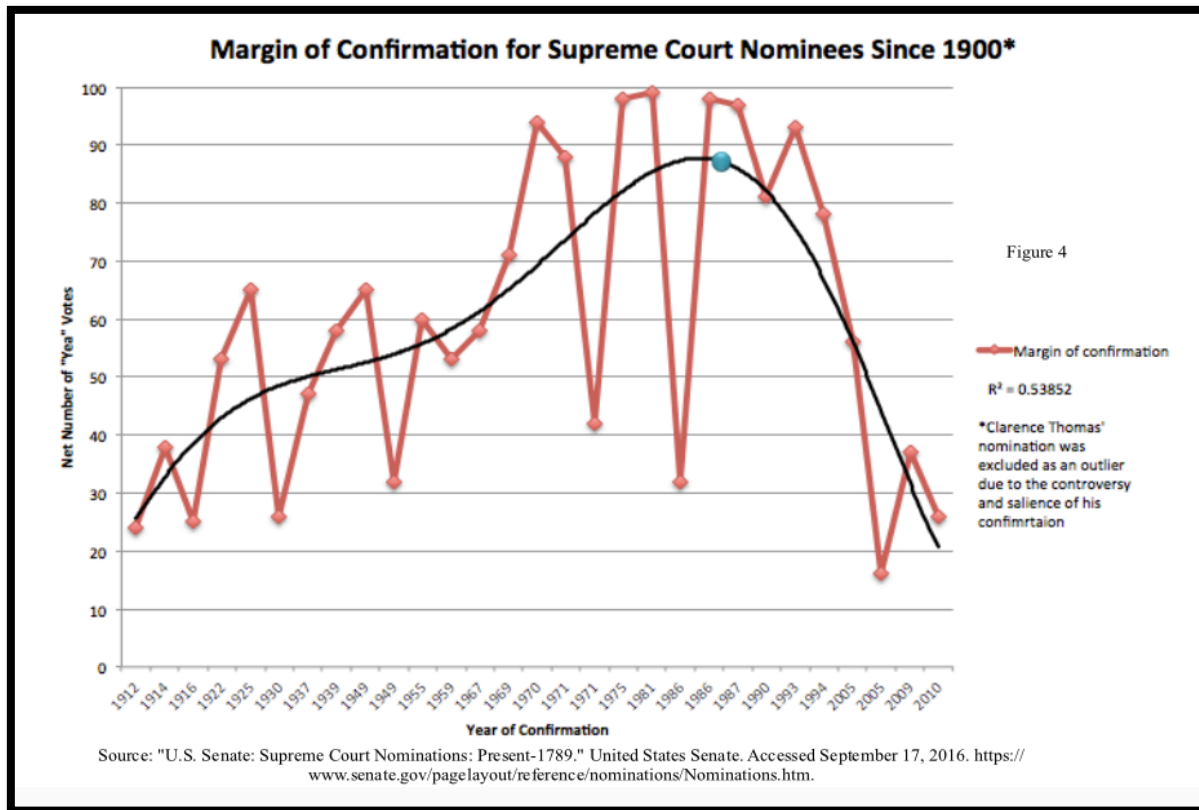
Moreover, interest groups used special tactics to convince certain sectors to oppose the Bork nomination, using the lenses of racial equality and gender bias to induce individuals to call their Senators in opposition to Bork (Litchman 1989, 978-79). What becomes abundantly clear is that public opinion in this case was hijacked through extensive lobbying efforts and smear campaigns, and made to reflect the wishes of the liberal activists who were opposing Bork simply to prevent the capture of the Supreme Court by Conservatives. The average American had no problem with Bork when he was nominated to be a federal judge seven years before, nor did they oppose him when he was initially nominated. However, the outrage only appeared when it became political relevant for the group of politicians and activists who sought

the continued usage of the Supreme Court as an instrument of policy development in the United States. Furthermore, most Americans do not want an ideological Supreme Court, as Luban suggested, indicating that most Americans would have preferred a less controversial confirmation process in which Senators made their decisions based on a nominee's qualifications and previous judgments rather than on his or her ideological or political stances on certain issues.

Referring to Figure 4 (below) however, it becomes clear that the case of Judge Bork was in fact a watershed moment in the Court's history. The blue point on the line represents the year in which the Bork nomination and subsequent rejection took place. Using a linear regression, it is apparent that, following the Bork incident, the margin of confirmation of every subsequent justice has continued to shrink, to the point that some modern nominees do not even receive hearings, indicating an enhanced importance of ideology in the process of being successfully confirmed as a justice of the Supreme Court. This reveals a worrying trend, showing that the government's least political branch in theory, has actually become one of its most political branches in practice.

This period marks the beginnings of the current system of Supreme Court nominations, characterized by bitter partisan fights and threats to derail or indefinitely forestall the confirmation of nominees. The level of political upheaval during this era of American politics was comparatively low, making the severe politicization of the Court during the Bork hearings somewhat surprising. It was also in this moment that we see a departure from the previous pattern, demonstrating that court politicization had moved from an extreme measure to a far more commonplace behavior. Decades of politicizing the court, through moments of political upheaval and moments of institutional stagnation led to a normalization of these type of tactics

by the political elite.



This brings the story to modern times, where the political elite blatantly uses political and ideological measures to determine who sits on the court, and where those on the court pursue political aims through the auspices of judicial activism to enact policy without ever being elected to serve as a legislator. Scholars have hypothesized how an Obama court with a liberal majority might be able to enact both legal and legislative change in the United States, indicating that would make only incremental changes to the current legal framework, at most reversing some of the Roberts Court's recent controversial and closely-divided cases (Robinson 2010).

The ideologically motivated obstruction of Obama's nominee to fill Antonin Scalia's

seat on the Supreme Court was what motivated this paper, but when the key points in the courts history are examined over time, it becomes obvious that there are two separate and distinct groups when it comes to the Judiciary branch and the way it should be operate; the first being the political elite, who see the judiciary as a vehicle for policy change in either the liberal or conservative direction, whereas the second, the American public, is more concerned with the court functioning efficiently and remaining nonpartisan. The second part of this paper seeks to find empirical evidence that this pattern still exists in modern America, namely that the American people would prefer Antonin Scalia's seat on the Supreme Court swiftly filled with an individual qualified to fill the post, rather than the partisan squabbling and bickering that has taken place under the administrations of both President Obama and now under the administration of President Trump.

Part E: Fitting into Larger Trends

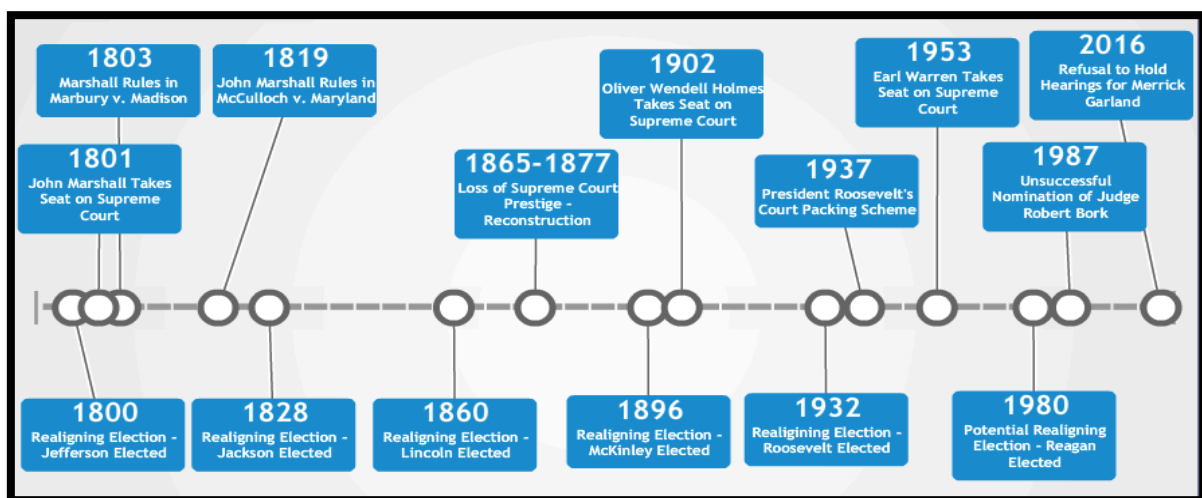
As one can see, through a multitude institutional and structural changes to the American system, politicization of the court has remained a constant theme and has steadily increased as time has passed, until present day where it has reached new partisan extremes. However, examples of court politicization persisted in spite of electoral shifts in the population at large.

Famous American political Scientist Walter Dean Burnham argued that throughout American history, there were several so-called "critical elections," which were elections resulting in critical realignments, or abrupt coalitional change among the mass-based electorate (Burnham 1970). These realigning elections are spread across the country's 200 plus year existence, starting with Jefferson's Presidential victory in 1800 and ending with Roosevelt's election in 1932, though several post modern example have been hypothesize including

Reagan's election, or that of Lyndon Johnson in 1968.

In each of these occasions, there have been serious changes in the mass electorate that have brought about different voting coalitions, which in turn carry politicians to power. What is striking, then, is that despite these various changes in the mass public throughout the period analyzed by this paper, there has been very little variance in the ways in which political elites have conducted themselves in regards to the Supreme Court. When all the events in this paper are overlaid on a timeline with the critical elections Burnham discusses in his book, it is evident that instances of elites utilizing the court to further their agendas are not localized to one or two periods in time, but rather are found consistently throughout the timeline.

This gives credence to this papers main argument, that there has in fact been a disconnect between the mass public and the political elites that has existed throughout American history, becoming more intense during the latter half of the twentieth century and moving into the twenty-first century. Consequently, this means that despite significant changes in the institutional structure of the nation, in the nature of the political elite, and in the electorate, court politicization remained constant.



In this way, this timeline demonstrates that this divide is persistent and therefore worthy of further study, bringing this paper to its second part: the collection of empirical data to validate these findings in the modern era. Given the patterns that have been traced thus far, it is expected that the data will reflect and lend support to the main arguments that have been developed utilizing evidence from various epochs of American history.

PART II: CASE STUDY OF MODERN AMERICAN NOMINATION POLITICS

Research Design

This research focuses on two key questions: how do the American people feel about the appointment of the next Supreme Court Justice and how different are these opinions from the actions we have seen from the political classes in the United States, namely the Senators and activists who have pushed for or against the confirmation of a nominee. The two hypotheses of this paper that follow are that A) the American public will prefer a working Supreme Court (fully populated) to one that more closely represents their ideology and B) that the view of the American public differs greatly from the political class when it comes to evaluating who should sit on the Supreme Court, regardless of the ideology or the political party of the respondent.

In order to gather data to test these hypotheses, a survey will be utilized, asking respondents a variety of questions on their feelings toward the Supreme Court and the nomination process, including some normative questions about how the Court should function. Additional demographic questions were also asked, to allow for the controlling of certain variables like political affiliation and self-identified ideology.

Furthermore, no questions are being submitted to United States Senators or activists for

several reasons, one of which is that Senators are incredibly busy and getting them to actually take this survey would be incredibly difficult. However, there are a multitude of statements made on the record by Senators showing why they believed that Judge Merrick Garland should not have received any hearings, or why they believe they should filibuster the nomination of Judge Neil Gorsuch to the Supreme Court. From these statements, as well as the extraordinary actions taken over the past year and a half, it can be inferred what the position of the United States Senate is, and in this way, the responses can be compared to a baseline. This will allow us to test the second hypothesis, and compare the positions of the American public as well as the political class.

The survey was conducted using Amazon's Mechanical Turk (mTurk), an online service that allows researchers to quickly obtain responses for a low cost. As an undergraduate student, it is an incredibly expedient and convenient way to obtain results and test hypotheses. The system allows participants sign up to complete specific tasks for other people that have been uploaded to the website, a common one of which is taking a survey. The participants get paid small amounts for the tasks they complete, giving them an incentive to complete the tasks to the best of their ability. Through this service, approximately 500 responses to the survey were obtained.

However, it must be stated that several biases in these results may exist for several reasons. Firstly, through Amazon's Mechanical Turk service, samples tend to draw from more Democratic and Independent populations. Additionally, because this service is catered to people who have computers and are technologically savvy, the respondents are generally younger and more educated than the average adult population, which might have skew the results obtained by this survey. Thirdly, racial discrepancies may exist in the data, though these

differences may be exogenous to the model and the service being utilized to obtain results. However, in spite of all these potential biases, by adding demographic questions about partisanship, ideology, educational attainment, and race, it becomes possible to control for these potential confounders, allows the results to paint a more clear picture of trends in the population at large (Buhrmester et al. 2011).

Data Presentation & Analysis

Part a: 2016 Data

I had previously done survey research into this phenomenon, with a sample of roughly 225 individuals throughout the United States and had found evidence of the elite v mass public divide that this paper has attempted to prove the existence of. Early in 2016, during the stand off over then President Obama's nominee, Merrick Garland, two survey questions were used to see what Americans wanted in a Supreme Court Justice. The results showed that the majority of Americans wanted a Justice who was nonideological, rather than one who was explicitly partisan and decided issues based upon political calculations. This held true regardless of political party, with the differences between individuals of the Democratic and Republican Party being statistically insignificant, indicating that the true population means of both parties are in fact equal. With a P value of almost 0.21, it is highly likely that the differences between democrats and republicans on this issue was the result of sampling error, rather than some substantive difference that existed within the population. This proves that, at least in part, the American people prefer a nonpartisan judiciary, departing from what we frequently see in Senate hearings, where ideological litmus tests are often used to gauge whether a nominee is fit to serve or not. These data suggest that there is in fact a divide between average Americans that

currently exists, showing that the pattern exhibited within this paper is one of the most important judicial legacies of American history.

	Type of Justice Preferred: Ideological	Type of Justice Preferred: Nonideological	<i>Marginal Row Totals</i>
Democrats	32 (35.25) [0.3]	66 (62.75) [0.17]	98
Republicans	18 (14.75) [0.72]	23 (26.25) [0.4]	41
<i>Marginal Column Totals</i>	50	89	
	Chi ² Statistic = 1.5883	P value = .207575	

This question spoke to the normative side of the Supreme Court, namely, how it should function in practice. The results then, are unsurprising; in terms of how the Supreme Court should be viewed objectively, Americans do not differ in the way they perceive the Court's function, or purpose, however, does this pattern hold true when the subject matter becomes more subjective, i.e. more partisan in nature?

Consequently, when a question of ideological substance was asked, ostensibly the results showed significant differences between Democrats and Republicans. On the question of whether the Senate had a constitutional obligation to hold hearings on Merrick Garland, surprisingly, a majority of both Democrats and Republicans agreed that the Senate did in fact have an obligation to hold hearings on the President's nominee, which would seem to contradict the public stances of the Republican leadership in the Senate and on the Senate judiciary committee. However, raw numbers are not evidence enough that there is a group consensus, as the number of self-identified Republicans who answered this question was relatively low (to be expected on Mechanical Turk), potentially biasing the results. To correct for this, another Chi Square test is conducted.

When a Chi square is run on the second question, it becomes clear that there is in fact a statistically significant difference between Democrats and Republicans on this more partisan-specific question.

	Constitutional Obligation: Agree	Constitutional Obligation: Disagree	<i>Marginal Row Totals</i>
Democrats	63 (57.86) [0.46]	4 (9.14) [2.89]	67
Republicans	13 (18.14) [1.45]	8 (2.86) [9.21]	21
<i>Marginal Column Totals</i>	76	12	88 (Grand Total)
	Chi ² Statistic = 14.011	P value = .000182	

This Chi-Square had to be altered however, as each cell did not have more than five responses, so to account for this potentially compromising fact, a small alteration must be made to ensure these data accurately reflect trends in the greater population – the Yates Correction. When this Chi Square is altered with the Yates Correction, to take into account the low number of Democrats who believed the Senate did not have a constitutional obligation to hold hearings on the nomination of Merrick Garland, the Chi Square statistic is lowered a bit to 11.416 with the p value equaling 0.0007.

Q2: Chi Square Value (Yate's Correction adjusted)	Q2: P Value (Yate's Correction adjusted))
Chi ² Statistic = 11.416	P value = 0.0007

From these statistics it is clear that Democrats and Republicans do differ significantly on this question, as should be expected because this particular question speaks directly to an

individual's party identifiers, which are incredibly strong predictors of the ways in which an individual considers issues of political salience. The authors of *The American Voter Revisited* (Lewis-Beck et al. 2014, 22-23) equate ideology to a perceptual screen that affects the ways in which we view the world, and in this instance, that is undoubtedly the case.

So from these data taken during the Obama administration, several points become clear. Firstly, in regard to broad, normative questions that ask how the court should function, these data suggest the American public is fairly united, as most believe the judiciary should remain nonpartisan and there is not a statistically significant difference between Republicans and Democrats. However on the contrary, on questions more tailored to recent events and anchored in party affiliation, the American public seems to be far more divided. While more Republicans in this sample did say they believed the Senate had a duty to hold hearings on the President's nominee, the miniscule size of the sample means indicates that sampling error or other biases in the ways in which the sample was constructed could have easily produced these results. Though, the differences between Republicans and Democrats on this question are far more enlightening – they reveal that on questions of political salience, there is a fundamental difference between the way Democrats and Republicans feel. While this may seem like a glaringly obvious result, will this dichotomy hold true in the current, larger dataset taken during the Trump administration? And more importantly, on issues of the judiciary, does the gap between the mass public and the political elite still exist, or has there been a convergence as of late? These are all questions the new dataset will help to answer.

It is entirely plausible, however, that political demographics may have completely shifted since this earlier sample was taken. The tumultuous Presidential election campaign of 2016 seemed to defy the odds and break with tradition at every turn, resulting in what some experts

refer to as the greatest political upset of all time. President Trump is unique in his ability to galvanize and energize his supporters behind causes that he advocates for, meaning that his nomination of Judge Neil Gorsuch and his public push to have his nomination confirmed may have altered the dynamics on this issue. This is another possibility that we may see reflected in the data collected during Trump's presidency.

Part B: 2017 Data

Methods

As previously stated, the survey was conducted online using Amazon's Mechanical Turk, and the survey was restricted so that only users based in the United States were allowed to take the survey, so as to eliminate the biases of foreign nationals who would damage the generalizability of the final results.

Using Mechanical Turk, survey data was collected from 500 individuals on a variety of topics relating to the Supreme Court. The release of the survey was coordinated with the Senate Judiciary Committee's hearings so that news of the Supreme Court's nomination process would be highly salient, therefore increasing the likelihood respondents were adequately informed about the material covered in the survey. Additionally, respondents would be more likely to be familiar with Judge Neil Gorsuch, Trump's pick to fill the seat left by Antonin Scalia's death, eliminating some of the potential biases of the survey.

In order to ensure that respondents completed the survey, they were given a code at the end which they had to input into mechanical Turk to receive payment for their efforts on the website. The survey was kept completely anonymous so as to limit the possibility exposing

potentially sensitive personal data. Users were told that they could quit the survey at any moment and that if they did not feel comfortable answering a particular question that they could simply skip that particular question and move on.

Demographic Breakdown

Preliminary data from the survey showed that of the 500 respondents, some 220 identified themselves as Democrats, with 158 identifying as Independents and another 122 identifying as Republicans. Converting to percentages, this tells us that approximately a quarter of the sample is Republican, while forty-four percent were Democrats and around thirty-one percent identified as political Independents. Using the seven-point scale for ideologies, the survey shows the sample is roughly fifty-one percent liberal, eighteen percent independent, and thirty percent conservative. According to a Gallup poll conducted in 2016, forty-two percent of Americans identified as political independents, twenty-nine percent identified as Democrats, and twenty-six percent identified as Republicans. The validity of the measures is up for debate, using this data as a baseline, this particular sample contains less than the average amount of independents and Republicans, while overweighting Democrats, which is consistent with samples collected from Turk.

Additionally, roughly eighty percent of the sample was White or Caucasian, while four percent identify as Hispanic, six percent identify as Asian, and seven percent identify as African American or Black. According to the US Census, around seventy percent of the United States is White, while Asians account for approximately six percent, African Americans for roughly thirteen percent, and some seventeen percent are Hispanic or Latino, indicating this sample is overly White and largely underrepresents African Americans and Latinos.

The average age of respondents was 38.7 years of age, with a minimum age of eighteen and a maximum age of eighty-six, indicating a fairly young sample, though decently heterogeneously distributed. Additionally, the sample was forty-four percent women and fifty-five percent men, with the remainder of individuals preferring not to specify. Furthermore, on average, respondents had roughly fifteen and a half years of schooling, meaning the majority of respondents were nearly college educated.

This confirms most of the biases that are frequently seen with mechanical Turk, and ultimately this could impact the results of the research. However, the assumption is that on certain normative questions about the courts purpose, an individual's personal partisanship should have very little bearing on the way that person responded to the question, as the assumption is this will be uniform across political affiliations.

Data Analysis & Discussion:

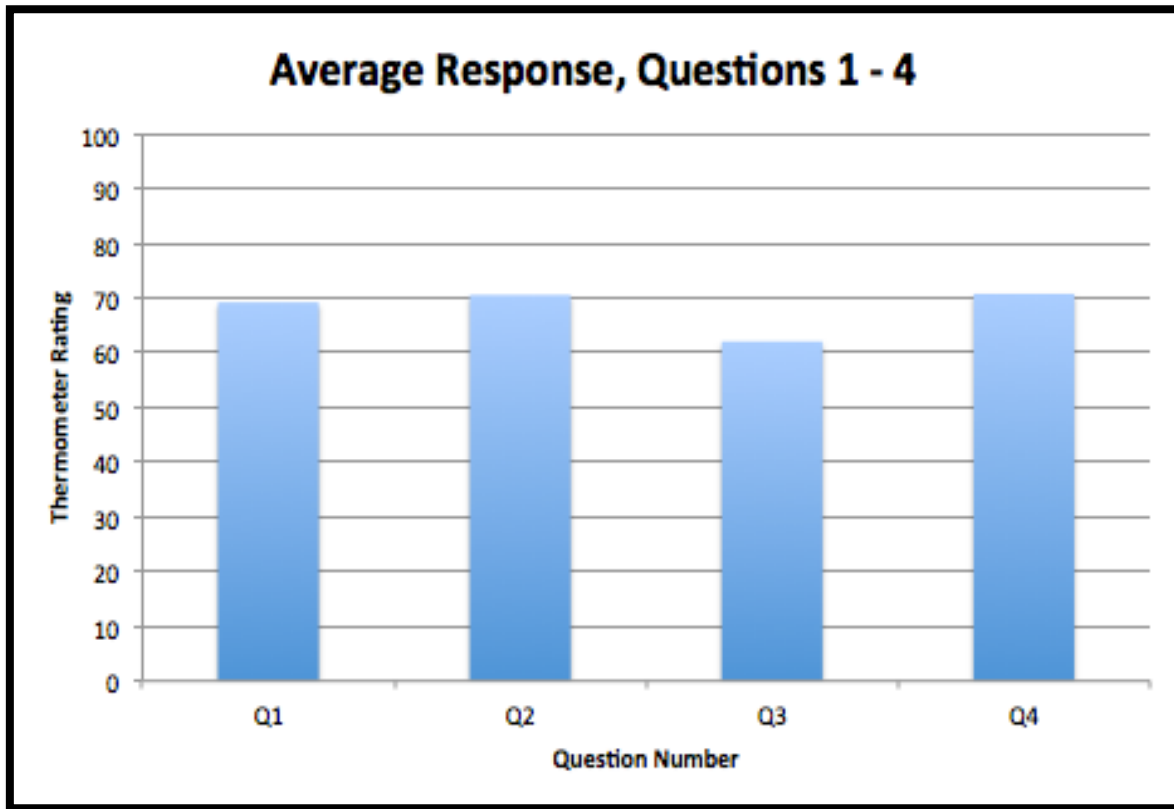
Questions 1 – 4:

The first four question in the survey were all open ended questions, asking individuals to input a value between zero and one hundred as a way of ascertaining their opinions about the functions of the Supreme Court, and interval level data was utilized so these results could be more easily compared with one another and so that the outcomes of each statistical test would have greater generalizability.

Two of the questions focused on the individual, asking if it is important that the court protect the values they care about, and if it is important that the court makes decisions they agree with. The remaining two questions asked if it was important that the court functioned

properly, and if it was important that any vacant seats on the court be filled so that it can operate effectively. According to hypothesis A, we would expect lower values on the first two feeling thermometers when compared with the results of the other two questions, which focused on the courts ability to fulfill its obligations. A full list of survey questions can be found in Appendix A.

Ultimately, the data confirms the first hypothesis, with the average response to the questions focusing on the importance of the court's ability to adequately execute its function exceeding that of the more individual centered questions. Individuals felt the least important aspect of the Supreme Court was that it made decisions they agreed with, followed by the court protecting the values the individuals cared about. The two questions designed to ascertain how important individuals felt a fully functioning court is, however, outscored the two previous categories and virtually tied, with a score of 70.53 and 70.74 respectively. Interestingly, this was not much higher than the response to question number one, which asked if the court protected the values the individual cared about, which was an average response of 69.18.



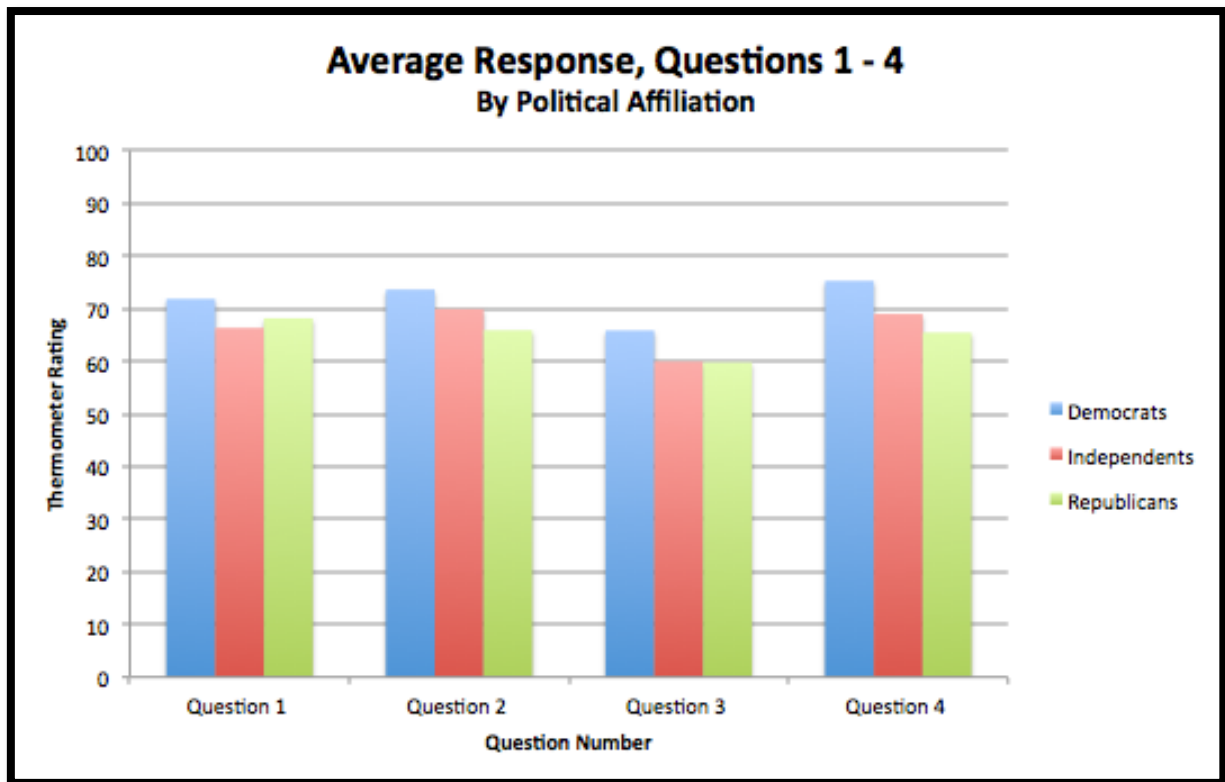
When these means are compared using a difference of means test, it becomes clear that we must retain the null hypothesis for the difference in average between question one and questions two and four. The average difference between question one and two was a paltry 1.35 points and resulted in a significance level of 0.3821, far larger than the 0.05 cut off, whereas the average difference between question one and question four was only 1.56, with a significance level of 0.3615, again largely insignificant. Therefore, the difference observed between the two averages can be attributed to sampling error or some other bias that exists within the sample, so the null hypothesis is retained. This indicates that in terms of importance, it is unclear which of these attributes Americans find most important, somewhat contradicting the theory postulated in hypothesis A.

On the other hand where there is a statistically significant difference is between question three and the remaining three questions. The average difference in responses between question three and question four was 8.72 points, resulting in a significance level of less than 0.01, indicating this difference is highly significant and therefore represents a concrete difference that exists in the population at large. The story is the same between question two and question three, resulting in an average difference of 8.51 and significance level of below .01 as well, and between question one and question three, which produced an average difference of 7.15, and a significance level below .01. A complete set of statistics for each difference can be found in Appendix B.

These results indicate that Americans do believe a functioning court, and a fully populated court are significantly more important than a court that makes decisions the individual agrees with, again validating hypothesis A. However, unexpectedly, individuals on average indicated that the court protecting the values they care about was roughly as important (or more important given our retention of the null hypothesis) as an efficient or effect Supreme Court, which detracts from the hypothesis as it indicates some personal bias could be potentially more important than having a functioning court. The hypothesis expected that, normatively, a fully operational court would represent a greater good and would therefore be more important than a personal belief, but in this case that holds untrue.

Moving on to hypothesis B, the sample was broken down and separated by political affiliation, into Democrats, Republicans, and Independents. This was done so that the average score for each question could be compared across parties, giving a clearer picture on how these values fluctuate as you manipulate the variable of party identification. According the hypothesis B, this should show that regardless of party affiliation, the American public is

different than the political elites in respect to these questions. Again, as no political elites were surveyed, the differences are drawn from public statements and actions taken by politicians, jurists, and activists across the nation. The results can be found in the graph below.



The pattern exhibited in the whole population is maintained when examine the averages for each party affiliation on each question. The only exception comes on question one, where Republicans said on average it was more important than all of the other questions, which departs from the previously observed trend. This data would appear to validate hypothesis B, as regardless of political party, we consistently see the highest scores coming on question two and four, with question one following in a close third and question three coming in a somewhat distant forth. Moreover, these data prove there is more support for filling the courts vacant seat than politicians in the Senate would have the American people believe, as average thermometer

scores of 65 or above indicate a perhaps mild desire to fill Scalia's seat. Yet, the Senate took extreme measures to ensure the seat would remain vacant until after the election – a blatantly partisan action that demonstrates the fundamental divide that exists between the American people and the political classes who occupy the legislature.

Additionally, the same pattern holds for each question, with Democrats rating the most highly, followed by independents, and then Republicans – a pattern frequently seen in the realm of American politics. Furthermore, as these data show, Democrats consistently indicated each question was more important than their Republican or Independent counterparts, and due to their overrepresentation within the sample, this likely drove up the national averages that were examined earlier.

When differences of means tests are conducting on these subsets of data, there is further support for both of the hypotheses of the paper. None of the differences between the Republican's mean and the independent's means achieve statistical significance, on any of the four questions. Furthermore, only two of the differences are indisputably significant, the difference between the Republican mean and Democratic mean on questions two and four, with both exceeding the .01 cutoff, indicating there is a 99% chance the results reflect a substantive difference. Four differences fall between a significance level of .05 and .01, and the remainder of the differences exceed a P value of .05, indicating those differences should be considered insignificant.

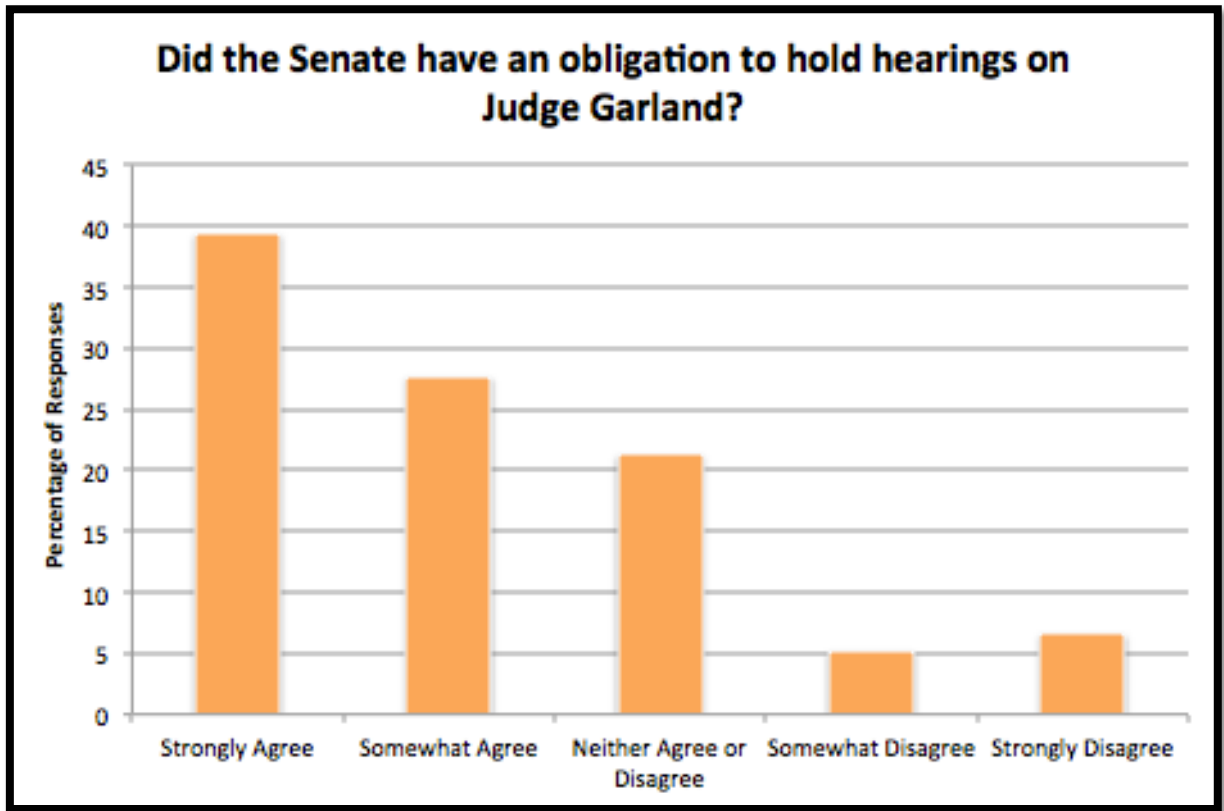
Ultimately, this is a mixed result, as there are a few concrete differences between Democrats and Republicans and Democrats and Independents, however several of the results display that there is not a significant difference in the ways members of various political

affiliations evaluate the importance of various aspects of the Supreme Court. While these results are not uniform, these similarities indicate there may not be as large of an ideological divide in the population as the news media or political party leaders would assert.

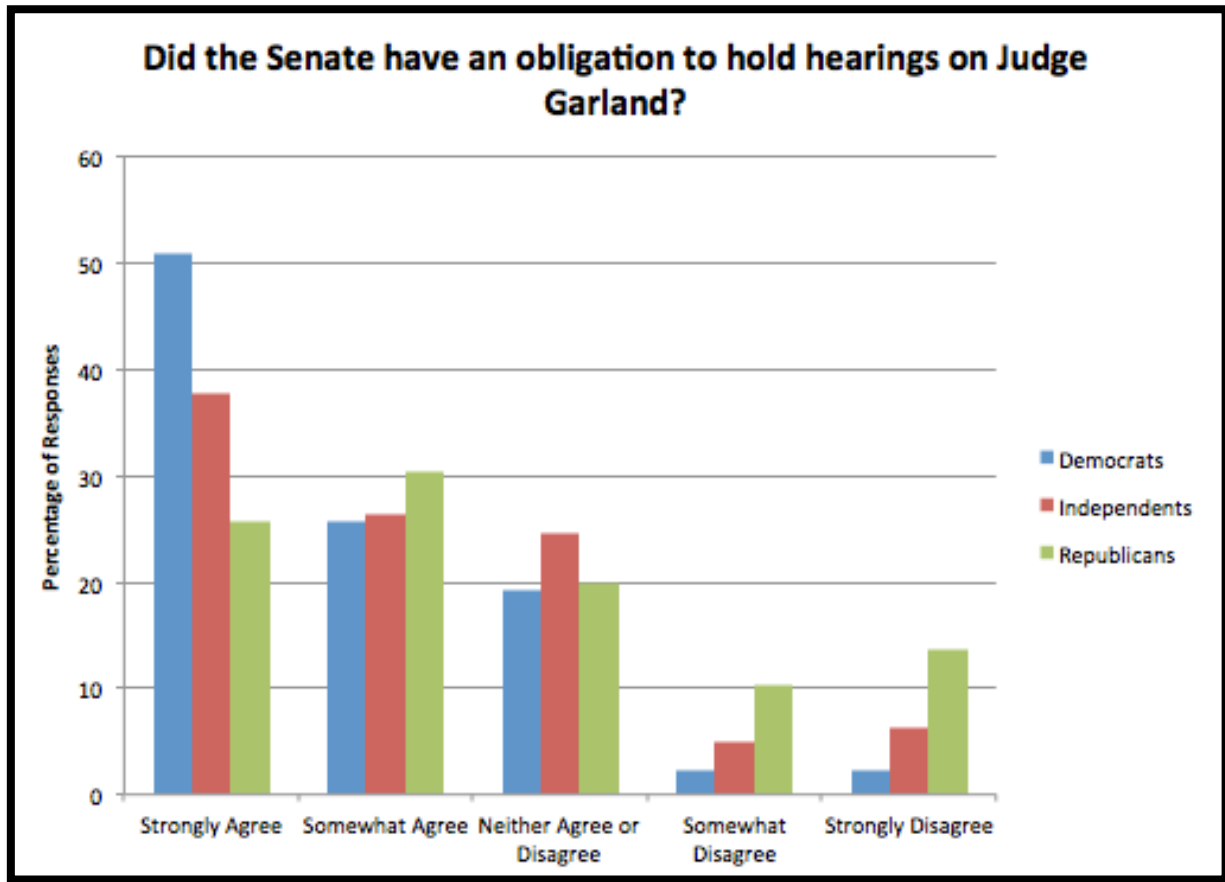
Questions 5-9

The next series of questions generated either nominal or ordinal level data, and tried to hone in on individual's opinions on specific aspects or individuals relating to the Supreme Court. The first question examined whether individuals believed that the Senate had a constitutional obligation to hold hearings on Obama's nominee, judge Merrick Garland. The results were surprising given the developments that took place in the Senate in early 2016.

A majority of individuals stated that they either strongly agreed or agreed with the notion that the United States Senate had a constitutional obligation to hold hearings on Judge Merrick Garland – an action that both Majority leader Mitch McConnell and Judiciary Committee Chairman Chuck Grassley indicated they had no responsibility to conduct. Nearly forty percent of individuals stated they strongly agreed, while just under twenty-eight percent agreed with the statement, in stark contrast with the five and seven percent who stated they disagreed or strongly disagreed, respectively. This would seem to suggest that again there is a disconnect between the American people and the political classes, while further validating the hypothesis that the public prefers a functioning court to one being used as a political tool. However, the significant number of Democrats in the sample means that this percentage could be artificially high, as ostensibly Democrats would be more likely than Republicans to support Judge Garland's nomination to the Supreme Court. In order to get a clearer picture, the results were then again controlled for partisanship.



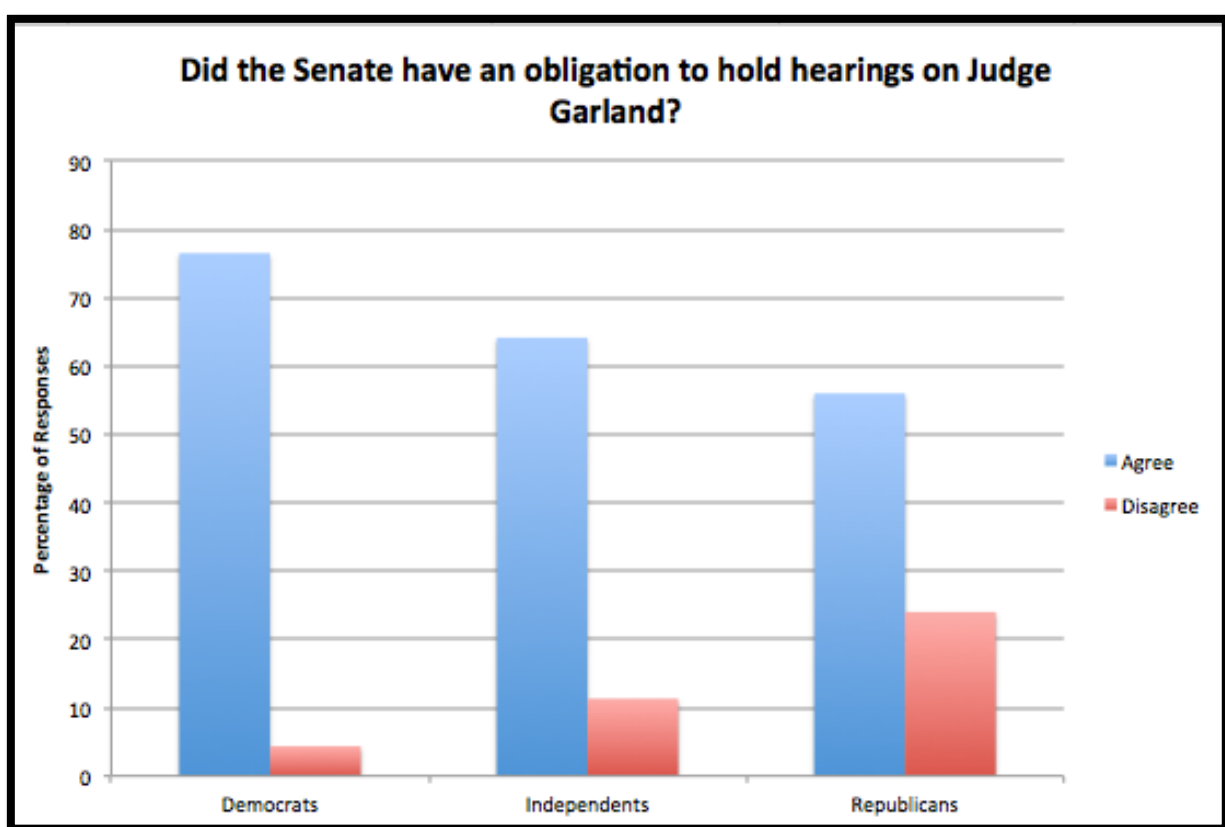
Surprisingly, when political ideology is controlled for, a similar pattern emerges, with a majority of Democrats, Independents, and Republicans stating that they believed the Senate did in fact have an obligation to hold hearings for Obama’s nominee. There are sizable differences in the percent of individuals who said they strongly agreed, with fifty-one percent of Democrats strongly agreeing with the statement, compared to thirty-eight percent of independents and twenty-six percent of Republicans. While thirteen percent of Republicans indicated they strongly disagreed with the statement, this constitutes roughly half the amount that stated strongly in the affirmative – again an interesting result.



These numbers show broad support across political parties, but in order to compare the percentage of those who agree to those disagree, the aggregate numbers of those who agreed and strongly agreed and those who disagreed and strongly disagreed were combined to form one category each to present a more clear picture regarding the proportions that were for and against hearings for Judge Merrick Garland. These proportions were then tested using a difference of proportions test to ascertain whether the results were statistically significant.

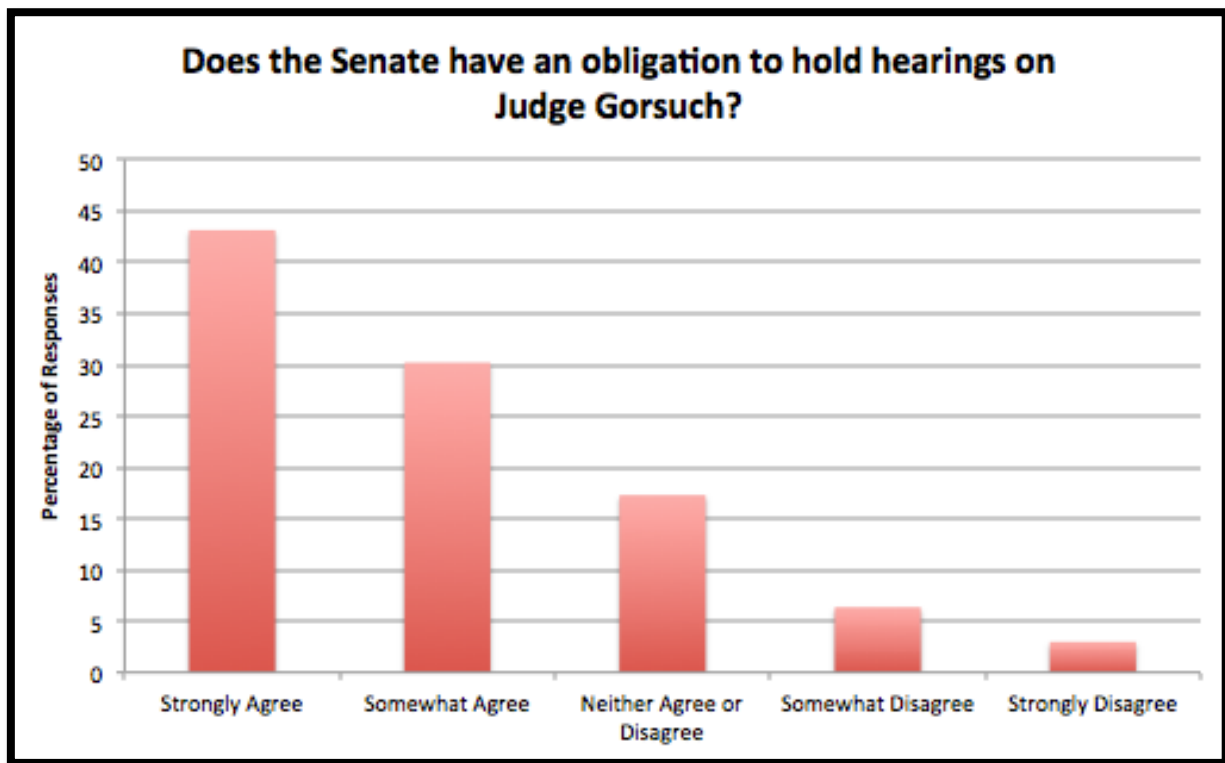
The results show that the difference between those who agree and those who disagree to be statistically significant, across all political parties ($P < .01$ for each). This result proves that a majority of Americans would have preferred Merrick Garland received hearings, regardless of that individual's political party, which validates hypothesis B. Senate Republicans refused to

even meet with Obama's nominee, whereas a majority of the members of their party believed he should in fact have received hearings, once again demonstrating there is a fundamental disconnect between the way the American public and the political elite view issues surrounding the judiciary. The intense and bitter partisanship found in the U.S. Senate over Supreme Court nominations does not appear to exist throughout country, as the data indicates there is far more consensus than previously believed.

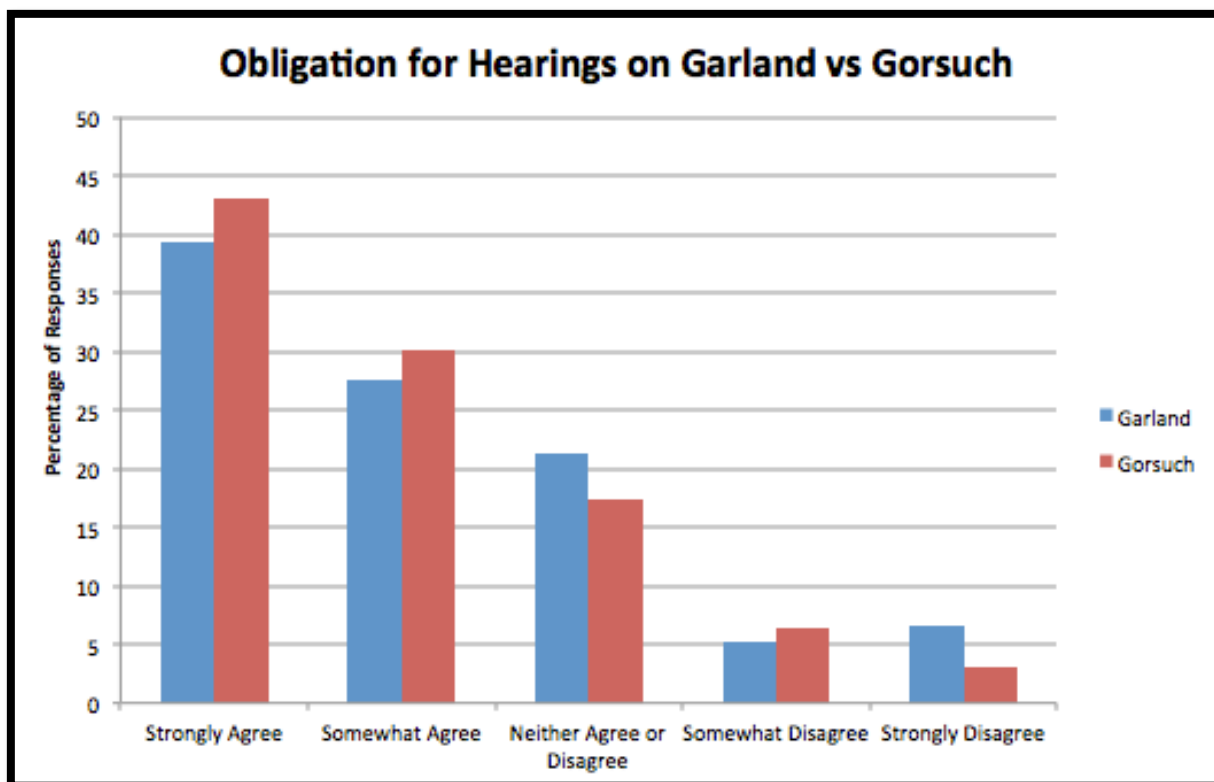


Given these results, we should find similar levels of consensus surrounding President Trump's nominee before the court, Neil Gorsuch. Respondents were asked the exact same question, but Judge Gorsuch's name replace judge Garland's name. When these results were tabulated, unsurprisingly, the graph has a higher percentage of Republicans who strongly agree and a lower amount of Democrats who strongly agree, however on the whole, the pattern of

general agreement holds. In actuality, a larger percentage of total individuals surveyed believed the Senate has a constitutional obligation to hold hearings on Judge Gorsuch, which is surprising given the number of Democrats in this sample. Yet, this again proves that the American public is far less polarized on the issue of nominees than the members of the Senate are.

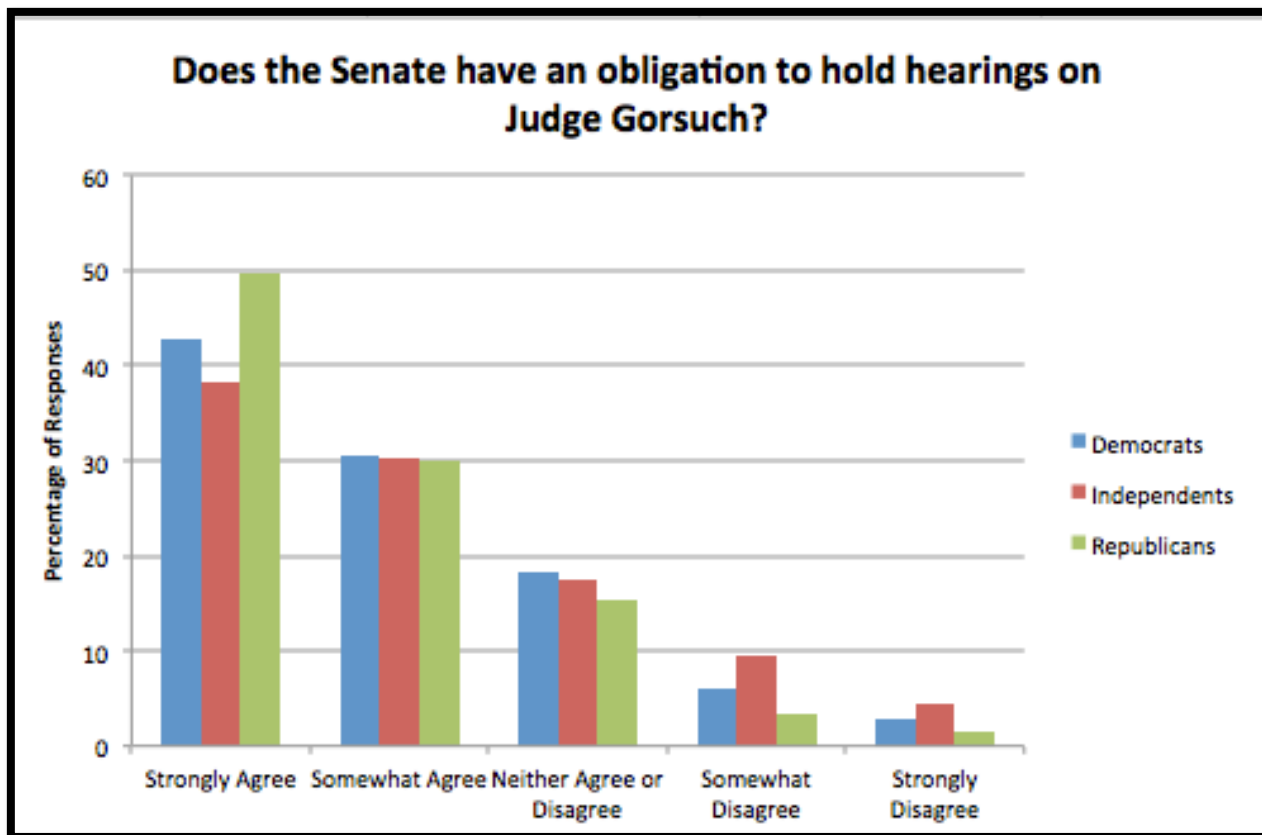


Furthermore, when the two graphs are superimposed upon one another, it becomes evident that the basic pattern holds. While there is a slight difference in magnitude, the only concrete difference we see is that there were more individuals who said they strongly disagreed that Judge Garland deserved hearings than disagree with the statement – a pattern that is flipped for Judge Gorsuch. While Democrats lack the Senate majority and therefore the ability to withhold hearings, it would appear there is broad national support for Judge Gorsuch.



Once again, when political parties are controlled for, a majority of each political affiliation either agrees or strongly agrees with the notion that hearings should be held for Judge Gorsuch. While support for hearings is an imperfect proxy for support for a successful nomination, the mere fact that similar percentages of Democrats and Republicans are supporting hearings is illuminating, especially in this highly partisan and polarizing political environment. Moreover it shows consistency; regardless of ideology we see strong support for both nominees. This lends further support to hypothesis B, as there is very little difference between individuals who identified as Republicans, Democrats, and Independents, and furthermore, the support for hearings of an opposing parties nominee demonstrates that there is a legitimate difference between elected officials, who use the court to pursue policy change, and partisans in the greater population who are less diametrically opposed to nominees with

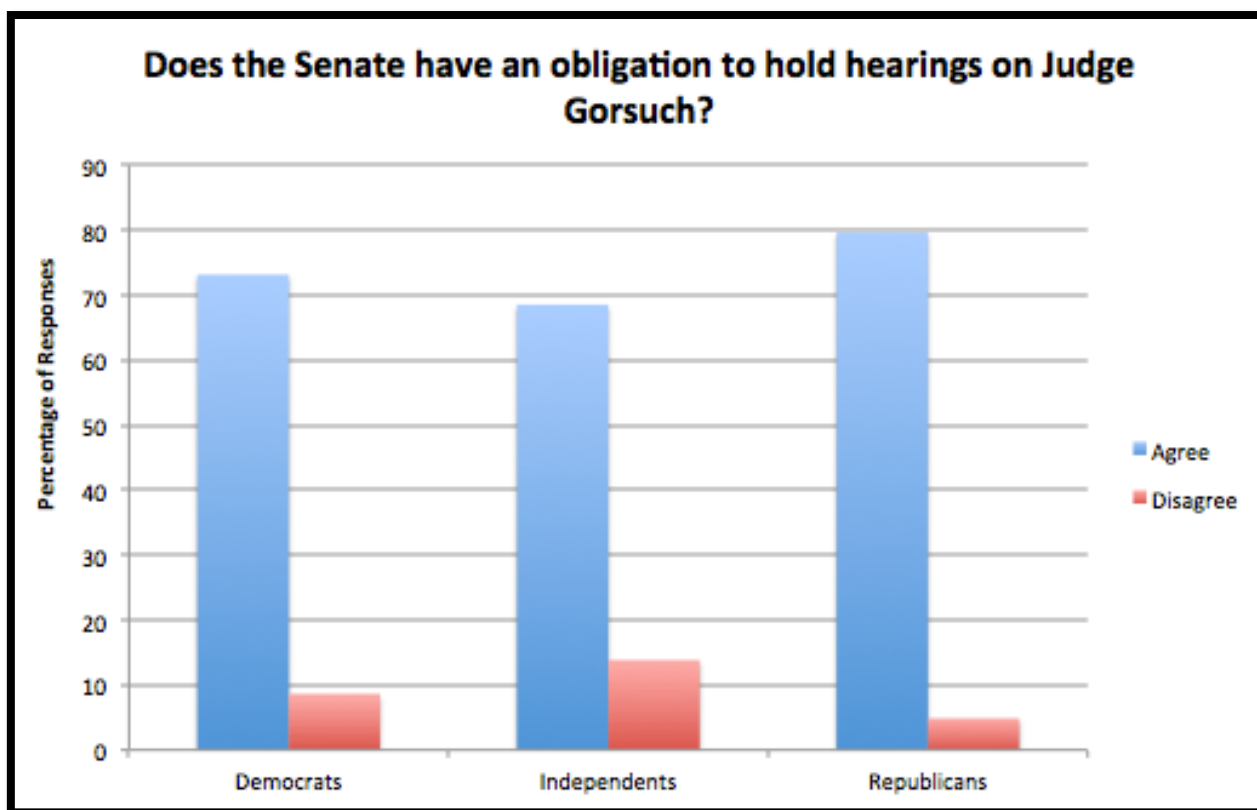
different ideologies.



When these were compressed into a simple agree/disagree dichotomy, the results are again statistically significant. The difference between the percentage of each political group that agreed with the statement far exceed the percentage that disagreed, with the P value exceeding the .01 cutoff in the positive direction. This proves the result are depicting an actual difference that exists within each group, proving that a demonstrable majority of Democrats, Republicans, and Independents supports hearings for judge Neil Gorsuch.

Additionally, if you run a difference of proportions test on the percentage of Democrats who agreed and the number of Republicans who agreed, the generated p value equals .1805, far above the 95% confidence cut off of .05, showing that there was not a statistically significant

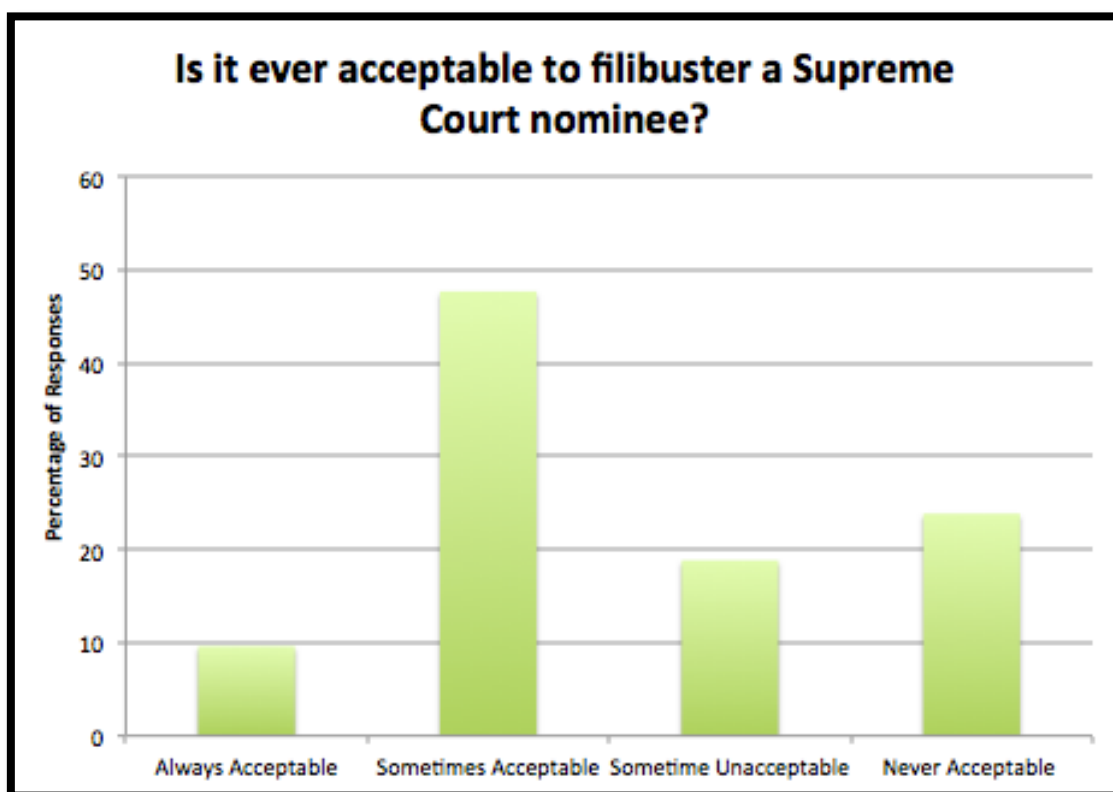
difference in the way Democrats and Republicans answered this particular question, again reaffirming the existence of a bipartisan consensus on the issue of Supreme Court nominations in the public at large.



The next several questions however, do not provide evidence that supports the hypotheses laid out in this paper. The next two questions focus on the use of ideological litmus test when considering a nomination, and the possibility of utilizing a filibuster to temporarily (or permanently) block a nominee from reaching the federal bench. These two actions are frequently used (or threatened in the case of the filibuster) in nomination politics, so per the hypotheses, the expectation would be that the American public would disagree with the usage of such extreme or overtly partisan measures, as perhaps they erode the nonpartisan nature of what the nomination process is supposed to look like. Normatively, one would expect these

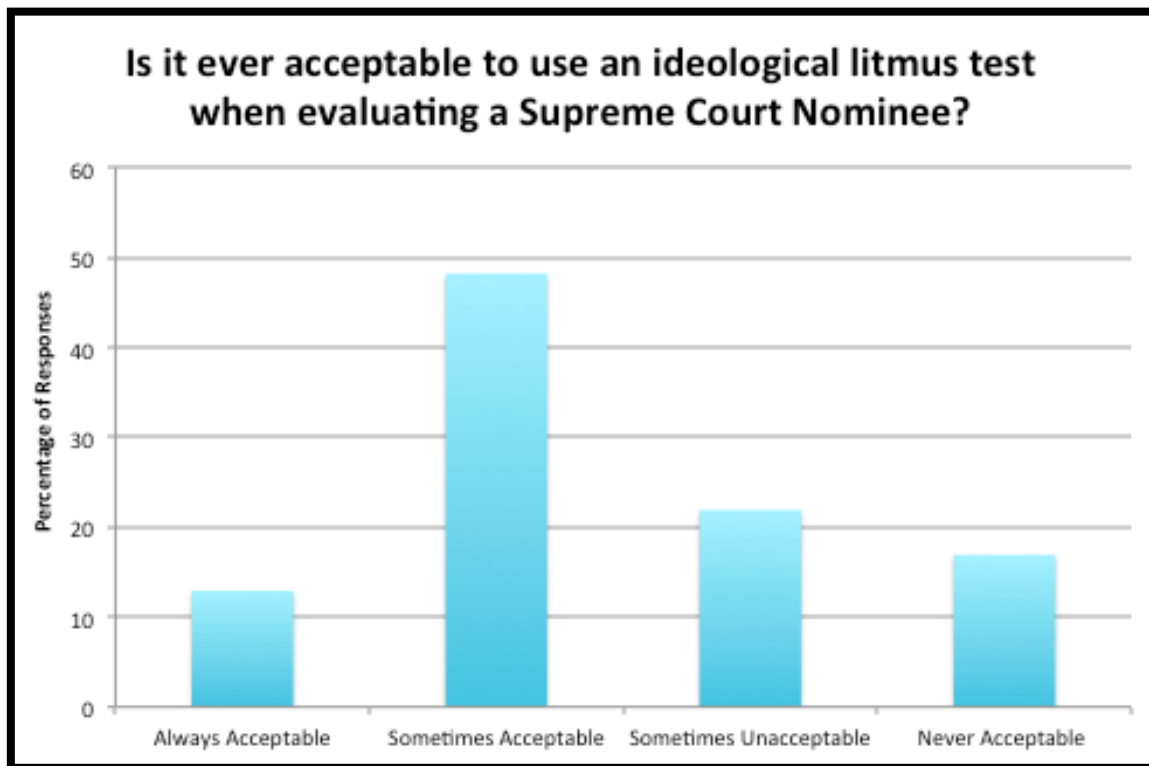
tactics to be anathema to the American public if they truly regarded the courts ability to function as a apolitical body higher than any personal biases about which individuals they would prefer see reach the Supreme Court. In this instance though, this is not the case.

In both examples, there is a fairly large percentage of the sample that said they found the use of litmus tests or a potential filibuster “sometimes acceptable,” or “always acceptable,” roughly fifteen percent more than those who indicated it was not acceptable in the case of the filibuster, whereas there is roughly a twenty-three percent difference in the case of litmus tests.



Given the earlier findings, this result is surprising as it contradicts previous trends and shows there are indeed similarities to the ways the political elite and the mass public view the usage of litmus tests or the filibuster. It is perhaps possible, however, that the large number of respondents who indicated that it would be sometimes acceptable to filibuster or use a litmus

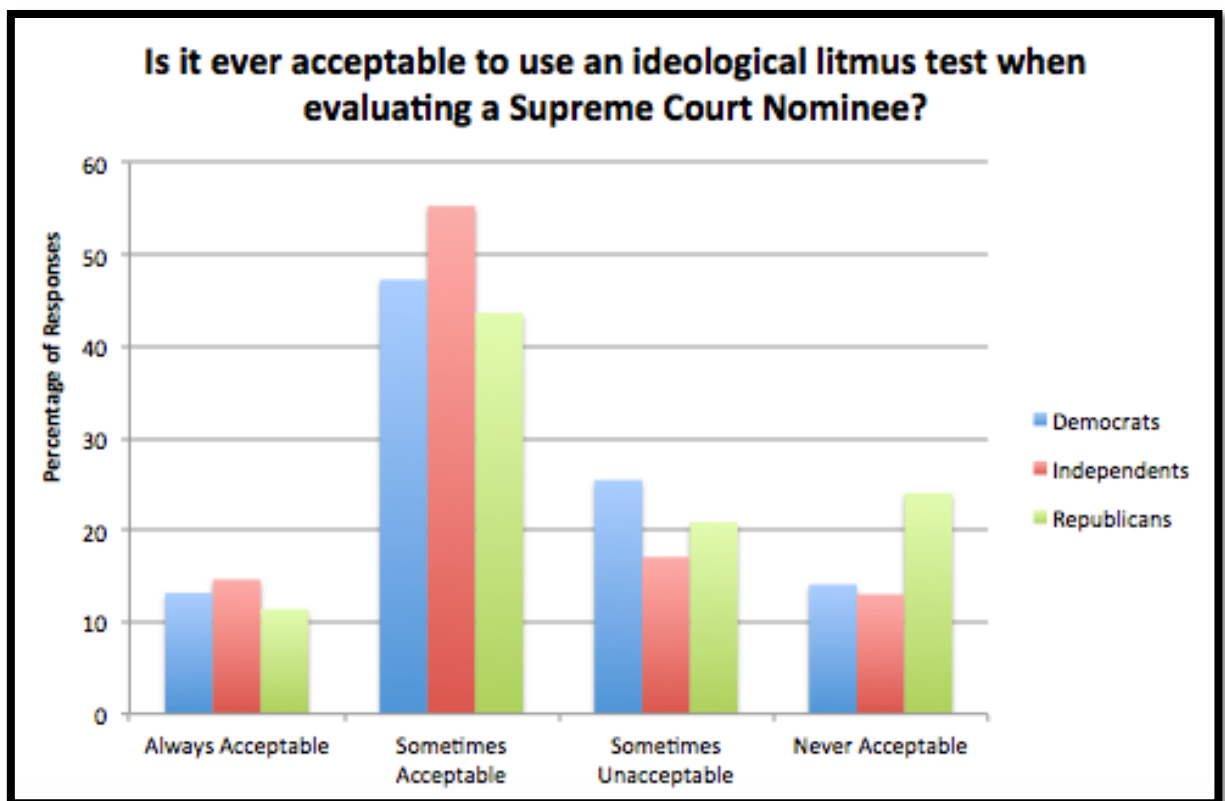
test on a nominee intended their response to mean only in certain extreme circumstances. In this way, the question structure may have forced a response that did not adequately capture the specific opinion of the individual answering the question, though ultimately this is purely conjecture.

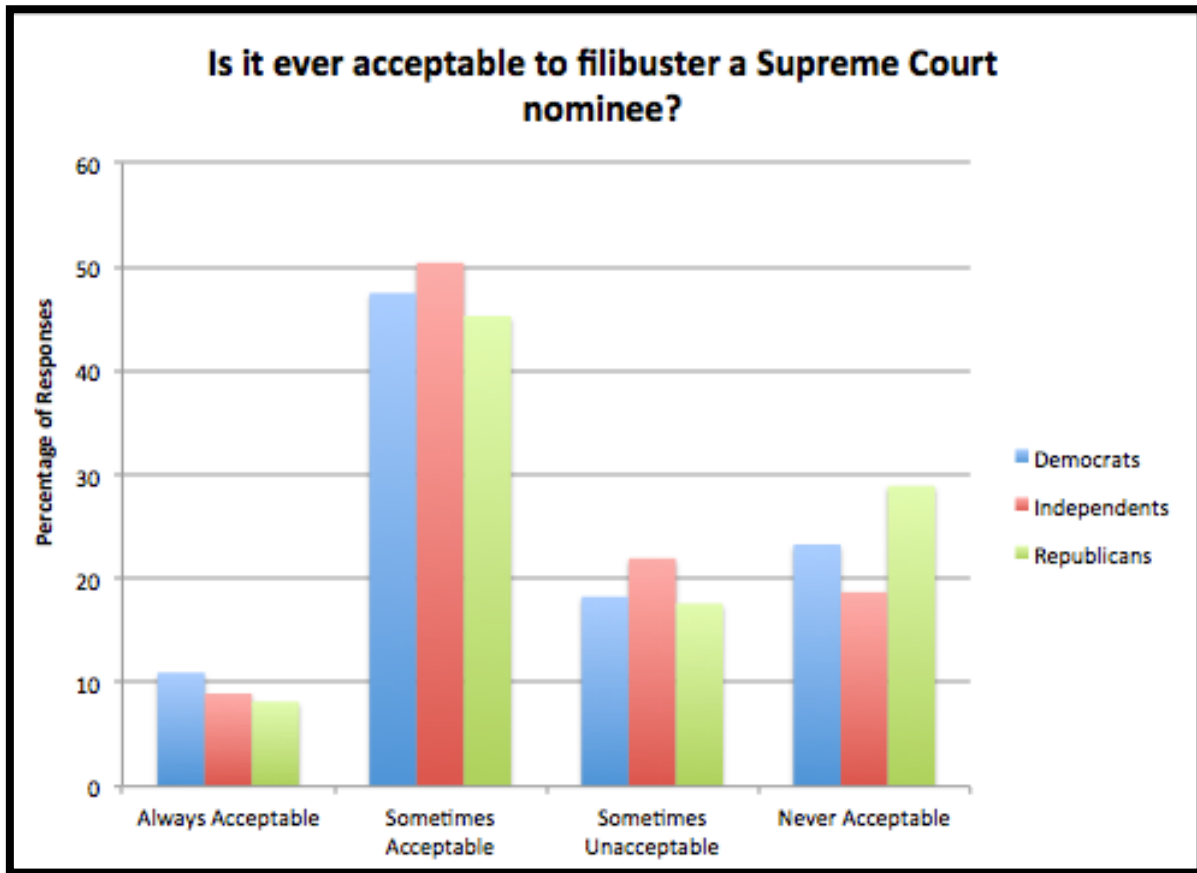


This pattern seemingly holds when political affiliation is accounted for, as the majority of the responses tend to accumulate in the middle of the graph, with “sometimes acceptable” and “sometimes unacceptable” consistently garnering the most support, though at the same time, the answers in the affirmative consistently account for larger proportions of the total population than the answers in the negative.

Again, the wording in these questions could potentially contribute to biases in the responses, as it is not incredibly clear what the difference between sometimes acceptable

and sometimes unacceptable is in practice. This ambiguity could have led to individuals mistakenly choosing one over the other, though ultimately I do not believe this completely biases the results as one would have expected the “Never Acceptable” answer to be far more popular than it was. That particular answer received anywhere between thirteen and twenty four percent of the choices cast, therefore proving that a large portion of the population believes the usage of these partisan tactics is at some time or another acceptable, which goes against the hypotheses earlier presented.

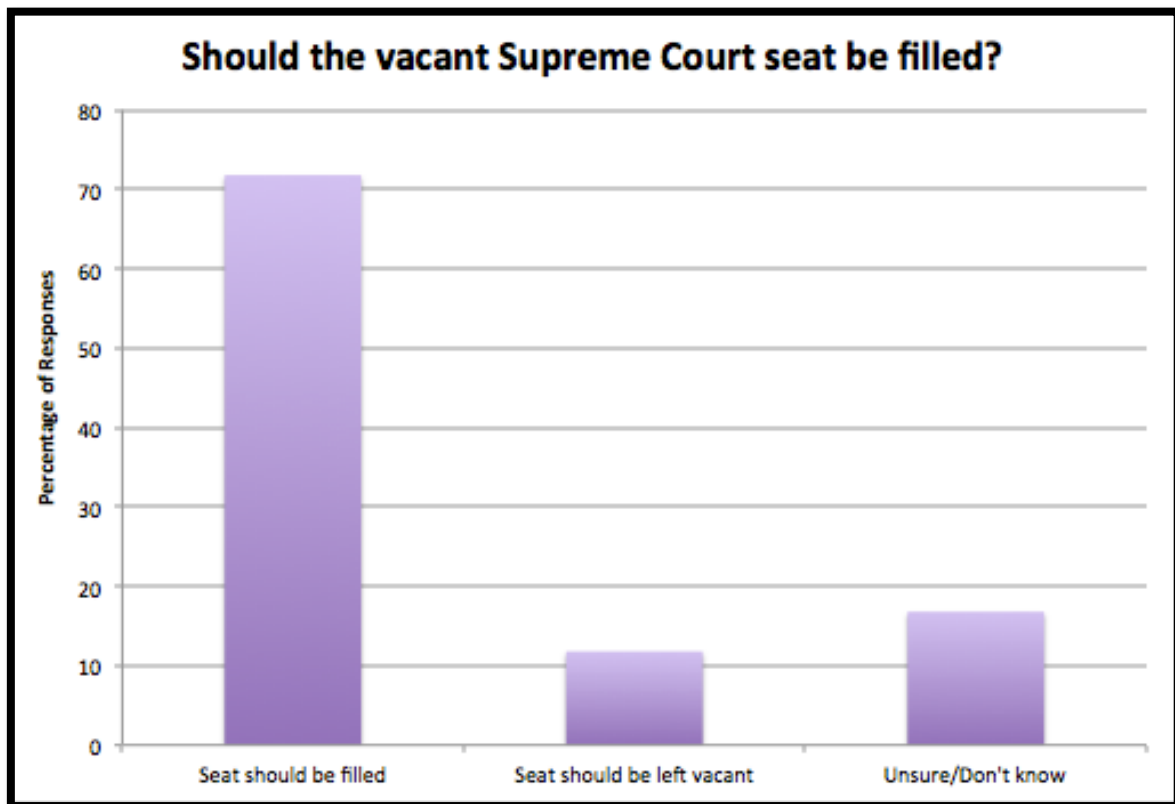




When these are compressed into a simple two category evaluation, the difference in proportions of individuals who believed the filibuster and litmus test were acceptable were shown to be statistically significant for Independents and Democrats, but interestingly, not for Republicans (all data available in Appendix B). The reason for this is unclear, although it could be a reaction to attempts to use litmus tests or a filibuster against Judge Gorsuch to stymie his efforts of joining the Supreme Court, and in this way could be a partisan reaction. For independents and Democrats however, the data is clear, the difference between the percentage of both groups who believe it is acceptable/unacceptable is both sizable and significant (P value far less than .01).

The next question focused specifically on whether the vacant seat on the Supreme Court

should be filled – a straightforward question that should have been met with very little confusion. The results were very clear, with overwhelming numbers of individuals believing the seat should be filled, though taken broadly this is not a surprising result given the liberal slant of the sample.

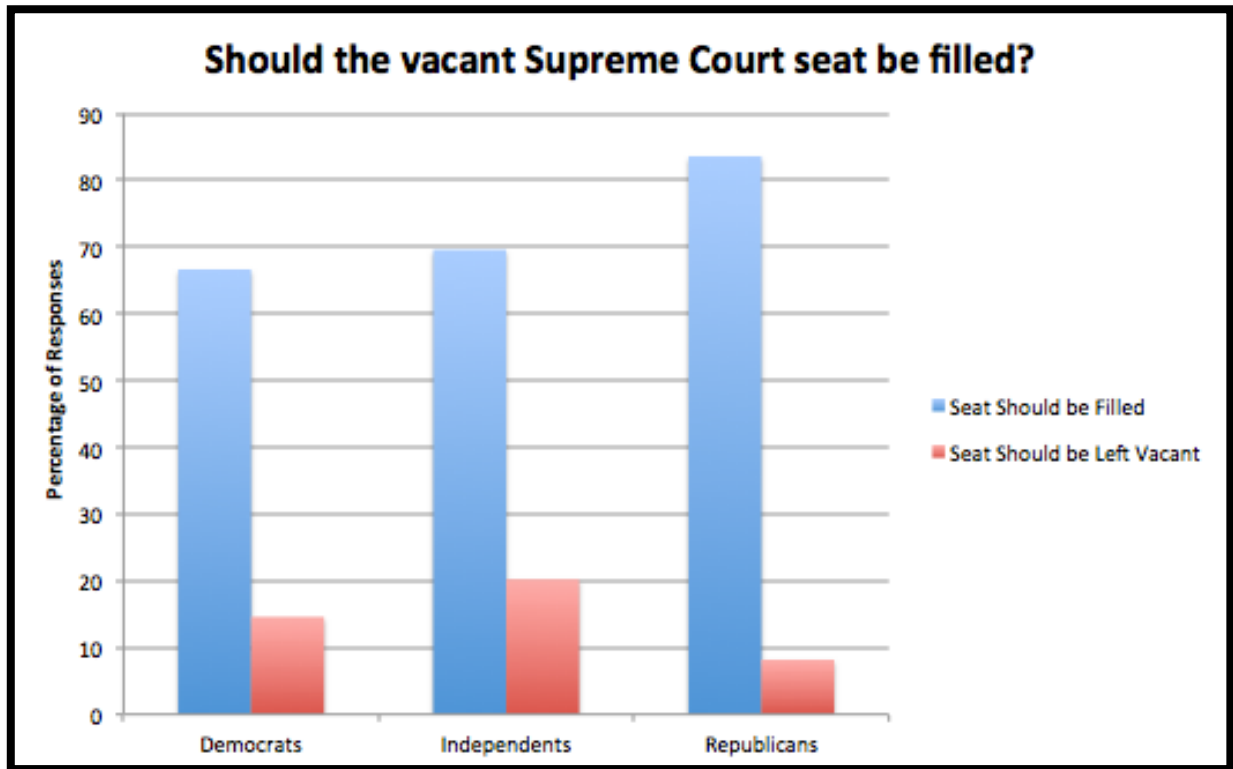


As you can see from the data presented above, just over seventy percent of the sample wants the seat to be filled, and while this does not mean the answer would have been exactly the same one year ago, what it does show is that the majority of the American public does not believe Senate Democrats should indefinitely block Judge Gorsuch.

The data breakdown is almost exactly the same when it is split between parties, with even an overwhelming amount of Democrats supporting the filling of the vacant seat, again

showing that the American public holds significantly different views from the political elite who use the Supreme Court nomination process as an ideological tool to further a partisan agenda. These data support hypothesis A, as the American public seems to support a court that has all nine members, therefore giving it the ability to actually decide cases and avoid the four to four gridlock that has characterized decisions since Scalia's death that lead to differences in court precedent across the country. This emphasis of functionality over ideology exactly validates the first hypothesis of this paper.

Secondly, these data also give support to hypothesis B, as there appears to be a disconnect between many of the party elites in the Senate who prefer brinksmanship and obstructionism when it comes to the President's nominee. Moreover, this divide exists throughout the population regardless of the political affiliation of the individual, as large numbers of Democrats, Republicans, and Independents want the seat to be filled. Again, this seriously bolsters the claims made in hypothesis B, giving further support to this paper's arguments.

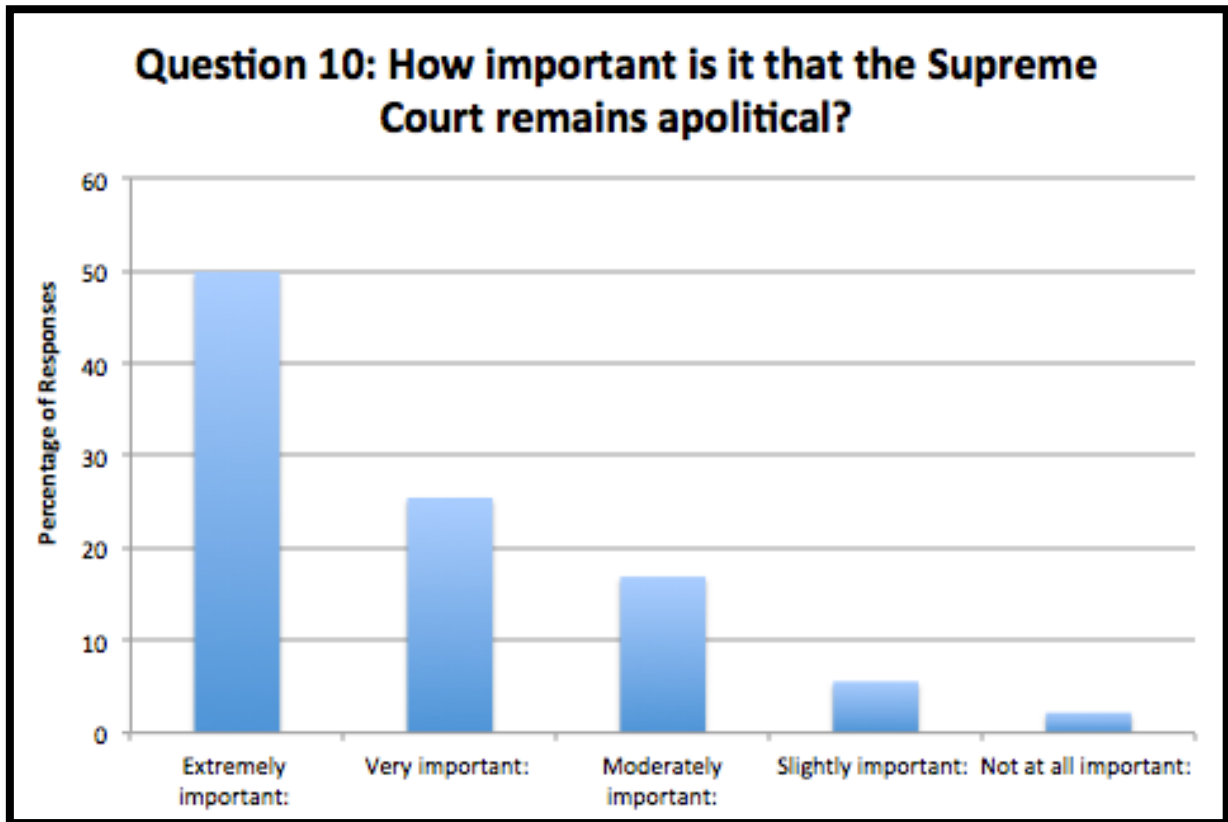


Once more, these differences are statistically significant, proving that it is in fact true that large majorities of Democrats, Republicans, and Independents want to see the seat filled. Unlike the last two questions, this particular question returns to the common theme of consensus amongst the American people, while there is a shockingly low amount of consensus amongst members of the United States Senate who differ ideologically. These results, taken in accordance with the bipartisan support for holding hearings on Judge Gorsuch seem to suggest more than moderate support for President Trump’s nominee in the population at large – arguably more than the sixty percent of the Senate that is needed to end a filibuster with a cloture motion.

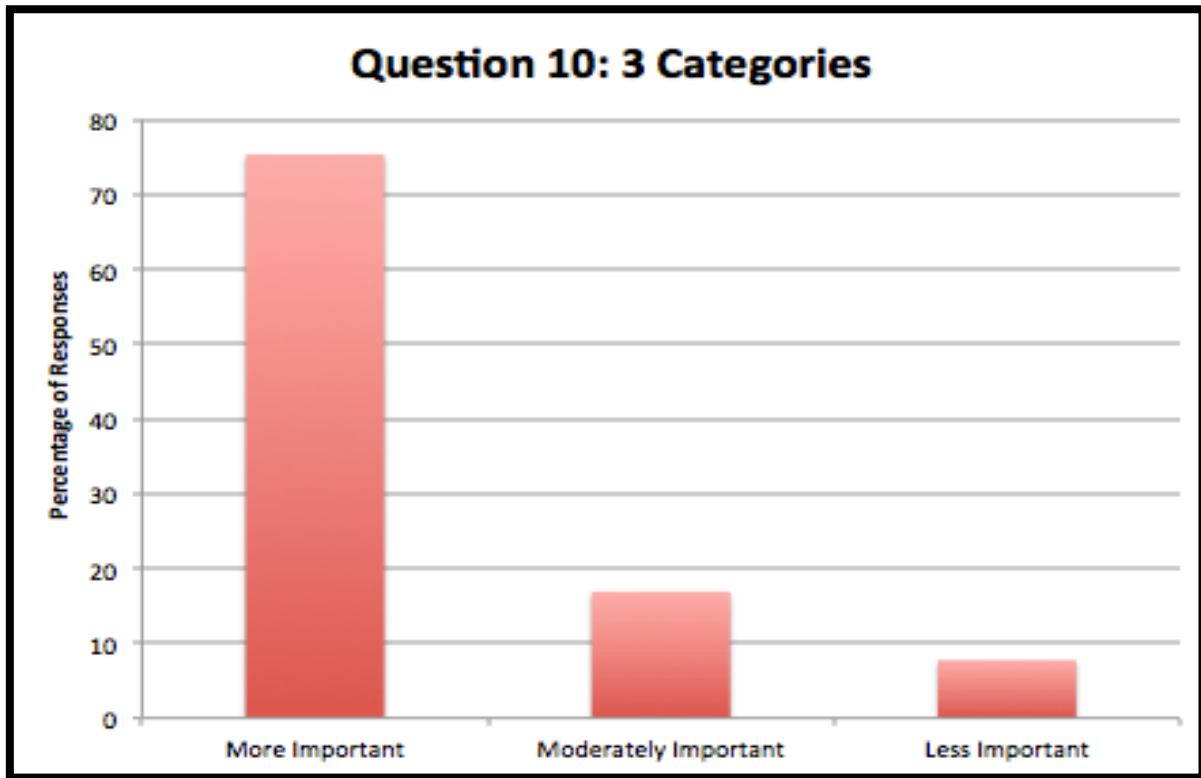
Questions 10-14

Question nine focused on the role of the Supreme Court in government, and specifically on whether the court should remain apolitical unlike the other two branches of government. Given the hypotheses, the expected results would be that the majority of responses would say that it was extremely important or very important, as this was the intent of the designers of the American system of checks and balances. Ultimately, this was the result, as most of the responses indicated they believed it was increasingly important that the highest court in the nation remains outside of the political fray.

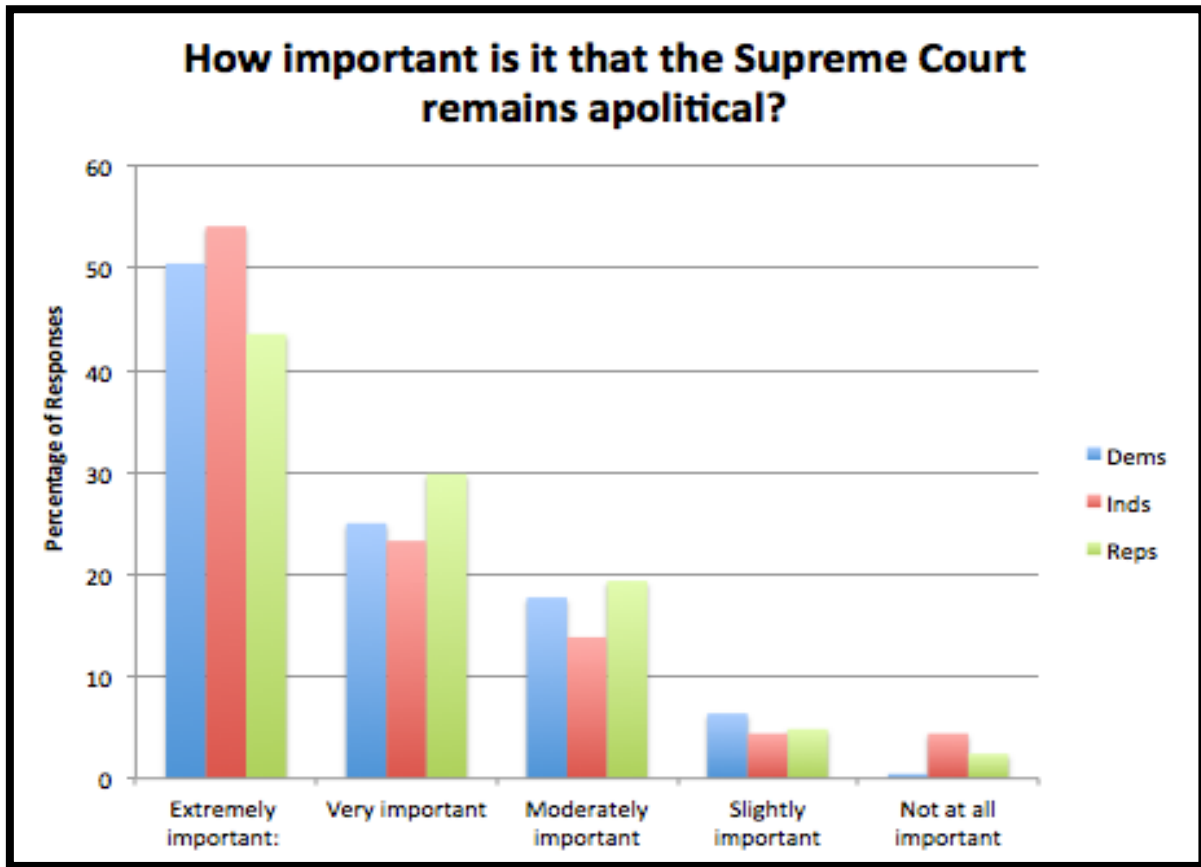
The “Extremely Important” category received forty-nine percent of responses, while the next most important category, “Very Important” received twenty-five percent of total responses. This result demonstrates yet another difference between the politicians and activists who place far more seriousness on selecting judges who will decide cases in a way that is consistent with their ideology. Additionally, by making ideology and partisanship a key part of the nomination process, the apolitical veil is destroyed, revealing an overtly political process.



When these results are combined into three categories to present a more developed representation of what these results show, it becomes evident that there is a statistically significant difference between the percentages of individuals who stated the courts apolitical impartiality. Fully seventy-five percent of the sample indicated it was more important, while only seven percent stated they did not find it that important that the court remain separate from the every day politics that engulf the other two branches. While this doesn't prove that the American public prefers a working Supreme Court, what it does show is that, based on the evidence presented here, the majority of American's dislike the repeated politicization of the Supreme Court by the political elite.

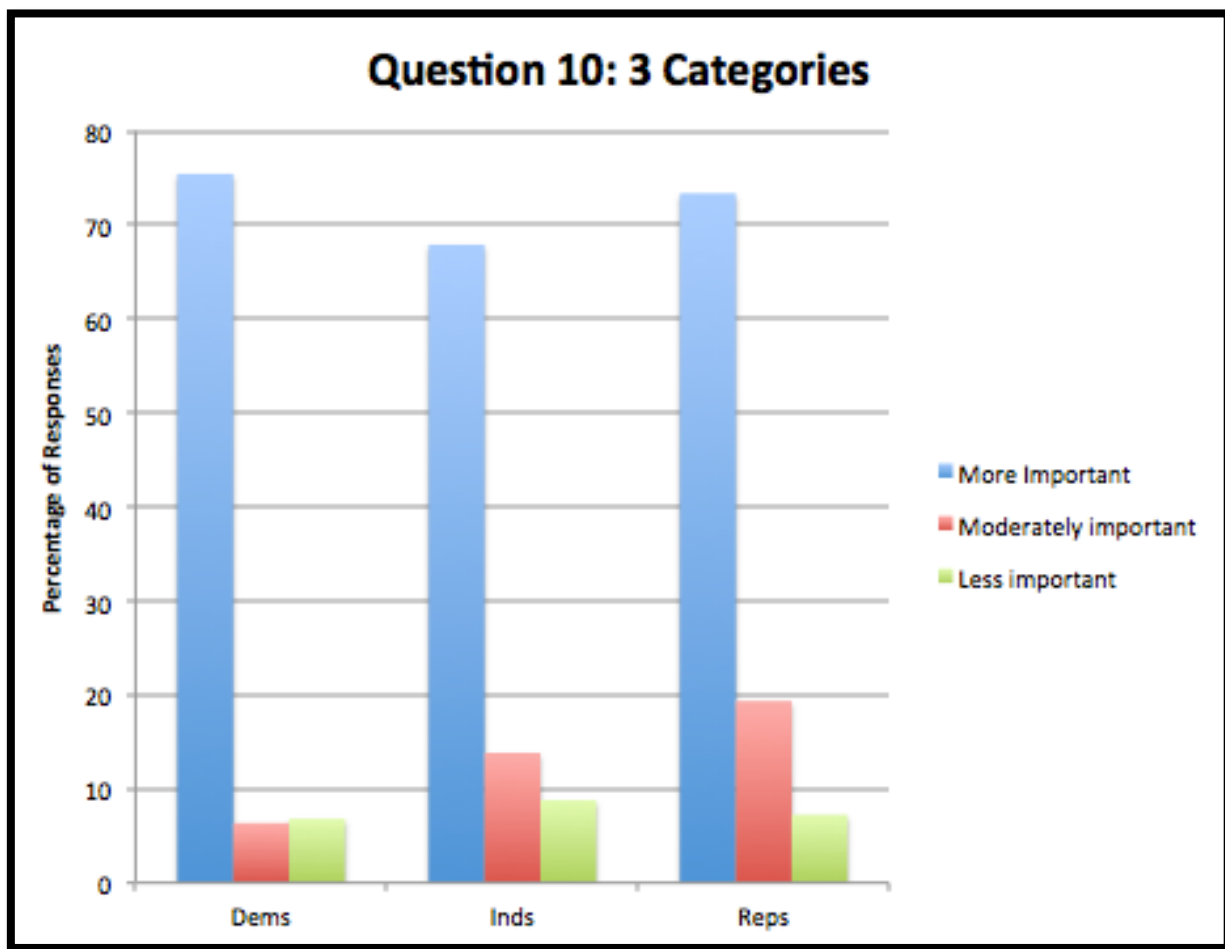


Again, these results hold when they are examined through the lens of individual partisanship, as these results hold for all groups surveyed. Over forty percent of Democrats, Republicans, and Independents stated that they believed it was extremely important the Supreme Court remained apolitical in modern times, while an additional twenty-two to thirty percent indicated they believed it was very important. On the contrary, five percent or less of each sample claimed that the courts apolitical impartiality was not at all important, with an additional five to seven percent saying that this was only slightly important. Lastly, fifteen to twenty percent indicated it was moderately important, though all of these data show that the court remaining apolitical is generally seen as more important than less important. To affirm the validity of this result, this graph was split into 3 categories – more important, moderately important, and less important.



When these results are grouped into three smaller categories, the results could not be more clear. Sixty-five percent or more said that the court remaining a political was on the more important side while less than ten percent stated it was less important – an average difference of around fifty to sixty percent. Unsurprisingly, these results are highly significant, as confirmed by a difference of proportions test, which found that each difference cleared both the 0.05 and 0.01 levels of significance. Therefore, as previously stated, it is a certainty that large percentages of Democrats, Republicans, and Independents favor an apolitical court – a departure from politicians and activists who are constantly trying to add partisan labels to nominees and further politicize the court to either further their own agenda or stymie their political opponents. Once more, this question provides evidence of a bipartisan consensus and

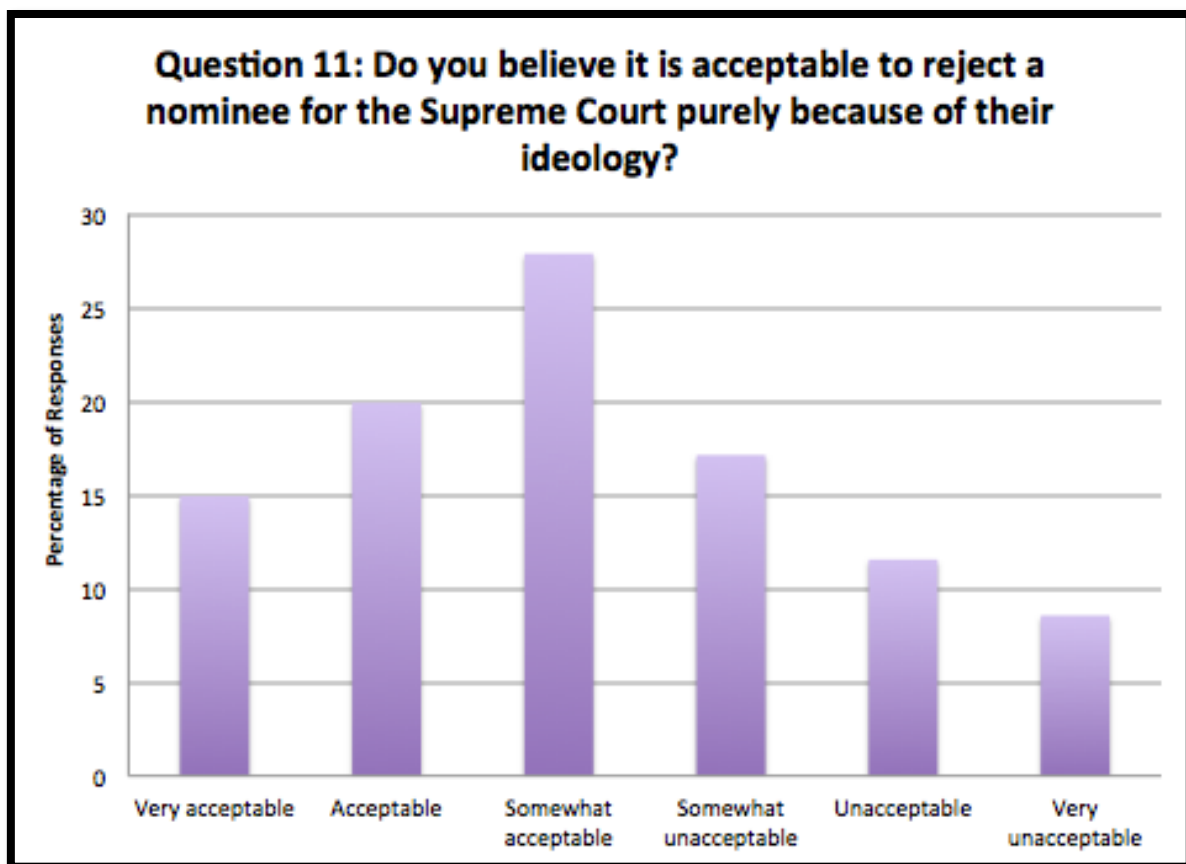
proves that there is a gulf of opinion that exists between average Americans and members of the political elite when it comes to questions centering on the court’s functionality and purpose.



Next, question eleven was intended to examine whether Americans believed it was acceptable to reject a nominee to the Supreme Court just because of his or her ideology alone. This would mean all other characteristics such as qualifications, personal history, and prior work history could potentially be ignored if the nominee’s opinions were perhaps too controversial. The motivation behind this question was the fairly famous case of Judge Bork, who was earlier discussed, a nominee who’s appointment failed largely because of his judicial philosophy and prior writings on certain key rights issues. During the Bork case, there was

significant mobilization of the American public, both for and against Judge Bork, though most of the lobbying was against his appointment to the Supreme Court.

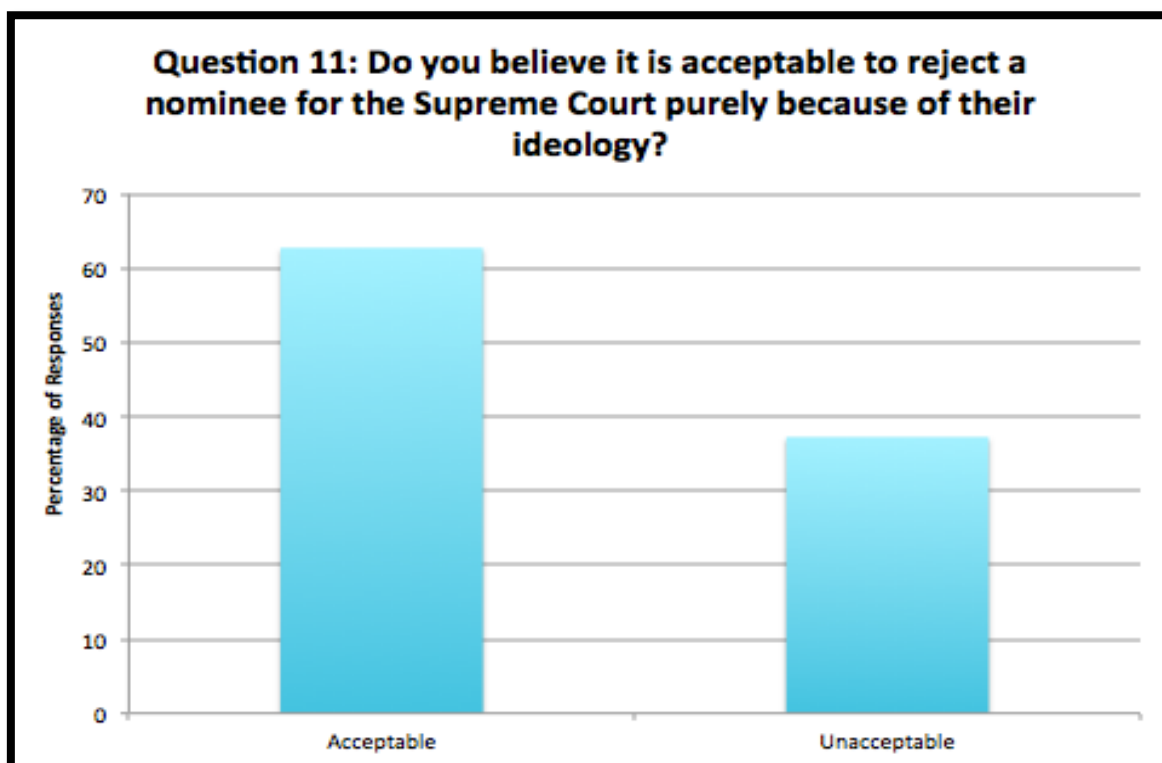
Given the previous findings of this paper, one would expect the results of this question to be similar to that of the others, with most American's finding the rejection of a nominee solely because of their ideology inappropriate or normatively wrong. However, given the recent trend of using a nominees ideology as grounds for rejection or significant opposition, it is possible that this behavior may have become normalized, which may be reflected in the data generated from question eleven.



Ultimately, in this example the latter was the case. According to these data we see “somewhat acceptable” receiving the most support, followed by “acceptable.” However, this

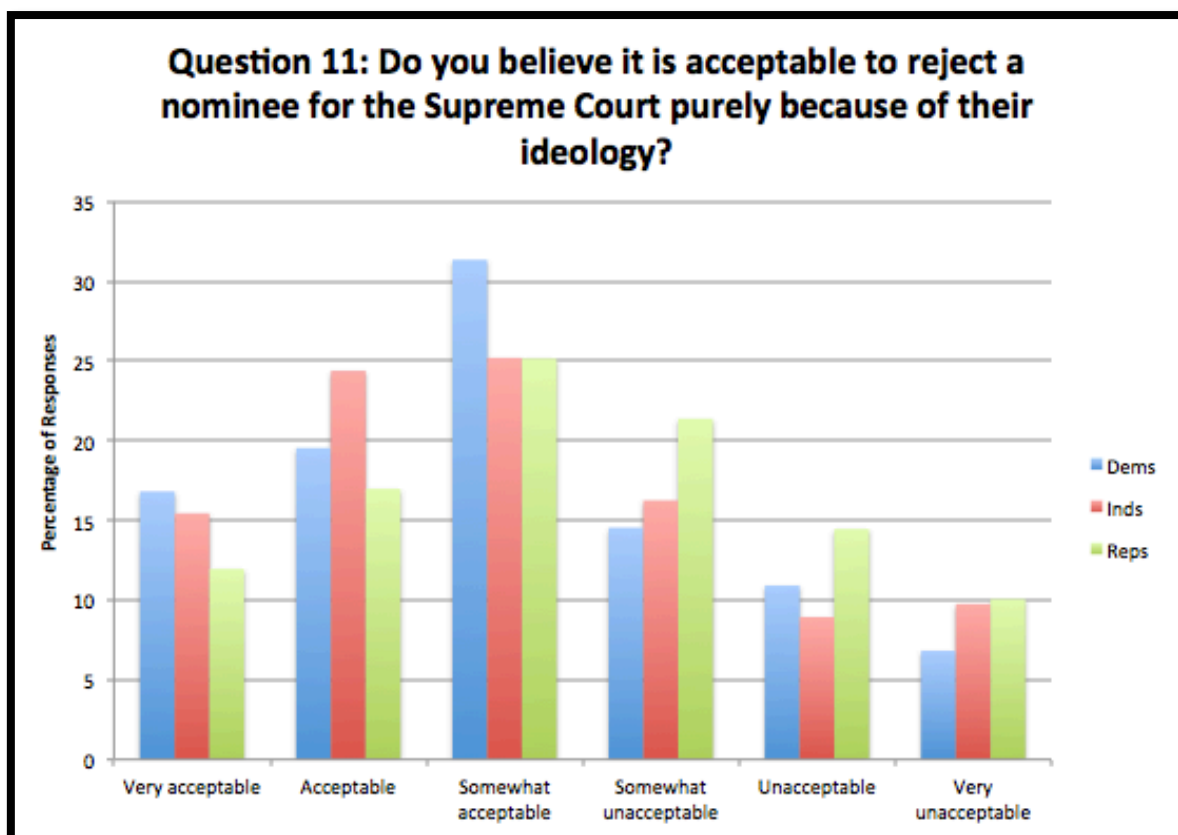
graph is far more normally distributed than any of those that have been previously presented, though it skews to the more acceptable side of the figure. This is an unanticipated result, given what has previously been found in this paper, as these results suggest somewhat broad support for rejecting a nominee based on ideology alone. Perhaps that the notion that judges with extreme ideologies being unfit to sit on the Supreme Court is not just partisan rhetoric designed to stall or prevent shift in power on the nine member body, but rather an accepted belief buttressed by a commonly held belief that exists in the American populace.

The picture becomes clearer when the answers are combined to form two categories, one each for acceptable and unacceptable. While the difference is far less pronounced than in previous questions, twenty-two percent more of the sample indicated that opposing a nominee based on their ideology alone was acceptable – no small margin. Indeed, this difference turns out to be statistically significant, directly calling into question some of the earlier results. The difference of proportions test yields a significance level of below 0.01, proving that this difference is statistically significant. However, given the biases in the data – specifically the



amount of Democrats – the potential remains that a certain demographics’ scores might be driving the overall trend. Given the current, pending nomination of Judge Gorsuch, it is possible that Democrats are stating it is more acceptable due to a partisan preconception of the judge.

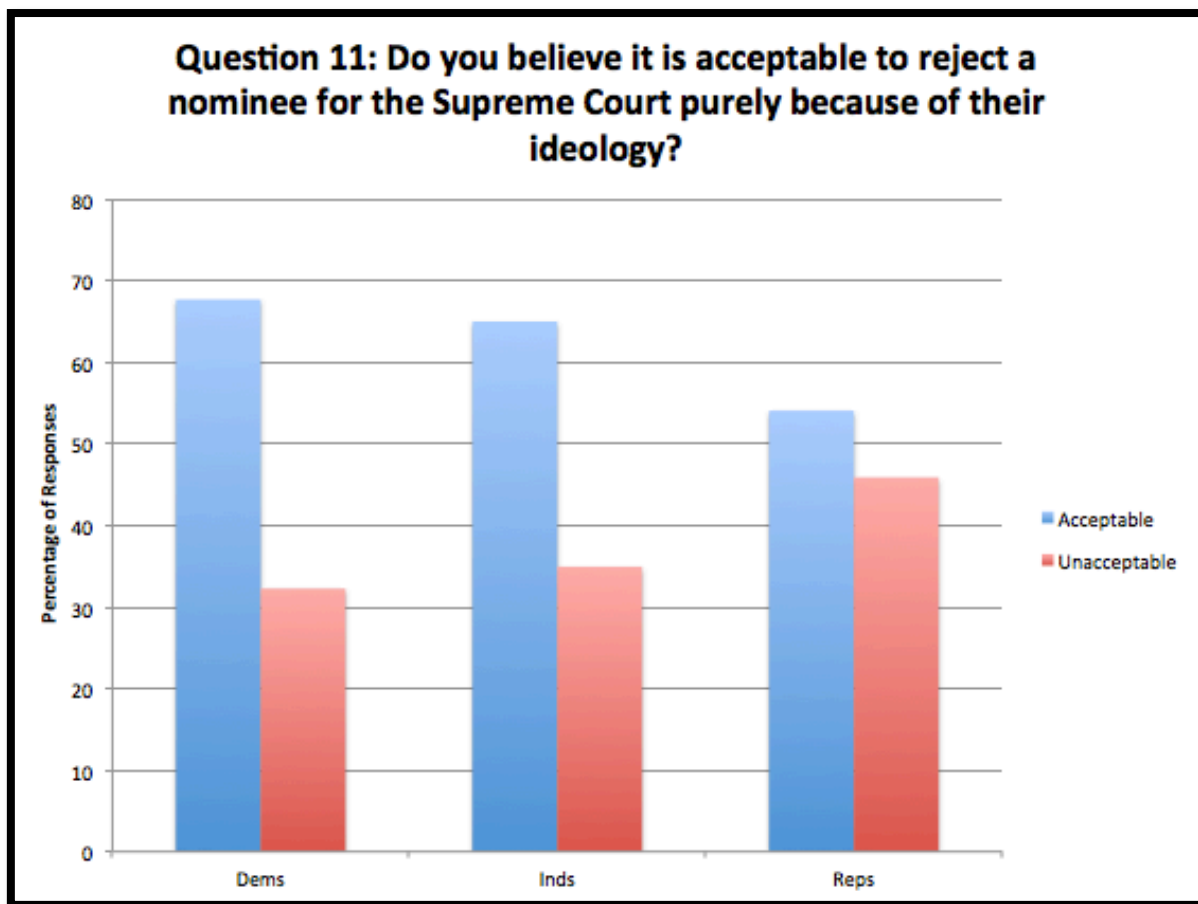
When the results are broken down by party, it is difficult to discern any observable pattern amongst the data. Approximately a third of Democrats believe the rejection of a nominee to the Supreme Court because of ideology alone is “somewhat acceptable,” while nearly twenty-five percent of Independents believe the same type of behavior is “somewhat acceptable” or “acceptable.” On the other hand, twenty-five percent of Republicans believe the use of ideology as grounds for rejection of a nominee as “somewhat acceptable,” though twenty-two percent Republicans believe it is, on the contrary, “somewhat acceptable.” Overall, there is a large amount of variation within the sample, departing from previous trends of consensus and instead portraying a far more fractured, disharmonious American public.



Further condensing the data into the same acceptable/unacceptable dichotomy as earlier, the data trends become much clearer. Out of all the groups, Democrats had the largest difference in support of use ideology alone as grounds for rejection, receiving thirty-five percent more responses indicating that it was acceptable. Additionally, sixty-five percent of independents said this was acceptable, compared to only thirty-five percent who disagreed – a similarly large margin of thirty percent. The Republican margin, however, was much smaller, with fifty-four percent stating it was acceptable, compared to forty-six percent saying it was not. This asymmetry gives credence to the idea that the number of Democrats in the sample may have artificially produced the trend in the overall population, as Democrats disproportionately favored the “acceptable” option the most. This could have perhaps biased the results to this question.

The statistics show that both the Democratic and independent differences are statistically significant, with a significance level below 0.01, solidifying the results and proving that both Democrats and Independents favor rejecting a nominee to the Supreme Court because of their ideology alone. However, the small difference that existed within the Republicans in the sample did not attain statistical significance when the percentages of “acceptable” and “unacceptable” results were examined, ultimately yielding a p value equal to 0.20. This indicates that perhaps Republicans might find it unacceptable to reject a nominee solely because of their ideology, though it is impossible to truly tell. These results seem to imply a partisan bias, as a Republican appointee is currently before the Senate, and his ideology is central to whether he is ultimately confirmed or rejected. Lamentably, this paper lacks data taken during the Obama Presidency on this issue that would help to validate this theory, as it might potentially show the opposite skew within the data.

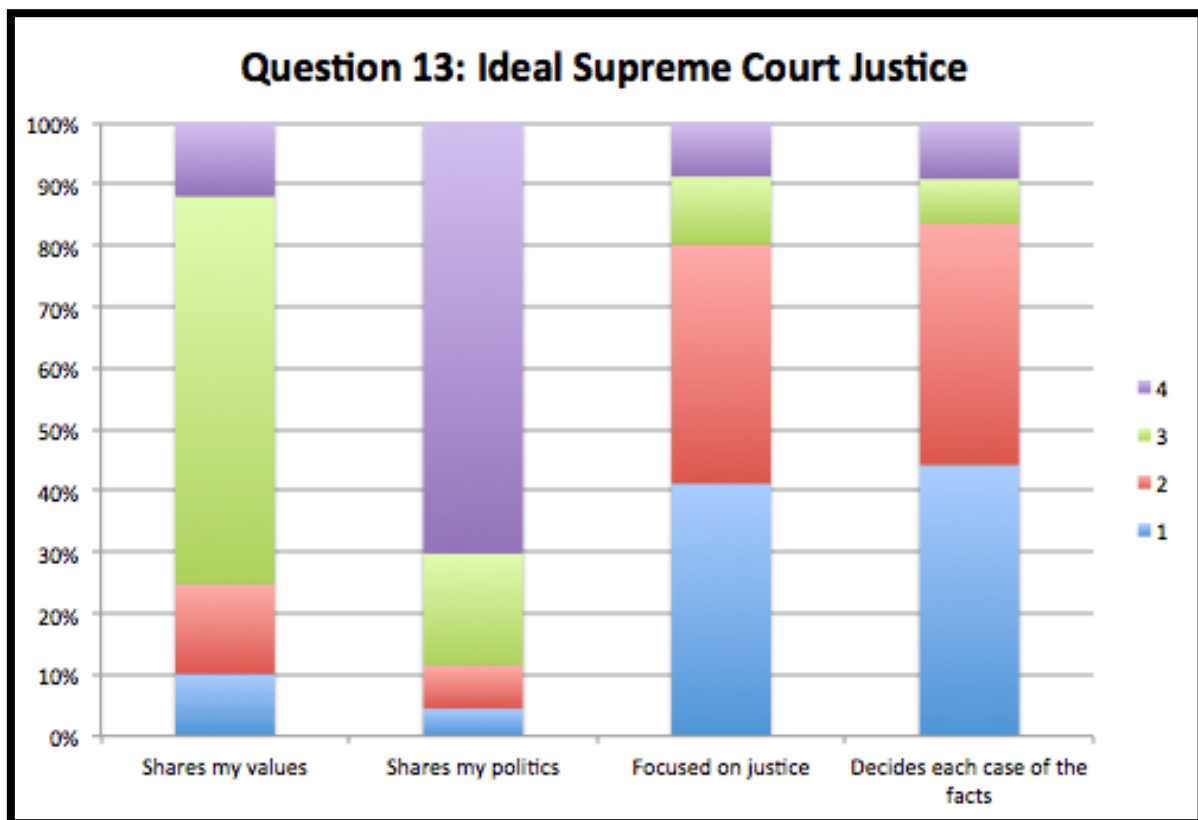
Nevertheless, these data raise questions about the validity of earlier results, as it shows that perhaps there is convergence between the mass electorate and the political elite on certain issues pertaining to the court.



Finally, the last two questions were crafted to examine individual's opinions about the type of Justice they would like to see on the Supreme Court. The first question asked respondents to state what their ideal type of Supreme Court Justice would be, which was done by creating four possible answers, and asking respondents to order these answers in terms of their personal preference (with 1 being the most ideal and 4 being the least ideal). The next question was delivered in the same format, but asked what the most important aspect or

characteristic of a Supreme Court Justice is. These two questions were intended to examine the ways in which individuals relate to the Supreme Court, and to see if they choose answers consistent with the hypotheses presented in this piece.

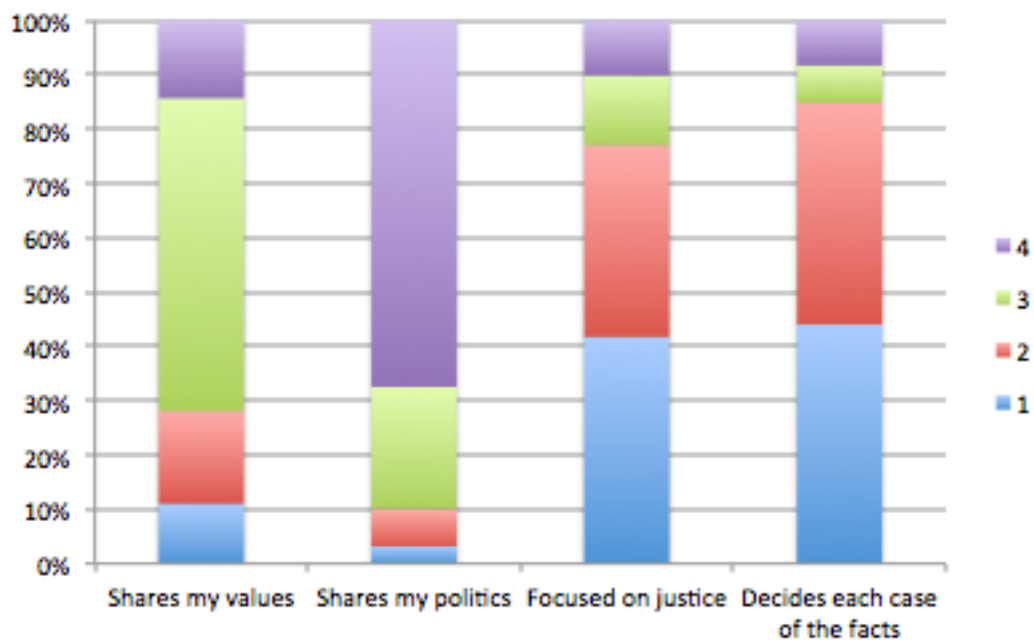
Question thirteen yielded results consistent with hypotheses B, as it showed most individuals said a Justice who is focused on justice, or a Justice who decides each case on the facts as they are presented, was their ideal type of Supreme Court Justice. Consequently, upwards of seventy percent said a Justice who agreed with their politics was the least ideal of the four choices presented. In fact, most individuals rated a justice who shares their values and a justice who shares their politics as a three or a four, indicating these responses were not nearly as important as the two more normative, non partisan answer choices.



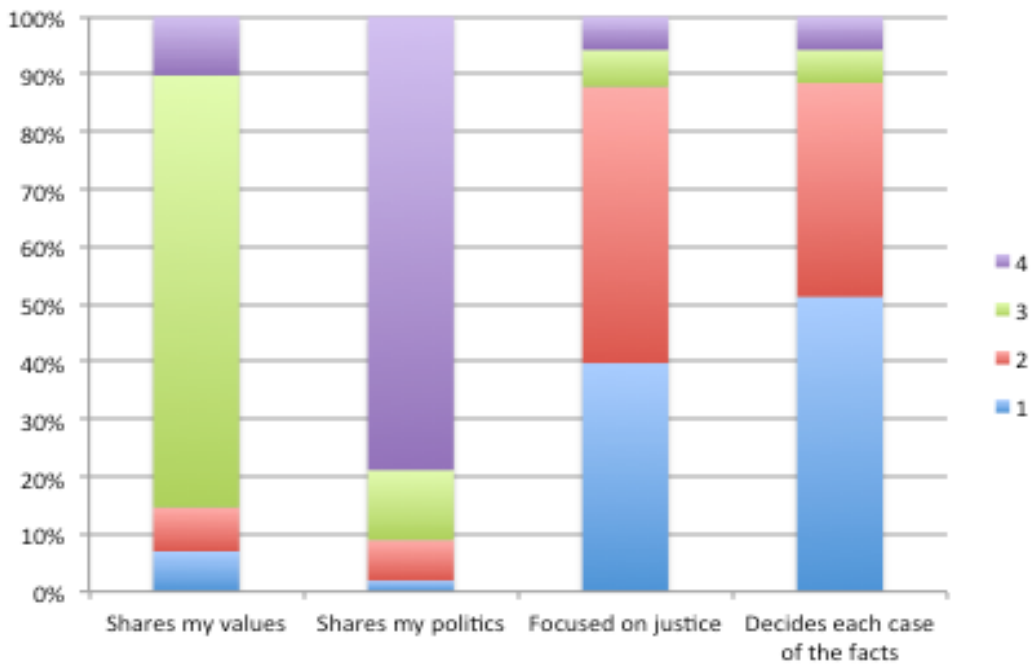
Democrats, Republicans, and Independent all expressed similar voting patterns on this question, with the majority of “1’s” and “2’s” accumulating in the columns on the right, the so called “nonideological” ideal justices, while most of the “3’s” and “4’s” tend to gravitate towards Justices who are somehow scored against a partisan or otherwise ideological measuring stick. The graphs below make it very clear that the American public would prefer a Justice who is more focused on the facts of each case, and wants to ensure justice is carried out, rather than an ideologue who conforms to party standards. Similarly, the most “4” votes without fail appeared in the column that was linked explicitly to politics, further solidifying that idea that the political beliefs of a judge hold very little bearing on the way the American public feels about that individual.

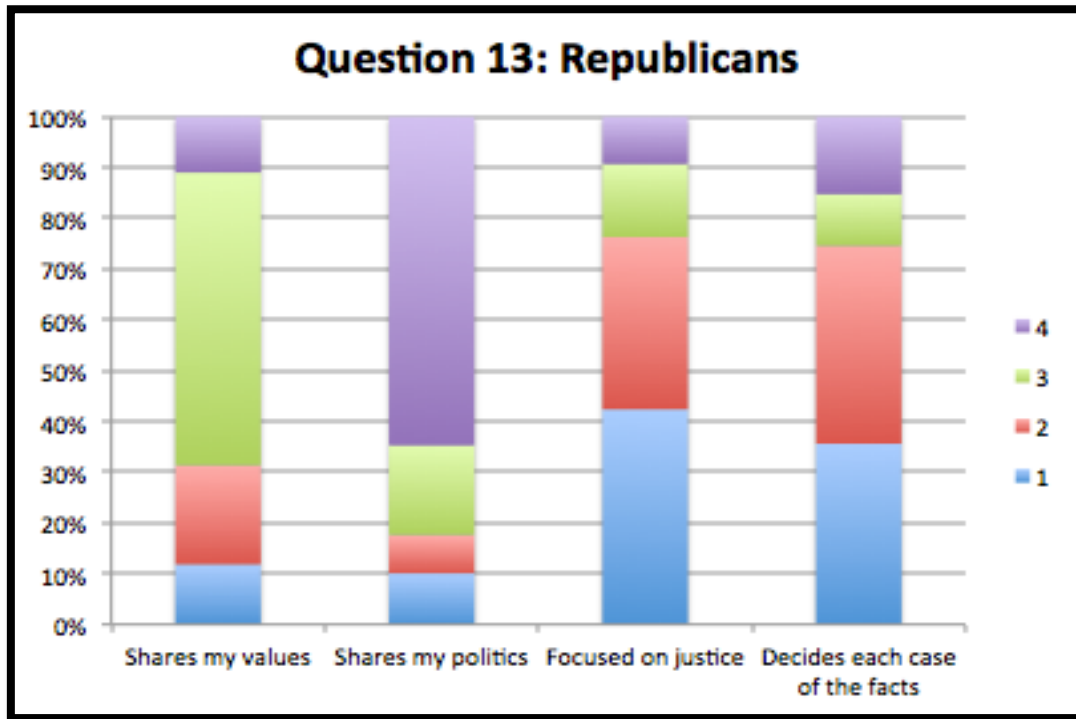
This is in contrast to politicians who use any means necessary to ascertain the judicial philosophies of potential nominees before ultimately deciding how they vote on the issues. While judges are never explicitly labeled as Democratic or Republican, much is made over their “conservative” or “liberal” ideologies, which serve as a sort of proxies for a belief set loosely aligned with either one of the political parties. Frequently, political elites take to saying that Justices must have ideologies that fall within the mainstream to be considered acceptable to sit on the Supreme Court, but in this way, these data suggest that the American mainstream is not concerned with partisanship or ideology whatsoever; rather they would prefer a Judge who approaches each case with a reverence for the due process of law and deeply examines each and every legal matter that is brought before them. In this way, we see yet another chasm that exists between political elites, and their chief constituencies, the American people.

Question 13: Democrats



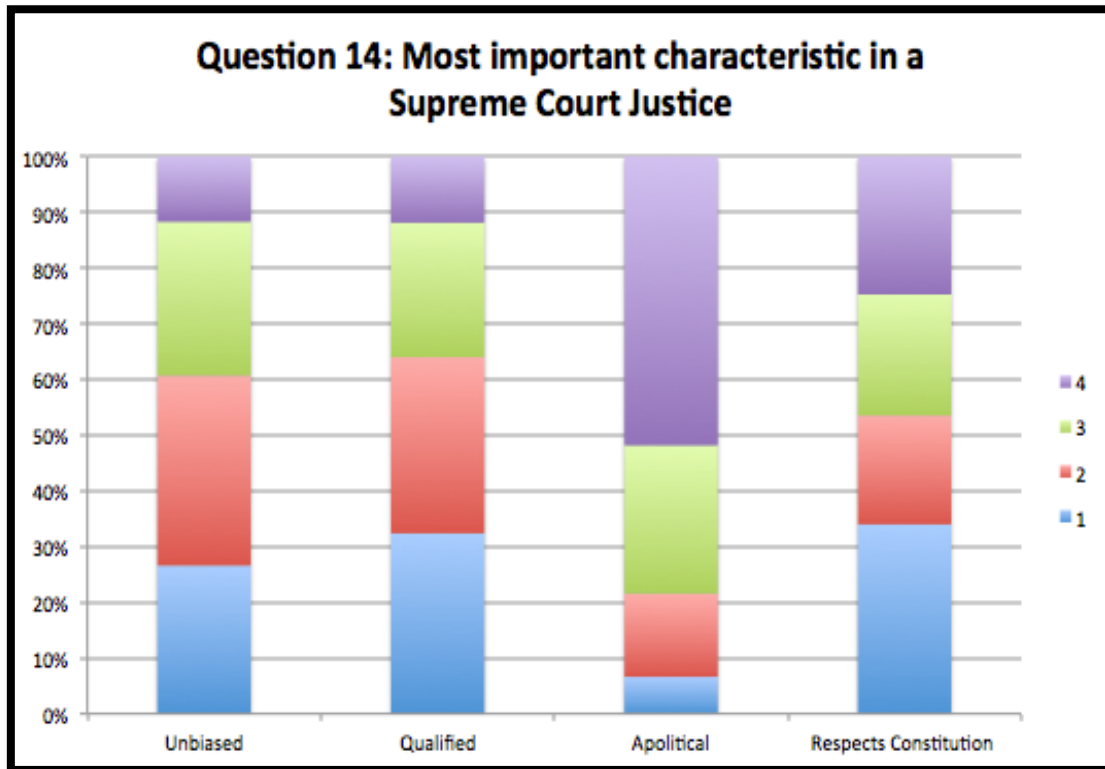
Question 13: Independents



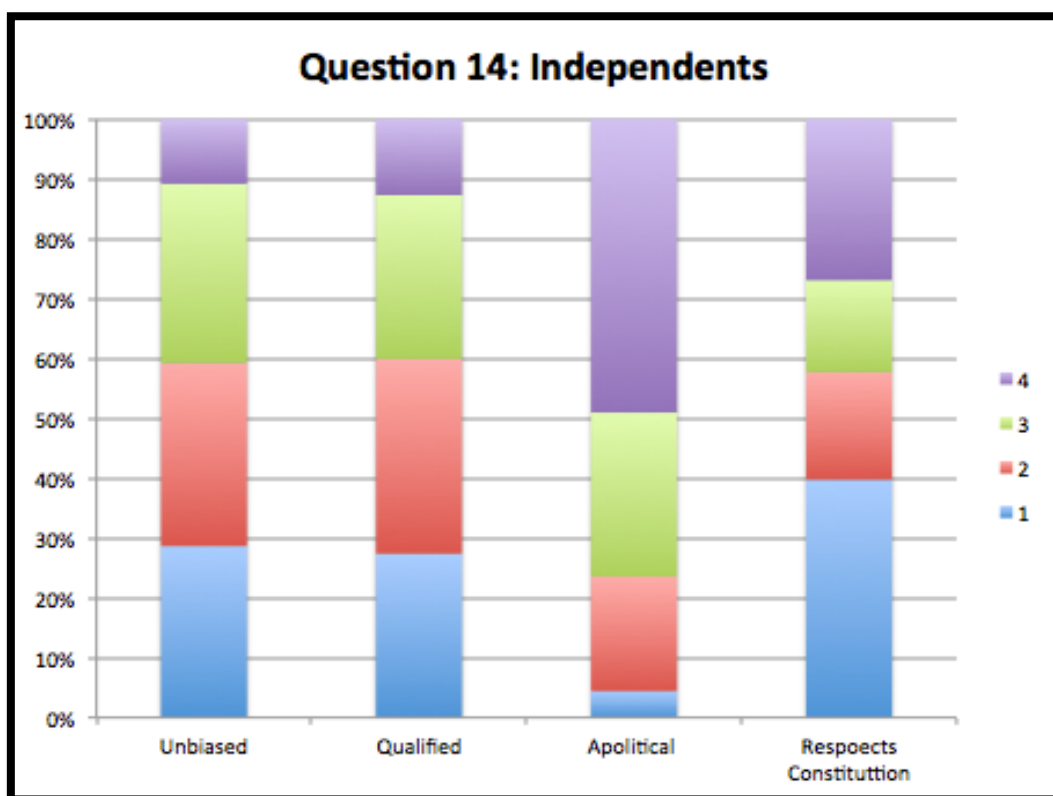
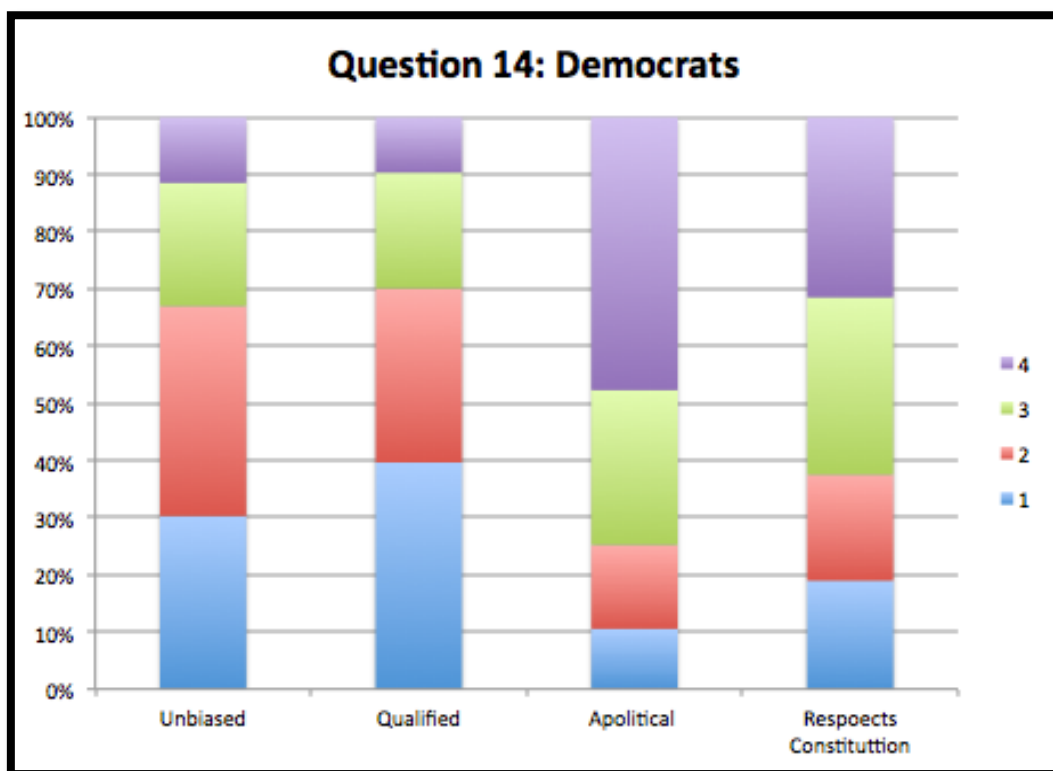


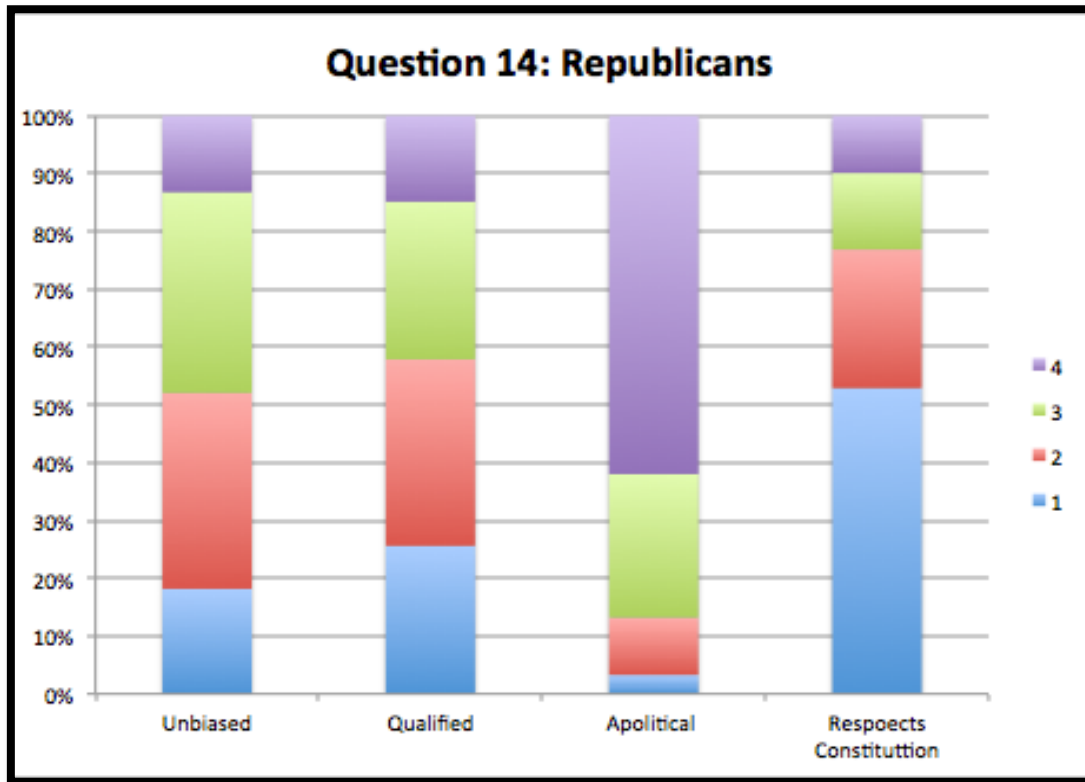
Last but not least, question fourteen honed in on specific traits and characteristics a Justice might possess in order to see which were considered the most important. As previously stated, the structure mirrored that of the question that preceded it, though the results were not what they were anticipated to be.

In the graph (below), it would seem that the first and second preference votes are far more diffuse throughout the sample, though what is clear is that the characteristic of being apolitical is not deemed as important as the other three. Notwithstanding, being qualified, unbiased, and having a respect for the constitution are typically regarded as paramount to any potential Justice, but given the nonpartisan nature of the hypotheses, one would anticipate the apolitical response would have received far more importance amongst the population than it ultimately did in this instance.



As we have seen through roughly all the previously examples, the trends demonstrated within the total population have roughly played out in the exact same manner in the partisan subsets that are being studied. Interestingly, the smallest percentage of Democrats out of the three groups indicated that respect for the constitution was the most important characteristic, while having a larger percentage of individuals listing apolitical as the most important characteristic. Both Republicans and Independents did not achieve such high percentages in this category however.





The Chi-square that was made from the 2016 data was remade here with the 2017 data to see if the election of Donald Trump has led to a transformation of partisan dynamics. Ultimately, the result is that it did not, and there was not a break down in consensus on what type of Justice is preferred by the American people. Again, as the 2016 data showed, there is no significant difference that exists (P value far greater than .05) between Democrats and Republicans on this specific issue, and as sizable majorities of those involved in the survey chose a nonideological judge as their preference, we can see a definite departure with the political class of individuals who places explicit importance on have Justices who will rule to uphold precedent which they personally believe in.

	Type of Justice Preferred: Ideological	Type of Justice Preferred: Nonideological	<i>Marginal Row Totals</i>
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Democrats	83 (77.98) [0.32]	209 (214.02) [0.12]	292
Republicans	58 (63.02) [0.4]	178 (172.98) [0.15]	41
<i>Marginal Column Totals</i>	141	387	
	Chi ² Statistic = 0.9875	P value = .320344	

Conclusion

Antonin Scalia's death in 2016 created a vacancy on the Supreme Court that, according to the United States Constitution, it was then President Barack Obama's responsibility to fill. Yet, in spite of this, Senate leaders told the President that there would be no hearings, there would be no vote, and that there would be no seat on the court for the President's nominee, Merrick Garland. Democrats derided this decision, calling it brinksmanship, partisan obstructionism – polarization in its highest form. White House Press Secretary Josh Earnest slammed the move as “a historic and unprecedented acceleration of politicizing a branch of government that's supposed to be insulated from politics” (Herszenhorn 2016, 2), yet this move represented the next step in a process that has been taking place for far longer than the Press Secretary may have been aware. The politicization of the Supreme Court has been a slow and steady process, starting in the earliest days of the Republic, persisting until this very moment, where it has perhaps reached a fever pitch.

American politics and political systems are incredibly complex, and there are very few aspects of the modern American system that perfectly resemble their original form, or live up to the exact purpose they were designed to fill. Yet it is this very complexity and unpredictability that make the institutional continuity of the Supreme Court so remarkable. Given the volatility that exists, an example of a phenomenon that persists in spite of changes to the electorate, in

spite of institutional transformations then, would – and rightly should - be considered a rarity. In the case of the Supreme Court and the nomination process, the tensions that have flared as of late are quite the opposite of what Mr. Earnest suggested in January 2016; they represent the consequences of over 225 years of using and abusing the court for its ability to deeply influence the American political landscape.

The purpose of this paper was to fully analyze the ways in which the Supreme Court and by extension, the nomination process, were politicized in an effort to hijack them and in essence mutate them into covertly political, policy making bodies, often with the intention of bypassing the legislative and executive branches to achieve political aims. This change came from both inside and outside the institution, with notable judges like Marshall, Holmes, and Warren all having profound impacts on the courts ability to make and review decisions, as well as to overturn acts of congress. But they were not alone in their efforts, with President's and Senators like Lincoln, Roosevelt, and Biden clashing with the Judiciary or its nominees in order to ensure the ability to control the decision-making agenda was not lost. But through it all, one notable actor was explicitly left out – the people.

There exists a fundamental disconnect between the average American, and the members of the political class of politicians, jurists, lobbyists, and activists who pursue their own individual agendas in spite of prevailing public opinion. In fact, the public outcry was the largest and most palpable when the court was seen as abusing its power, in essence when the court used its role as an impartial arbiter of the law to serve as the final voice on some of the most salient and controversial issues of its time. There has been a litany of examples presented that solidifies this divide; in spite of what has happened to the court and its politics, the American public still believes in a normative version of the court. A court that can remain

apolitical and impartial, and that can remain above the political fray.

This was proven not only with an in depth analysis of the literature and a developed study of American history, but with contemporary analyses and hard data that show that something more is at play. Politicians have to emphasize differences, as it is central to political gamesmanship to create an “us vs them” mentality, and truly it is easier to identify those who do not agree as the enemy of progress. Even now, Senate Democrats led by minority leader Chuck Schumer (D-NY) seek the filibuster the nomination of President Trump’s nominee to the Supreme Court, Neil Gorsuch. Though is this really what Americans would like to see happen? Is this seriously what Democrats believe is correct for the country? When one endeavors to uncover what is really going on in the mind of Americans across the United States, the results are far more uniform than one might have previously expected. Not only do Americans agree on non-partisan issues, they even agree on some of the most hotly debated issues of the day. Majorities of Democrats, Republicans, and Independents agree that the Senate had a constitutional obligation hold hearings on Judge Merrick Garland, with even larger numbers agreeing that Judge Gorsuch deserved the same. Huge majorities agree that the court remaining apolitical was highly important, and affirmed that the vacant seat left when Antonin Scalia died should be filled, rather than being kept artificially empty as a result of some never ending filibuster or parliamentary procedure. These same groups indicated that the courts functionality and ability to function effectively as a branch of government was significantly more important than the court upholding political decisions the individual agreed with, and signaled that their ideal Supreme Court Justice was somebody who cared about the facts of each case and was focused on Justice, rather than a partisan who espoused the same values or political beliefs as the respondents in question. Again, large numbers of Democrats,

Republicans, and Independents all stated that when it comes to the characteristics of a nominee, the most important factors are that the candidate is unbiased and qualified, while the political leanings of the prospective justice. All this information affirms there is a two-track way of thinking in the United States – the elites who pursue a more partisan centric agenda, and the mass public, who prefers normative good to politically beneficial outcomes.

But in a larger sense, what this paper proves is that the American public is far less divided than it is presumed to be when it comes to the topic of the Supreme Court. The 2016 election brought with it unprecedented partisanship and polarization, and the evidence presented herein does not on the whole invalidate this perception of the United States. However, what it shows is that consensus does exist on a variety of issues of and pertaining to the judicial branch of the United States government – that normative beliefs still have a place in the collective American psyche.

What is striking is that, in spite of all the ways the country has changed, through realigning elections, wars, and different political regimes, the same type of politicization of the Supreme Court has continued to take place. This type of behavior is not isolated to Democrats, or Republicans, but rather it is confined to the political elite – those with the most to gain from using the court as a political tool.

Ultimately, this study could be expanded to further hone in on the nuances that exist within the realm of public opinion. This survey was limited in scope, and the historical analysis was somewhat limited. Further research might conduct audit studies on periodicals from the period to attain a more accurate depiction of what public opinion was like in each period.

APPENDIX A

Complete list of survey questions:

1) On a scale of 1-100, how important would you say the following is: "The United States Supreme Court protects the values I care about"

2) On a scale of 1-100, how important would you say the following is: "The United States Supreme Court functions properly"

3) On a scale of 1-100, how important would you say the following is: "The United States Supreme Court makes decisions I agree with"

4) On a scale of 1-100, how important would you say the following is: "The United States Supreme Court should never have a vacant seat so it can operate effectively."

5) What is your opinion of the following statement: "The Senate had a constitutional obligation to hold hearings for Judge Merrick Garland."

Strongly agree (1)

Agree (2)

Somewhat agree (3)

Neither agree nor disagree (4)

Somewhat disagree (5)

Disagree (6)

Strongly disagree (7)

6) Do you think it is ever acceptable for the United States Senate to filibuster a nominee to the Supreme Court?

Always acceptable (1)

Sometimes acceptable (2)

Sometimes unacceptable (3)

Never acceptable (4)

7) Do you think it is ever acceptable for the United States Senate to use ideological litmus tests when considering a nominee to the Supreme Court?

Always acceptable (1)

Sometimes acceptable (2)

Sometimes unacceptable (3)

Never acceptable (4)

8) What is your opinion of the following statement: "The Senate has a constitutional obligation to hold hearings for Judge Neil Gorsuch"

Strongly agree (1)

Agree (2)

Somewhat agree (3)

Neither agree nor disagree (4)

Somewhat disagree (5)

Disagree (6)

Strongly disagree (7)

9) Do you believe the United States Senate should hold hearings and a vote on the President's nominee for the vacant seat on the Supreme Court, or should the seat be left vacant?

Seat should be filled (1)

Seat should be left vacant (2)

Unsure/Don't Know (3)

10) In your opinion, how important is it that the Supreme Court remains an apolitical body, that is, how important is it that the Supreme Court is treated differently and the other branches of government?

Incredibly important (1)

Important (2)

Somewhat important (3)

Somewhat unimportant (4)

Unimportant (5)

Incredibly unimportant (6)

Don't know/Unsure (7)

11) Do you believe it is acceptable to reject a nominee for the Supreme Court purely because of their ideology?

Very acceptable (1)

Acceptable (2)

Somewhat acceptable (3)

Somewhat unacceptable (4)

Unacceptable (5)

Very unacceptable (6)

Don't know/Unsure (7)

12) In your opinion, what is the correct way to interpret the Constitution of the United States?

Read the words literally (1)

Make decisions based on the original intent of the founders (2)

Relate the words to a modern context (3)

13) How would you describe your ideal Supreme Court justice? Please rank the following descriptions from 1-4 in order of importance (1 being the most important, 4 being the least important)

Someone who agrees with my values (1)

Someone who shares the same political beliefs as me (2)

Someone who is more focused on justice than politics (3)

Someone who decides each individual case based on the merits/facts as they are presented (4)

14) What characteristics are the most important in a Supreme Court Justice? Please rank the following descriptions from 1-4 in order of importance (1 being the most important, 4 being the least important)

A candidate who is unbiased (1)

A candidate who is qualified (2)

A candidate who is apolitical (3)

A candidate who respects the constitution (4)

15) We hear a lot of talk these days about liberals and conservatives. On most political issues, do you think of yourself as liberal, moderate, or conservative?

Extremely liberal (1)

Somewhat liberal (2)

Lean liberal (3)

Neither liberal nor conservative/Moderate (4)

Lean conservative (5)

Somewhat conservative (6)

Extremely conservative (7)

16) Generally speaking, do you usually think of yourself as a Republican, Democrat, an

Independent, or something else?

Republican (1)

Democrat (2)

Independent (3)

Other (4)

17) Are you registered to vote?

Yes (1)

No (2)

I don't know (3)

18) What racial or ethnic group do you consider yourself? (Select all that apply)

Alaskan Native (1)

American Indian/Native American (2)

Asian (3)

African American/Black (4)

Hispanic/Latino/Latina/Chicano/Chicana (5)

Pacific Islander (6)

White/Caucasian (7)

Arab/Arab American (8)

19) In what year were you born?

Year(1)

20) How many years of schooling have you completed? For example, 12 years would be a high school graduate, and 16 is a college graduate?

Years(1)

21) Are you male or female?

Male (1)

Female (2)

Other (3)

22) Please estimate the total combined annual income before taxes for you and the other members for household.

Less than \$29,999 (1)

\$30,000 to \$49,999 (2)

\$50,000 to \$99,999 (3)

\$100,000 to \$299,999 (4)

More than \$300,000 (5)

APPENDIX B:

Replication data can be made available upon request.

Table A:

Question	Mean #1	Mean #2	Difference	Standard Error	95% CI	t - statistic	DF	Significance level
Q1 v Q2	70.53	69.18	1.352	1.546	-1.6819 to 4.3857	0.874	998	P = 0.3821
Q1 v Q4	70.74	69.18	1.562	1.711	-1.7955 to 4.9195	0.913	998	P = 0.3615
Q3 v Q4	70.74	62.02	8.715	1.669	5.4406 to 11.9896	5.223	998	P < 0.0001
Q3 v Q2	70.53	62.02	8.505	1.499	5.5633 to 11.4467	5.673	998	P < 0.0001
Q3 v Q1	69.18	62.02	7.153	1.468	4.2726 to 10.0336	4.873	998	P < 0.0001

Table B:

Question	Mean #1	Mean #2	Difference	Standard Error	95% CI	t - statistic	DF	Significance level
Dem v Rep: Q1	71.855	68.179	-3.676	2.602	-8.7947 to 1.4427	-1.413	340	P = 0.1587
Dem v Rep: Q2	73.632	65.894	-7.738	2.746	-13.1391 to -2.3369	-2.818	340	P = 0.0051
Dem v Rep: Q3	65.855	59.797	-5.058	2.469	-9.9141 to -0.2019	-2.049	340	P = 0.0413

Dem v Rep: Q4	75.282	65.455	-9.827	3.285	-16.2878 to -3.3662	-2.992	340	P = 0.0030
Dem v Ind: Q1	71.855	66.333	-5.522	2.422	-10.2845 to -0.7595	-2.280	376	P = 0.0232
Dem v Ind: Q2	73.632	69.918	-3.714	2.508	-8.6458 to 1.2178	-1.481	376	P = 0.1395
Dem v Ind: Q3	65.855	59.937	-4.918	2.257	-9.3555 to -0.4805	-2.179	376	P = 0.0299
Dem v Ind: Q4	75.282	68.981	-6.301	2.954	-12.1093 to -0.4927	-2.133	376	P = 0.0336
Rep v Ind: Q1	68.179	66.333	-1.846	3.082	-7.9130 to 4.2210	-0.599	278	P = 0.5497
Rep v Ind: Q2	65.894	69.918	4.024	3.143	-2.1636 to 10.2116	1.280	278	P = 0.2015
Rep v Ind: Q3	59.797	59.937	0.140	2.847	-5.4652 to 5.7452	0.049	278	P = 0.9608
Rep v Ind: Q4	65.455	68.981	3.526	3.749	-3.8543 to 10.9063	0.940	278	P = 0.3478

Table C:

Question 5	Percentage Agree	Percentage Disagree	Difference	95% CI	Significance level
Dems	76.522	4.438	72.17 %	66.3859 to 77.9451%	P < 0.0001
Inds	64.150	11.321	52.83 %	42.8596 to 61.5102%	P < 0.0001
Reps	56.000	24.000	32 %	20.5901 to 43.4099%	P < 0.0001

Table D:

Question 8	Percentage Agree	Percentage Disagree	Difference	95% CI	Significance level
Dems	73.182	8.364	64.55 %	56.7344 to 71.1885%	P < 0.0001
Inds	68.553	13.836	54.72 %	44.6302 to 63.3947%	P < 0.0001
Reps	79.675	4.878	74.80 %	67.4175 to 82.1825%	P < 0.0001

Table E:

Questions 6 & 7	Percentage Agree	Percentage Disagree	Difference	95% CI	Significance level
Dems – 6	58.447	41.553	16.895 %	7.2548 to 26.2087%	P = 0.0004
Inds – 6	59.350	40.650	18.699%	7.2944 to 29.6015%	P = 0.0009
Reps – 6	53.459	46.541	6.918 %	-6.1086 to 19.7040%	P = .2789
Dems – 7	60.455	39.545	20.909 %	11.3015 to 30.1126 %	P < 0.0001
Inds – 7	69.919	30.081	39.837 %	28.8513 to 49.7495%	P < 0.0001
Reps – 7	55.063	44.937	10.127 %	-2.9225 to 22.8228	P = 0.1130

Table F:

Question 9	Percentage for filling seat	Percentage against filling seat	Difference	95% CI	Significance level
Dems	66.667	14.612	52.0548%	44.4642 to 59.6454%	P < 0.0001
Inds	69.620	20.253	49.367 %	40.1253 to 58.6087%	P < 0.0001
Reps	83.607	8.197	75.410 %	68.0205 to 82.7995%	P < 0.0001

Table G:

Question 10	Percentage More Important	Percentage Less Important	Difference	95% CI	DF	Significance level
	75.348	7.753	67.594%	62.7652 to 71.8964%	1	P < 0.0001

Table H:

Question 10	Percentage More Important	Percentage Less Important	Difference	95% CI	DF	Significance level
Dems	75.455	6.818	68.636%	61.1305 to 75.9102%	1	P < 0.0001
Inds	67.924	8.805	59.119%	50.9512 to 67.2868%	1	P < 0.0001
Reps	73.387	7.258	66.129%	57.6531 to 74.6049%	1	P < 0.0001

Table I:

Question 11	Percentage Acceptable	Percentage Unacceptable	Difference	95% CI	DF	Significance level
	61.155	38.845	22.311 %	16.0617 to 28.3729%	1	P < 0.0001

Table J:

Question 11	Percentage Acceptable	Percentage Unacceptable	Difference	95% CI	DF	Significance level
Dems	67.727	32.273	35.455 %	26.1015 to 44.1210	1	P < 0.0001
Inds	65.041	34.959	30.081 %	19.642 to 40.5200	1	P < 0.0001
Reps	54.088	45.912	8.176%	-4.5763 to 20.9283	1	P = 0.2006

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