

On the Basis of Politics: Public Approval of the Supreme Court

An Undergraduate Honors Thesis

By  
Melissa Barnosky  
Political Science Major / History Minor

SUNY Brockport, State University of New York  
Spring 2021

Thesis Director: Dr. Susan Orr, Associate Professor, Political Science

To my papa, William Dermody (1942-1993), from whom I inherit my love of learning.

## ACKNOWLEDGMENTS

I first need to thank the American Legion for introducing me to the fascinating world of constitutional studies through their national “Constitutional Speech” scholarship program. I often think of how fortunate I am to have delved into independent research as a very young scholar. Not many high school students obtain this type of experience, and even fewer use it as a foundation for their future endeavors. I am grateful that the work and dedication of the Legion have made both possible for myself.

I would next like to thank my family. Though my intense interest in academics and research surely continues to puzzle them, they have permitted me the freedom to pursue the activities that I desire. Through the countless hours I spent working on this project, it has been my parents and siblings who have picked up the slack in household duties among other responsibilities that have remained lacking on my behalf over the past year. Special thanks to my beloved feline and canine children—cats, Will and Kate, and dog, Pumpkin—for providing me with unconditional love and non-judgemental support. In times when I was tired and wanted to lie on my bed, they made sure to take up all the room so as to motivate me to keep working. Much appreciation to them.

I would especially like to thank my mom who has kept me grounded throughout my life’s achievements, encourages me to live with purpose, and continues to teach me the importance of being a good person. I recall a time in the first grade when I proudly boasted my straight A’s in front of a few members of our church—and later that day, my mom sitting me down and acknowledging that though she is proud of strong academics, she is even prouder of good character, asserting, *“I would prefer to go bed at the end of the day knowing I had a kind*

*daughter rather than a smart one.*” It is my hope that I prove both to be true for myself, for my mom, and for the goals that I aspire to achieve in academics and the world more generally.

I would be negligent if I failed to take the time to thank the people and things who indirectly helped me with this project more than they will ever know. Conducting school, work, extracurriculars, and my first major research project all within the isolation of a single bedroom while the outside world fell apart surely presented its challenges. Many times, it was the comedic gold of *The Golden Girls*, the calming voices of John Denver and Judy Collins, and the assuring familiarity of my favorite novels that helped boost my motivation when even my most important academic responsibilities appeared less than trivial. Moreover, I am exceedingly grateful to my professors at Brockport who have been especially caring toward their students even in times in which they were struggling themselves. Although they may not fully realize it, we notice and appreciate all that they do for us.

I have saved the most deserving of recognition for last. Sincerest appreciation to my advisor, mentor, and—if I may say—dear friend, Dr. Susan Orr, whom I met at the simultaneously best and worst time possible: the infamous 2020. Best, because I cannot imagine having worked under the guidance of another person during such a chaotic period in my life and in the world. Worst, because I so wish that I had been able to present a better version of myself as both a student and person than proved possible given the circumstances. With all that has occurred, I remain bewildered as to how she can continue to see potential in me as a student. No matter the case, Professor Orr is the quintessential image of an exemplary mentor—kind, hard-working, and incredibly patient. My greatest aspiration is to grow and mature into the kind of person that she is today.

TABLE OF CONTENTS

	<u>page</u>
<b>ACKNOWLEDGMENTS</b> .....	3
<b>ABSTRACT</b> .....	7
<b>INTRODUCTION</b> .....	8
<b>CONSTITUTIONAL INTERPRETATION</b> .....	10
<b>ORIGINALISM</b> .....	11
<i>Originalism’s Chief Objection</i> .....	13
<b>THE LIVING CONSTITUTION</b> .....	15
<i>The Living Constitution’s Chief Objection</i> .....	16
<b>PUBLIC VIEW OF ORIGINALISM/THE LIVING CONSTITUTION</b> .....	17
<b>SUPREME COURT LEGITIMACY</b> .....	20
<i>Components of Specific/Diffuse Support</i> .....	22
<i>Challenges to Specific Support-Diffuse Support Relationship</i> .....	24
<b>RESEARCH QUESTIONS</b> .....	25
<b>DATA AND METHODS</b> .....	27
<b>POLITICS, INTERPRETIVE APPROACHES, AND SPECIFIC SUPPORT</b> .....	29
<i>Political Preferences in Specific Support</i> .....	30
<i>Interpretive Approaches in Specific Support</i> .....	35

<b>POLITICS, INTERPRETIVE APPROACHES, AND DIFFUSE SUPPORT .....</b>	<b>40</b>
<i>The Impact of Politicized Interpretive Approaches on the Specific-Diffuse Support Relationship.....</i>	<i>43</i>
<b>CONCLUDING THOUGHTS.....</b>	<b>46</b>
<b>LIST OF REFERENCES.....</b>	<b>50</b>
<b>APPENDIX A.....</b>	<b>54</b>

## ABSTRACT

Over the last century, the Supreme Court's decisions have become increasingly salient to the public, as they regard some of the most polarized topics in American politics. This has prompted serious concern for the institution's legitimacy. What if citizens begin to view the Court as political as they do the Presidency and Congress? The judicial branch will then no longer be seen as possessing a distinct role in American politics—a role premised on the perception that the Court exercises legal rather than political reasoning. This study will use a survey to determine to what extent the approaches to constitutional interpretation are seen by the public as a proxy for ideology. It will further seek to discover whether average citizens can take their preferred approaches to interpreting the Constitution and apply them to Supreme Court case decisions. If findings reveal that the public consistently conflate ideology and interpretive stances, then the Court's legitimacy in the public mind is increasingly contingent on politics itself rather than the Court's ability to remain above politics as an independent institution.

## INTRODUCTION

Everyone is an expert when it comes to the U.S. Constitution—at least that is how it seems in American society. In 2013, Governor Andrew Cuomo signed into law the New York Secure Ammunition and Firearms Enforcement Act (commonly referred to as the SAFE Act), which consists of a number of reforms ultimately intended to reduce gun violence in New York State. Soon after the act was passed, staunch gun owners in Western NY proclaimed in heated conversation that the act was unconstitutional as it allegedly violated the Second Amendment. Arguments of this nature only went as far as to profess the regulations of the law infringed on citizens' right to keep and bear arms. No specific evidence or reasoning ever seemed to succeed these shallow declarations. But it is not only citizens on the political right who assert such open-ended claims. Talk of firing NFL players for kneeling during the National Anthem in protests against police brutality in 2016 sparked similar discourse among liberals who believed that such a response to the protests would violate the players' First Amendment right to free expression. This, despite the fact that the First Amendment is designed to limit government officials, not private businesses.

To be sure, neither of these scenarios ever found their way to court to discover in certainty whether there were any true violations of the U.S. Constitution. However, they did get me thinking about the habitual nature of average American citizens utilizing constitutional rather than ideological or political reasoning to support their arguments against particular laws or actions. Surely the public fundamentally care only about meeting their own political ends; an attempt to incorporate constitutional or legal reasoning to support their arguments must be mere rationalization. Or is it?



Suppose that the above cases *had* made their way to the Supreme Court. Further suppose that the Court upheld both the SAFE Act and the firing of NFL players as constitutional. Would those who disagree with these decisions accept such rulings, or would they deem the justices not following proper constitutional reasoning? What would the latter indicate about the way in which the public evaluate the Court’s institutional legitimacy?

All of this comes down to whether ordinary citizens in the American public possess the ability to interpret provisions in the U.S. Constitution based on a principled interpretive approach. Two broad interpretive methodologies are *originalism* and the *living Constitution*.<sup>1</sup> Briefly, an originalist interprets constitutional provisions based on original meaning, while a living constitutionalist interprets constitutional provisions based on contemporary meaning (Bialik 2018). My study contains a survey which measures whether citizens are capable of interpreting the Constitution by consistently applying one of these two approaches to individual judicial decisions. If so, then perhaps the public do possess a level of principled reasoning—in the form of interpretive methods—that they use to determine the constitutionality of certain laws and policies. This reasoning may also apply to citizens’ opinions of Supreme Court case decisions.

If a citizen, for example, disagrees with the *Roe v. Wade* decision, is it because he is politically pro-life, or is it simply that he is an originalist who does not agree that a proper interpretation of the Constitution guarantees abortion constitutional protection? My study determines which of these two scenarios proves more legitimate. My study further measures how the public perceive *originalism* and the *living Constitution* more generally. Are these terms

---

<sup>1</sup> Throughout this paper, I often refer to *originalism* and the *living Constitution* as “interpretive” or “judicial approaches;” however, I recognize that, in actuality, they are broader characterizations for individual, more specific judicial philosophies. This is why I also refer to them as “methods.”

objective or politicized in the public mind, and what could this indicate about Supreme Court legitimacy as a whole?

The overarching topic of my research is the Supreme Court-public opinion relationship. A key focus is on interpretive approaches, the way in which the public understand these approaches, and what this suggests about the role that public approval plays in Supreme Court legitimacy. I predict that citizens' opinions of judicial decisions are based on political preference rather than principled, interpretive reasoning.<sup>2</sup> I further hypothesize that the public view *originalism* and the *living Constitution* in a partisan rather than principled, apolitical manner.

## CONSTITUTIONAL INTERPRETATION

*It is emphatically the province and duty of the judicial department to say what the law is.*

—Chief Justice John Marshall, 1803

What is constitutional interpretation? Writ large, it is the way in which a constitution is interpreted—the determination of what provisions in the document mean. Specifically regarding the United States Constitution, the *Marbury v. Madison* (1803) case bestowed the right of judicial review upon the justices of the Supreme Court. It is, therefore, the justices' chief responsibility to interpret the U.S. Constitution to determine the constitutionality of specific issues, laws, and actions presented in cases before the Court (Barber and Fleming 2018).

Justices establish the meanings of various constitutional provisions by utilizing specific approaches to interpreting the text. These approaches, often called judicial philosophies, vary

---

<sup>2</sup> Throughout this paper, I at times refer to the participants in my study as *citizens*. This study was conducted on a college campus, thus a small number of participants may also be permanent residents or international students.

among the different justices. Some are conservative, while others are more liberal. Some rely mostly on the text, while others take into consideration established precedents. No matter the case, most, if not all of these distinct approaches to interpreting the Constitution fall under one of two broader methods termed *Originalism* and the *Living Constitution* (Barber and Fleming 2018).

## ORIGINALISM

*The Constitution is a written instrument. As such its meaning does not alter.  
That which it meant when adopted it means now.*

—From *South Carolina v. United States* opinion, 1905

Originalism requires that constitutional provisions be interpreted based on what they “meant as originally written” (Bialik 2018). This is a general definition of originalism as a judicial methodology; however, there are a variety of approaches that fall under this broad characterization. I will briefly outline five central kinds:

- **Narrow originalism**, also known as concrete originalism or intentionalism, is the strictest form of original meaning. A narrow originalist interprets constitutional provisions based on the original intentions or understandings of the framers who wrote them.
- **Abstract originalism** is one of the broader forms of original meaning. Rather than basing interpretation off a strict type of intention, abstract originalism construes constitutional

language as general ideas or concepts. For example, while a narrow originalist may interpret the First Amendment's Free Speech Clause according to what the framers of the Amendment intended the term *free speech* to mean, an abstract originalist might instead interpret the clause according to what the principle of *free speech* means as a general concept. This is done without taking into consideration any person's intentions for the term's meaning.

- **Broad originalism** is intended to serve as a happy medium for narrow and abstract originalism by determining the so-called *level of abstraction* at which a constitutional provision is conceived. This is accomplished by turning to historical beliefs or practices and taking these into consideration when engaging in constitutional interpretation.
- **Public meaning originalism** interprets the Constitution by determining the public meaning of the text at the time it was written and applying that meaning to modern-day circumstances.
- **Textualism** seeks the meaning of constitutional provisions by examining the plain words of those provisions. Textualists adhere strictly to the text itself to ascertain the meaning of the phrases in question<sup>3</sup> (Barber and Fleming 2018; Law and Liberty 2019).

The term *originalism*, more generally, was first coined in 1980 by constitutional law scholar, Paul Brest (Barnett 2017). Although there are many different types of originalism—such as those briefly described above—there are only two distinct historical developments within the interpretive method. In particular, there is *classic originalism* and *new originalism*.

---

<sup>3</sup> Some constitutional scholars claim that textualism is related to originalism rather than a specific type of the methodology. Others argue that despite differences, textualism is still a form of originalism since it is premised on original meaning (Wurman 2020). I agree with the latter school of thought.

Classic originalism promotes judicial restraint in original meaning, while new originalism is allegedly less focused on restricting judges and more closely concerned with upholding the original Constitution (Raban 2020; Barber and Fleming 2018). Despite their differences, both classic and new originalism are fundamentally conservative, as they agree that the authoritative means of constitutional interpretation is the original understanding of the text itself. Moreover, originalists of every kind claim that their judicial philosophy is a neutral and objective method. They maintain that an originalist judge's interpretation is dictated by original meaning alone, thus leaving little to no room for personal preferences or value judgments in the decision making process (Raban 2020).

### **Originalism's Chief Objection**

As with any judicial philosophy, originalism attracts its share of criticism. One of originalism's chief objections is that the method does not remain true to its claim to objectivity. All originalists argue that their approach is bound by original meaning, whether it be by the framers' intentions, public meaning of the words at the time they were written, or by the text itself. Non-originalists challenge this premise on the grounds that originalism can not logically apply to all circumstances such as hard cases, therefore, it leaves room for the value-judgements and personal preferences of judges (Raban 2020; Strauss 2010).

Interestingly, many prominent originalists agree that originalist approaches cannot conform to every situation. Justice Antonin Scalia—the quintessential originalist himself—once acknowledged, “I am an originalist...not a nut” (Toobin 2007). Here, Scalia is inferring that he recognizes there are times in which originalism proves impractical and must be abandoned as a method of constitutional interpretation. This notion was specified when in 2016 current

originalist Justice Amy Coney Barrett asserted, “Adherence to originalism arguably requires...the dismantling of the administrative state, the invalidation of paper money, and the reversal of *Brown v. Board of Education*....no serious person would propose to undo [these] even if they are wrong” (Millhiser 2020). Clearly, there are times in which originalism is not rational even in the eyes of originalist scholars.

With this in consideration, what action is an originalist to take when an issue presents itself that would require one to be, in the words of Scalia, “a nut” in order to remain wholly faithful to the originalist philosophy? In other words, what does one apply if originalism is rendered impossible or irrational in a particular circumstance?

The answer to this question remains relatively obscure. Originalist judges possess the liberty to decide for themselves which legal approach to undertake when their philosophy proves ineffective. Many originalist judges, such as Justice Amy Coney Barrett, claim that the way to ensure originalism is always effective is to hear only cases to which originalism can reasonably apply. This would mean choosing not to hear cases regarding topics such as public school segregation or the constitutionality of the American dollar (Millhiser 2020). Opponents of originalism argue that this proves the interpretive method is ineffective when such cases do make their way to court. As a result, the incorporation of personal or political preferences is highly plausible in an originalist’s judicial decision making (Segall 2017). If this critique is accurate, then originalism is not as wholly impartial as it is purported to be.

Originalists ultimately formulate consolidated, and at times, clever rebuttals in response to the claim that originalism is not an objective judicial philosophy. The particular details of such responses are not worth entertaining here, as they go far beyond the scope of my own study’s purposes. What is important to understand is how originalism is viewed by legal scholars who

support the approach: as a neutral method of constitutional interpretation in which judges are bound by the meaning of the text (as emphasized by classic originalists), thus ensuring complete impartiality in the judicial decision making process.

## THE LIVING CONSTITUTION

*An unchanging Constitution would fit our society very badly. Either it would be ignored or, worse, it would be a hindrance, a relic that keeps us from making progress and prevents our society from working in the way it should.*

—David Strauss, excerpt from *The Living Constitution* (2010)

The term *living Constitution* was devised in 1927 when political scientist Howard Lee McBain wrote a book introducing the notion of a dynamic Constitution that allegedly grows with society (Loeb 1935). The living Constitution method of interpretation treats the Constitution as “an evolving document that changes over time and adapts to new circumstances” (Barber and Fleming 2018). As such, interpretive approaches that fall under this characterization permit the meaning of constitutional provisions to hinge on the conditions of the time. The living Constitution perspective is capable of applying to virtually any non-originalist approach. In many ways, it is the sharp contrast of originalism, as a living Constitution judge views the Constitution as ‘living,’ while an originalist perceives the document as ‘enduring’ (Patel 2012). Although there are many arguments in support of a living Constitution, two central perspectives are as follows:

- The **pragmatist** view argues that the living Constitution is necessary only because originalism is, at times, impractical when it comes to matters of policy; this is particularly true in hard cases.
- The **philosophic** approach argues that the framers wrote the Constitution utilizing vague language because they purposefully wanted to create a flexible and evolving Constitution, thus the document should be interpreted as such today (Chawawa 2019).

Most judges who interpret the Constitution as a living document find it bizarre to interpret a document based on original meaning when considering the significant changes that have occurred since the time that the provisions were written. This notion was perhaps best clarified by the late Justice Ruth Bader Ginsburg:

*“[The] Constitution begins with the words, ‘We the people of the United States in order to form a more perfect union.’ Think about how things were in 1787. Who were ‘We the people’? Certainly not people who were held in human bondage because the original Constitution preserves slavery. Certainly not women whatever their color and not even men who own no property. It was a rather elite group”* (Clinton Foundation 2019).

A living Constitution approach ensures that modern conditions are taken into consideration so as to avoid being dictated by outdated norms from centuries ago. Its greatest support arguably derives from its acknowledgment of change—from technology, to social mores, to the very criteria for whom constitutional protections apply.

### **The Living Constitution’s Chief Objection**

The greatest objection to the living Constitution is that it is too flexible of an interpretive methodology, thus it is claimed by critics to be “fundamentally at odds with the notion of a fixed



rule of law that protects us from the arbitrary rule of man” (Anderson 2012). The concern here is that the elasticity of a living Constitution makes it manipulable by those who are responsible for interpreting it—namely, judges who may have the power to impose their own preferences on the rest of society if permitted to determine the current meanings of provisions themselves.

One response to this criticism is that the living Constitution is also a common law Constitution. Because common law is based on precedent and has historically guided judges to their decisions, interpreting the Constitution as a living document may not be as manipulable as claimed by living Constitution critics. No matter the case, living Constitution scholars believe that society’s changes are too great to rely on the slow and tedious amendment process to create modifications that better fit current circumstances (Strauss 2010). For this reason, they argue that interpreting the Constitution as a living document is of vital importance for adapting to the changes of the time.

#### PUBLIC VIEW OF ORIGINALISM/THE LIVING CONSTITUTION

*The correct answer to the question of who gets to interpret the Constitution is ‘everyone.’ The framers of the Constitution quite sensibly considered the power of constitutional interpretation...to be far too important a matter to vest in a single set of hands.*

—Michael Stokes Paulsen, 2015

The Pew Research Center, a nonpartisan think tank in Washington D.C., regularly conducts annual surveys to random samples in the American public as a way to measure general

tendencies and shifts in public opinion (Gramlich 2020). Public opinion on how the Supreme Court ought to interpret the U.S. Constitution is a specific aspect of these reports.

The latest findings from summer 2020 reveal that more than half of Americans believe that the Supreme Court should base its rulings on what the Constitution “means in current times” (living Constitution) as opposed to what it “meant as originally written” (originalism) (Gramlich 2020). Survey results also show that the majority of Republican citizens favor originalism to the living Constitution approach, and vice versa for Democratic citizens. Table 1 outlines Pew Research survey results spanning from 2014 to 2020. It contains percentages from the total number of respondents in the surveys overall; the total number of Republican respondents in the surveys; and the total number of Democratic respondents in the surveys.

TABLE 1

*Percentage of Respondents Supporting Originalism and Living Constitutionalism*

Year	Total		Republican		Democratic	
	Means in Current Times	Meant as Originally Written	Means in Current Times	Meant as Originally Written	Means in Current Times	Meant as Originally Written
2020	55	43	32	67	76	23
2018	55	41	30	67	78	18
2016	46	46	19	74	69	23
2014	49	46	29	69	70	26

*From Pew Research Center Political Survey Data 2014-2020*

The findings in Table 1 indicate that the living Constitution slightly edges out originalism in popularity among the American public overall. Furthermore, the living Constitution approach has garnered stronger support in recent years relative to that of originalism. Although this increase in support is small, it provides significant insight into what interpretive method citizens believe justices should base constitutional decisions, which is particularly relevant as the institution's interpretive composition grows more conservative. Assume the trend of living Constitution support continues to increase over the next few years; what happens if a striking contrast prevails between public support for a particular interpretive approach and that which is dominant on the current Court?

Despite implications that might be drawn from such a question, the surveys conducted by the Pew Research Center did not go as far as to inquire how citizens interpret the Constitution themselves. Moreover, they did not determine the extent to which judicial approaches are politicized in the public mind nor whether interpretive methods play a role in individuals' approval of the Supreme Court. Whether *originalism* and the *living Constitution* contribute to citizens' perception of the Court is an area that I examine further in my own study. However, it is significant to first obtain a better understanding of where current literature stands on public opinion of the Court and what this suggests about the Court's legitimacy as an institution. Only then can the nuance of interpretive approaches be further examined as part of the bigger picture.

## SUPREME COURT LEGITIMACY

*We don't have an army. We don't have any money. The only way we get people to do what we say that they should do is because people respect us and respect our fairness.*

—Justice Elena Kagan, 2018

Legitimacy is a complex topic that proves vital to the Supreme Court's institutional functionality. Generally speaking, an institution is considered legitimate when it is perceived as possessing decision-making authority. In democratic societies, public opinion plays a crucial role in determining whether this is true; therefore, the way in which the public view an institution is imperative to maintaining the legitimacy of that institution. This can be deemed a type of cycle: institutions must obtain some extent of public approval in order to maintain legitimacy. Inversely, institutions must maintain legitimacy in order to obtain public approval. Legitimacy is especially significant to an institution such as the Supreme Court, as the Court can not obtain its legitimacy from elections as the Congress and Presidency do. Moreover, the Court does not have the power to enforce its own rulings, thus relies on legitimacy to ensure compliance to its decisions (Grove 2019).

There are two terms found in legitimacy literature known as *diffuse* and *specific* support. The Supreme Court's legitimacy creates *diffuse support*, which refers to a "reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging their wants" (Caldeira and Gibson 1992). In not so many words, diffuse support concerns citizens' general attitudes toward the Court as an institution. On the other hand, *specific support* is based on mere performance satisfaction.

Regarding the Supreme Court, specific support is public approval of individual case decisions (Caldeira and Gibson 1992).

According to conventional wisdom in court legitimacy literature, diffuse support ensures that people respect the Court even in times in which their specific support decreases.

Specifically, when citizens disagree with one of the Court's decisions, the Court's specific support decreases; however, citizens may still view the Court as a legitimate institution overall, thus the institution's diffuse support remains relatively stagnant (Gibson and Nelson 2014). This can be better understood in the form of an example.

*Roe v. Wade* (1973) is a widely-familiar Supreme Court decision in which the Court ultimately ruled that the right to choose abortion is guaranteed protection by the Constitution. Suppose there is an American citizen who perceived the Court as a legitimate institution prior to *Roe v. Wade*. This means that he possessed high levels of diffuse support for the Court prior to the *Roe* case. Let's further suppose that same individual disagreed with the *Roe* decision once it was ruled in 1973. This means that his specific support for the Court decreased, but what does it indicate about his diffuse support levels? Conventional wisdom claims his diffuse support remained relatively unaffected from his decrease in specific support. Conversely, if one in 1973 agreed with the *Roe v. Wade* decision, her specific support increased, while her diffuse support remained relatively unaffected. Table 2 more clearly outlines the conventional wisdom applied to this example.

TABLE 2

<i>Roe v. Wade</i> (1973)	Specific Support	Diffuse Support
Agree with Decision	Increase	Unaffected
Disagree with Decision	Decrease	Unaffected

The logic behind this is as follows: just because a citizen disagrees with one of the Court’s decisions does not indicate that the individual will in turn perceive the Court as a less legitimate institution. One can disagree with a decision, while maintaining that the Court still possesses legitimacy. Conversely, agreeing with a Supreme Court decision does not suggest that an individual will in turn perceive the Court as being a more legitimate institution overall.

**Components of Specific and Diffuse Support**

High levels of diffuse support ensure equally high levels of legitimacy and vice versa, but what exactly comprises diffuse support? Moreover, what comprises specific support? Conventional wisdom in the literature claims that the Court’s diffuse support consists of principled, apolitical elements since the Court is intended to be an independent institution, distinct from Congress and the Presidency. On the other hand, specific support is presupposed to be contingent on political or ideological preferences of citizens. Arguably, it is common knowledge what different types of policy preferences exist regarding salient legal topics such as gun control, birthright citizenship, and mass incarceration. It is more ambiguous what objective principles comprise diffuse support aside from vague democratic ideals. More specifically, there are many survey-studies that ask respondents whether they trust and respect the Supreme Court

or if they view the Court as a just institution (Annenberg Center 2019). The answers to these questions indeed determine the Court's diffuse support levels, but they do not provide insight into *why* the respondents feel the way they do regarding their general attitudes toward the Court.

With that said, one commonly accepted aspect of diffuse support was recently analyzed by Harvard Law professor, Richard Fallon, in his 2018 publication, *Law and Legitimacy in the Supreme Court*. According to Fallon's analysis, the Supreme Court gains institutional legitimacy from the public (diffuse support) when justices' decision-making follows principled methods to interpreting the Constitution. Fallon claims that no matter what interpretive method justices decide to use, the Court gains legitimacy, or diffuse support, so long as the justices apply their "preferred approach consistently across cases." (Grove 2019). This means that even if citizens disagree with a judicial decision—causing a decrease in specific support—their diffuse support is not affected if they believe that the justices made that decision by following a principled approach. The assumption here is that principled approaches contain apolitical connotations in the public mind, thus they are considered a non-partisan aspect of diffuse support.

But what if so-called apolitical components of diffuse support are not viewed as objective by the public? In a survey-designed study conducted in 2011, the majority of the survey's participants believed that justices allow ideology to influence their decision-making, yet those same participants nonetheless viewed the Court as legitimate so long as they believed that justices' decision-making was principled. In other words, "the American people accept that judicial decision making can be discretionary, grounded in ideologies, but also principled and sincere" rather than strategic such as that of politicians (Caldeira and Gibson 2011). This particular study suggests that diffuse support can comprise principled decision-making of justices, even when such principled decision-making is believed to contain some ideological

influence. This overturns the conventional wisdom that diffuse support is only maintained when politics are out of the picture. However, it does not mean that the public perceive the Court as legitimate because they recognize political influence in judicial decision-making; rather, it indicates that the public perceive the Court as legitimate *despite* recognizing some extent of political influence in judicial decision-making.

This study did not measure principled *interpretive* approaches in particular, and more significantly, did not go as far as to discover what the findings indicate about the relationship between the Court's specific and diffuse support levels. My study examines these aspects by focusing on the role of interpretive approaches in both specific and diffuse support, which will be further explained in a later section.

### **Challenges to Specific Support/Diffuse Support Relationship**

If conventional wisdom deems specific support on the basis of politics and diffuse support primarily on the basis of something more principled, then this explains why specific support is not believed to significantly impact the diffuse support, thus legitimacy of the Court. Even so, this long-held notion has faced challenges in recent years. A 2012 study conducted by Bartels and Johnston reveals the extent to which specific support directly influences the Court's level of diffuse support. Like most scholarship on the topic, the study presupposes that ideology is the basis of specific support—that citizens' agreement of judicial decisions is based on political preferences. Findings from multiple surveys conducted in the study show that citizens ascribe the highest levels of institutional legitimacy to the Court when its decisions align with their policy preferences. Conversely, the lowest levels are attributed when the Court's decisions conflict with their policy preferences (Bartels and Johnston 2012).



A study conducted by political scientist, Rick Swanson, suggests that inconsistent study results regarding the relationship between specific and diffuse support derive from a misconception of diffuse support. Swanson claims that there are two different concepts: *level* of diffuse support at any given moment and *change* of diffuse support over time (Swanson 2007).

Overall, the relationship between specific and diffuse support is a complex topic that remains debated in current literature on Supreme Court legitimacy. The unresolved disputes concerning public approval is undesirable, especially for a topic so significant to understanding a key portion of Supreme Court legitimacy. This justifies the importance of further inquiry on the subject.

## RESEARCH QUESTIONS

With the current debates taken into consideration, the following are questions to which I seek to provide insight:

- *Does only politics comprise specific support of the Supreme Court, or could there be more principled factors included such as approaches to interpreting the Constitution? —*

The current assumption is that specific support is based on politics, ideology, policy preferences, or a related type of political foundation. My study determines whether average citizens use a more complex set of criteria when assessing court decisions; specifically, do they also rely on a preferred interpretive method such as originalism or the living Constitution?

I hypothesize that conventional wisdom is correct in assuming that specific support contains a political tenor.

- *Do interpretive approaches play a role in diffuse support of the Supreme Court? If so, are these approaches politicized in the public mind? More specifically, do citizens associate originalism with the Republican party and/or do they associate the living Constitution with the Democratic party?* — A common assumption in court legitimacy literature is that diffuse support is based on principled, apolitical factors. One such factor is interpretive approaches (*specifically, if justices remain consistent with an interpretive approach across cases, the Court is viewed as a legitimate institution by the public*). My study attempts to affirm this truth; however, it challenges the notion that principled interpretive approaches are viewed as apolitical. I hypothesize that citizens possess a partisan perception of *originalism* and the *living Constitution*. If this proves accurate, then interpretive approaches as a portion of the Court's diffuse support are inherently political, meaning diffuse support, in part, must too be political. As outlined earlier, a previous study challenged conventional wisdom in the literature by showing that citizens can view the Court as political *and* legitimate so long as justices are principled rather than strategic in their decision-making (Caldeira and Gibson 2011). I attempt to unveil the same finding; however, my study contains a focus on interpretive approaches and goes a step further by determining what such a finding could indicate about the specific/diffuse support relationship, and ultimately, about the Court's institutional legitimacy.

## DATA AND METHODS

This research is based on a convenience sample from my college campus. It contained an online survey via Qualtrics that was distributed to students, faculty, staff, and other members affiliated with SUNY College at Brockport. There were a total of  $N = 144$  participants who took the survey between March 16, 2021 and April 9, 2021.

One significant portion of the survey regarded questions that asked respondents for their opinion on various Supreme Court decisions. There were five different judicial decisions outlined—two real, three hypothetical—that addressed five distinct legal topics. Each judicial decision question contained four responses for participants to select from; two responses indicated agreement with the judicial decision, while two indicated disagreement. The distinction between the two agreement and two disagreement responses concerned the interpretive reasoning utilized. Specifically, one contained originalist reasoning and the other contained reasoning from a living Constitution perspective. Essentially, each question contained one conservative/originalist response, one conservative/living Constitution response, one liberal/originalist response, and one liberal/living Constitution response. This is explained more clearly when I outline survey results in the next section.

Later in the survey, participants were asked to select their political view of the same five topics addressed in the judicial cases. Finally, respondents were asked to indicate their level of agreement for a few questions regarding interpretive approaches and Supreme Court legitimacy. The exact design and content of the survey questions is found in Appendix A. It is worth noting that my research regarding the Court's legitimacy is distinct from what is typical in the literature. Most survey studies that measure the Court's legitimacy do so by asking respondents questions such as the extent to which they trust the Court; respect the Court; find the institution to be fair;

how greatly they support eradicating the Court; how political they view the Court as being, etc. My study does not attempt to measure the Court's legitimacy as a whole. Rather, it in part focuses on one specific aspect of diffuse support which has been supported by previous research as comprising the way in which the public view the Court—the extent to which justices consistently apply judicial approaches in their decision making (Grove 2019).

Because the survey was distributed to a college community, the sample was not representative of the national average with respect to demographic information. The sample was significantly more educated, with exactly half of respondents possessing a college education relative to the national 31 percent average. There were slightly more women (60%) than the national average (51%). Moreover, there was an overrepresentation for young people between the ages of 18-24 (51% relative to the 12% national average) and an underrepresentation for all other age groups. Finally, the percentage of Democrats who took the survey (53%) was higher than the national average (31%); conversely, the number of Republicans (12%) was lower than the average (26%). Despite the sample not being nationally representative, it was largely representative of the population at SUNY Brockport and that of American colleges and universities more generally (Marcus 2019; Abt Associates 2019; Gallup 2021; Harvard Law Review 2014).

Interestingly, although the sample was not nationally representative concerning demographics, several findings were similar regarding preferred judicial approaches relative to the most recent Pew Research survey conducted in summer 2020. For example, in the Pew survey, 35 percent of Hispanic participants agreed more closely with originalism, while 62 percent did the living Constitution. Similarly, in my survey, 33 percent of Hispanics agreed more closely with originalism, while 67 percent did the living Constitution. Regarding race more

generally, the Pew survey results and my own show that the majority of citizens across all races support the living Constitution over originalism as a judicial approach to interpretation. Moreover, in the Pew survey, 67 percent of Republican participants agreed more closely with originalism, while 32 percent did the living Constitution. Similarly, in my survey, 65 percent of Republicans agreed more closely with originalism, while 35 percent did the living Constitution. Both surveys also contain results showing that the majority of Democratic participants agreed with the living Constitution approach over originalism. Finally, findings from both surveys show that the living Constitution is more strongly supported relative to originalism among younger people, as well as those with a college education (Hartig 2020).

#### POLITICS, INTERPRETIVE APPROACHES, AND SPECIFIC SUPPORT

- **Question:** Does only politics comprise specific support of the Supreme Court, or could there be more principled factors included such as approaches to interpreting the Constitution?
- **Background:** The current assumption is that specific support is based on politics, ideology, policy preferences, or a related type of political foundation. My study aims not only to affirm this, but to also determine whether average citizens use an additional, more complex set of criteria when assessing court decisions; specifically, do they also rely on a preferred interpretive method such as originalism or the living Constitution?
- **Hypothesis:** Conventional wisdom is correct in assuming that specific support contains a political tenor. Survey responses will prove this to be true. Moreover, they will show that

interpretive approaches are not used by average citizens to determine their agreement/disagreement with Supreme Court decisions.

To answer this question in the study, I determined how much politics AND interpretive methods play a role in citizens' view of Supreme Court case decisions. To discover to what extent politics contributes to the Court's specific support, I measured the frequency of respondents' consistently applying their political views to their opinion of judicial decisions. Similarly, to discover to what extent interpretive methods contribute to the Court's specific support, I measured the frequency of respondents' consistently applying their preferred interpretive approach to their opinion of judicial decisions.

### **Political Preferences in Specific Support**

There were five different judicial decisions outlined in the survey—two real, three hypothetical—that addressed five distinct legal topics; respondents were asked to indicate whether or not they agreed with each decision made by the Supreme Court. Later in the survey, participants were asked to select their political view of the same five topics addressed in the previously outlined cases. Below are the five judicial decisions included in the survey along with the political/legal views that correlate with each one.

1. Court decision:

The Supreme Court decides that flag burning is protected by the First Amendment's Free Speech Clause (occurred in *Texas v. Johnson (1989)*) — Respondents indicate whether they agree or disagree with the decision

Political/legal view:

“It should be illegal to burn an American flag” — Respondents indicate if they agree or disagree with this statement and also indicate whether their view is strong or moderate

2. Court decision:

The Supreme Court decides that abortion is guaranteed constitutional protection (occurred in *Roe v. Wade (1973)*) — Respondents indicate whether they agree or disagree with the decision

Political/legal view:

“I am politically pro-life” OR “I am politically pro-choice” — Respondents select the statement with which they agree and also indicate if their view is strong or moderate

3. Court decision:

The Supreme Court decides that former President Donald Trump’s impeachment trial was unconstitutional (hypothetical case) — Respondents indicate if they agree or disagree with the decision

Political/legal view:

“Donald Trump should NOT have been impeached for a second time” — Respondents select whether they agree or disagree with this statement and also indicate whether their view is strong or moderate

4. Court decision:

The Supreme Court decides that the death penalty violates the Eighth Amendment’s Cruel and Unusual Punishment Clause (hypothetical case) — Respondents indicate whether they agree or disagree with the decision

Political/legal view:

“I am politically pro-death penalty” OR “I am politically anti-death penalty” — Respondents select the statement with which they agree and also indicate whether their view is strong or moderate

5. Court decision:

The Supreme Court decides that semi-automatic weapons are guaranteed protection by

the Second Amendment (hypothetical case) — Respondents indicate whether they agree or disagree with the decision

Political/legal view:

“I would support restricting the sale of semi-automatic weapons” — Respondents select whether they agree or disagree with this statement and also indicate whether their view is strong or moderate

How respondents answered the previous questions, in part, shows that the majority of individuals’ political views line up with their constitutional views. For example, if a respondent selected that he agrees with the *Roe v. Wade* decision and then later on in the survey indicated that he is politically pro-choice, then his political and constitutional views are in sync with one another. The survey’s findings reveal that only a small number of individuals’ political preferences fail to match up with their constitutional views. Going back to the *Roe v. Wade* example, if one had agreed with the *Roe* decision but then classified himself as politically pro-life, this would demonstrate a disagreement between his political and constitutional view on abortion. Table 3 breaks down, by topic addressed in the five court cases, what percentage of people’s constitutional and political opinions were congruent and what percentage were conflicting. There are the aggregate percentages along with distinctions between those with liberal political preferences and those with conservative political preferences.



TABLE 3

*Percentage of Congruent Political & Constitutional Views Relative to Conflicting Political & Constitutional Views By Topic of Court Case*

Political - Constitutional View Relationship	Congruent	Conflicting
--	-----------	-------------

Overall

Trump's Impeachment Trial	94	6
Flag Burning	91	9
Capital Punishment	91	9
Abortion	89	11
Semi-Automatic Weapons	85	15

Among Those With Liberal Political Preferences

Liberal Constitutional View

Conservative Constitutional View

Trump's Impeachment Trial	97	3
Flag Burning	95	5
Capital Punishment	94	6
Abortion	94	6
Semi-Automatic Weapons	84	16

Among Those With Conservative Political Preferences

Conservative Constitutional View

Liberal Constitutional View

Trump's Impeachment Trial	76	24
Flag Burning	77	23
Capital Punishment	86	14
Abortion	64	36
Semi-Automatic Weapons	89	11

Interestingly, these findings indicate that relative to individuals with liberal political preferences, individuals with conservative political preferences are less likely to allow those preferences to dictate what is their constitutional opinion on the given topic. This suggests that liberals are more likely to allow their political views to determine the Court's specific support levels. The highest percentage of constitutional and political conflict among liberal responses was in regard to the semi-automatic weapon topic; 16 percent of those who supported restricting the sale of semi-automatic weapons simultaneously agreed with the hypothetical judicial decision to guarantee semi-automatic weapons constitutional protection. On the other hand, the highest percentage of constitutional and political conflict among conservative responses was in regard to abortion; 36 percent of those who selected that they were politically pro-life also claimed to agree with the *Roe v. Wade* decision. Another interesting observation is that the highest percentage of constitutional and political *congruence* among conservative responses was the highest percentage of constitutional and political *conflict* among liberal responses. This is concerning the semi-automatic weapons topic.

It is important to note that the number of respondents that possessed conservative political preferences for each topic was significantly lower than those with liberal political preferences. This is undoubtedly due to there being more liberals who took the survey relative to conservatives (77% to 23%). For instance, although 36 percent of pro-life respondents agreed with the *Roe* decision, there were only 25 pro-life respondents overall, meaning the 36 percent comprises a mere nine people total. This suggests that the sample size is too small to make accurately conclusive inferences.

No matter the problems that arise from a small sample size, the following is my most important finding: even when divided between conservative and liberal responses the results

largely demonstrate that political views/preferences *do* contribute to how citizens determine whether they agree or disagree with the Court's decisions, as the highest percentage of constitutional-political conflict overall was only 15 percent. In other words, these particular findings support current Supreme Court legitimacy literature that presupposes specific support to contain a political tenor.

### **Interpretive Approaches in Specific Support**

A question near the end of the survey read as follows:

Which of these two approaches to interpreting the U.S. Constitution do you believe is more legitimate?

- Originalism: interprets constitutional provisions based on what the people who adopted them understood them to mean
- Living Constitution: considers the Constitution an evolving document whose meaning changes over time and adapts to new circumstances

This is how I obtained the preferred approach of respondents. Recall the five outlined Supreme Court case decisions regarding the following topics: abortion, flag burning, capital punishment, semi-automatic weapons, and Trump's impeachment trial. Also recall that respondents were asked to indicate whether they agreed or disagreed with the Court's decision in each case. Each of the five Court decision questions contained four responses for survey participants to select from. Two responses indicated agreement with the judicial decision, while two indicated disagreement. The distinction between the two agreement and two disagreement responses regarded the interpretive reasoning utilized. Specifically, one contained originalist reasoning and

the other contained reasoning from a living Constitution perspective. Outlined is a loose example below:

Court decision explained to respondents. Respondents asked to select one of the following responses to indicate whether they agree or disagree with the Court’s decision.

1. Agree with decision (originalist reasoning applied for why there is agreement)
2. Agree with decision (living Constitution reasoning applied for why there is agreement)
3. Disagree with decision (originalist reasoning applied for why there is disagreement)
4. Disagree with decision (living Constitution reasoning applied for why there is disagreement)

Essentially, each question contained one conservative/originalist response, one conservative/living Constitution response, one liberal/originalist response, and one liberal/living Constitution response. Table 4 shows how consistent respondents were in selecting responses that utilized their preferred interpretive approach’s reasoning. The table shows what percentage of originalist supporters selected originalist responses across all five judicial decision questions relative to the percentage of living Constitution supporters who selected living Constitution responses across all five judicial decision questions.

TABLE 4

<i>Percentage of Originalist and Living Constitution Supporters By Percentage Who Were Consistent Versus Inconsistent With Choosing Responses that Contained Reasoning From Their Preferred Interpretive Approach</i>			
	Total	Consistent Applying Approach	Inconsistent Applying Approach
Originalist Supporters	19	0	100
Living Constitution Supporters	81	27	73

The findings in Table 4 show that the majority of respondents believed that the living Constitution approach to interpretation is more legitimate than an originalist approach (81%) while the minority thought originalism to be more legitimate than the living Constitution (19%). These results are not surprising since only 23 percent of conservatives took the survey relative to 77 percent of liberals; data from national surveys continuously show that originalism is more popular among conservatives, as the living Constitution is among liberals (Hartig 2020).

Noteworthy from the data is that no originalist supporters were able to remain consistent with selecting originalist responses across the five judicial decision questions. This means that all 19 percent of originalist supporters selected at least one living Constitution response when choosing why they agreed or disagreed with the Court's decisions. Similarly, the majority (73%) of living Constitution supporters in the survey were inconsistent with selecting living Constitution responses. Only 27 percent of living Constitution supporters selected all living Constitution responses when indicating whether they agreed or disagreed with each of the five Supreme Court case decisions. Table 5 breaks down approach consistency by case among living Constitution and originalist supporters that took the survey.

TABLE 5

<i>Topic Addressed in Court Case By Percentage of Individuals That Selected Responses From Their Preferred Interpretive Approach To Justify Agreement/Disagreement With the Court's Decision</i>		
Was Preferred Approach Applied in Respondents' View of the Court's Decision?	YES	NO
Originalism		
Capital Punishment Case	24	76
Abortion Case	28	72
Trump's Impeachment Trial Case	38	62
Flag Burning Case	65	35
Semi-Automatic Weapon Case	54	46
Living Constitution		
Capital Punishment Case	89	11
Abortion Case	87	13
Trump's Impeachment Trial Case	71	29
Flag Burning Case	63	37
Semi-Automatic Weapon Case	65	35

The findings in Table 5 show that a majority of living Constitution adherents selected a response that contained living Constitution reasoning for each judicial decision question, while a minority of originalist adherents selected a response that outlined originalist reasoning with the exception of the flag burning and semi-automatic weapon cases. Recall, since 27 percent of living Constitution respondents were wholly consistent in selecting living Constitution responses, and no originalists were consistent in selecting originalist responses, this means that only 23 percent of all people who took the survey were consistent with a judicial approach. This

suggests that citizens do *not* use a principled interpretive approach to determine their agreement with individual judicial decisions.

The distinct results between originalist and living Constitution responses does not indicate that living Constitution adherents are more likely to utilize their preferred approach in determining their performance satisfaction of the Court so much as it does that a living Constitution approach is simpler for all citizens to conform their political preferences to regarding certain legal topics. This is clear in the manner that the data work out by case topic. Specifically, the abortion and capital punishment cases garnered a higher percentage of living Constitution responses relative to the gun control and flag burning cases, which attracted more originalist responses. This may be because abortion and capital punishment are not explicitly mentioned in the text, thus it is more difficult to utilize originalist reasoning to support one's position on the issues. On the other hand, the right to *keep and bear arms* as well as freedom of expression are more clearly outlined in the Constitution, therefore, they are easier topics for the use of originalist reasoning.

No matter the case, the key conclusion from this aspect of the study is that citizens largely do not consistently apply originalism and the living Constitution to their opinion of judicial decisions; this means that these interpretive methods are not factors in the Supreme Court's specific support.

## POLITICS, INTERPRETIVE APPROACHES, AND DIFFUSE SUPPORT

- **Question:** Do interpretive approaches play a role in the diffuse support of the Supreme Court? If so, are these approaches politicized in the public mind? More specifically, do citizens associate originalism with the Republican party and/or do they associate the living Constitution with the Democratic party?
- **Background:** A common assumption in court legitimacy literature is that diffuse support is based on principled, apolitical factors. One such factor is interpretive approaches (specifically, if justices remain consistent with an interpretive approach across cases, the Court is viewed as a legitimate institution by the public). My study attempts to affirm this truth; however, it challenges the notion that principled interpretive approaches are viewed as apolitical.
- **Hypothesis:** Citizens possess a partisan perception of originalism and the living Constitution while simultaneously believing the approaches confer legitimacy to the Court. If this proves accurate, then interpretive approaches as a portion of the Court's diffuse support are inherently political, meaning diffuse support must too, in part, be political.



One question in my survey directly asked respondents to indicate their level of agreement with the following statement:

*The Supreme Court gains legitimacy when justices follow a principled approach to interpreting the U.S. Constitution.*<sup>4</sup>

Questions prior to this defined originalism and the living Constitution as examples of principled interpretive approaches. Quite plainly, interpretive approaches *do* contribute to the Court's diffuse support if respondents agreed with the statement above; conversely, approaches *do not* contribute if respondents disagreed with the statement.

In the survey, 88 percent of respondents agreed with the statement, while only 12 percent disagreed. This means that the majority of individuals believe interpretive approaches, in part, play a role in whether they view the Court as a legitimate institution. This finding is supported by previous research and is not remarkable in itself (Fallon 2018). Interesting implications are instead drawn by determining how respondents perceive interpretive approaches. Specifically, do they view them through a political or objective lens? Below are the last two questions outlined in the survey, from which respondents indicated their level of agreement:

- *If a judge is an originalist, this means that their decisions appeal to Republicans*
- *If a judge is a living constitutionalist, this means that their decisions appeal to Democrats*

---

<sup>4</sup> Past research has supported the notion that the Court gains legitimacy when justices consistently follow an interpretive approach. I do not have the word *consistently* incorporated into this statement however, it is meant to be implied.

Overall, about half of respondents agreed with these two statements. Table 6 outlines what percentage of respondents associated originalism with the Republican party and the living Constitution with the Democratic party. It is broken down by those who agreed that interpretive approaches play a role in the Court’s diffuse support relative to those who disagreed.

TABLE 6

<i>Respondents' View of Whether Interpretive Approaches Grant Legitimacy By Respondents' View of Whether Interpretive Approaches Are Politicized</i>		
	Agree	Disagree
Judicial Approaches Contribute to Court's Legitimacy	88	12
Associates Originalism with Republican Party		
Yes	55	53
No	24	35
Unsure	21	12
Associates Living Constitution with Democratic Party		
Yes	50	53
No	27	41
Unsure	23	6

Again, the majority of people who took this survey agreed that the Court gains legitimacy when justices utilize either an originalist or living Constitution approach when interpreting constitutional provisions. Half of that majority simultaneously agreed that an originalist judge makes decisions that appeal to Republicans and/or a living constitutionalist judge makes decisions that appeal to Democrats. If convention deems the Court legitimate due to its principled and objective manner then why would one believe the institution gains legitimacy

when its members abide by approaches that lead to alleged partisan outcomes? My survey does not answer this question directly; however, we can recall the Caldeira and Gibson study that challenged conventional wisdom in the literature by showing that citizens are capable of viewing the Court as political *and* legitimate so long as justices are principled rather than strategic in their decision-making. In not so many words, the myth of legality is largely untrue, as citizens who believe that justices are influenced by political preferences can simultaneously view the Court as legitimate (Caldeira and Gibson 2011). Such logic can be applied to my own findings by suggesting respondents that participated in the study believe the Court is legitimate so long as justices follow interpretive approaches; whether the approaches are associated with certain political parties does not matter, as it does not appear to affect the way in which the public measure the Court's legitimacy. This would explain why a notable number of individuals found that justices' ability to follow interpretive approaches contributes to the Court's institutional legitimacy despite the approaches' connotations with politics. But what does such an implication suggest about the Court's specific-diffuse support relationship?

### **The Impact of Politicized Interpretive Approaches on the Specific-Diffuse Support Relationship**

Imagine that the Supreme Court unanimously ruled that semi-automatic weapons are not guaranteed protection by the Second Amendment. Suppose an originalist justice writes the opinion for the Court using originalist reasoning by saying, in part, that semi-automatic weapons are not lineage to the types of weapons that existed at the time the Second Amendment was ratified. For this reason, they should not be guaranteed protection by the Amendment today.

The interesting part of this case is that it has a politically liberal outcome since most liberals are not strong supporters of the Second Amendment; however, it contains originalist reasoning, and originalism is a judicially conservative approach. The problem here is that a conservative, pro-Second Amendment citizen may not view originalism as solely *judicially* conservative but also *politically* conservative. Thus, if such a citizen opposes the Court's decision, the only way he might continue to view the Court as a legitimate institution is if he believes the justices remained faithful to their preferred interpretive approach in their decision making in the case. But assume this particular citizen thinks that an originalist judge makes decisions that appeal to the Republican agenda. Since in this case an originalist justice made a decision that does not do this, the citizen may believe that the justice did not remain faithful to their approach. This is because of his belief that the only way in which originalism is used properly is if it produces an outcome that appeals to his conservative policy preferences. This could also work the other way around regarding a liberal's reaction to a living Constitution judge that makes a conservative decision.

If all this is accurate, then the fifty percent of people who view originalism and the living Constitution in a partisan manner may allow their satisfaction with the Court's individual decisions to directly influence how legitimate they think the Court is as an institution overall. Such a scenario directly contradicts conventional wisdom in court legitimacy literature which claims that performance satisfaction does *not* influence the Court's institutional legitimacy. My overall finding supports the notion that the Court can be viewed as legitimate so long as it is seen as principled. This is shown by the many respondents who viewed the approaches as politicized, while simultaneously agreeing that those approaches provide the Court with legitimacy when utilized by justices; however, the finding also demonstrates the subsequent danger that such

poses to the Court's legitimacy as outlined in the example above. A clearer demonstration of this danger is below in the form of an example that outlines some of the public's possible reasoning in a simplified fashion:

*An originalist judge makes conservative decisions that appeal to the Republican agenda, therefore, if an originalist judge makes a liberal decision then he must not be using originalist reasoning. If an originalist judge is not using originalist reasoning, then he is not following his preferred interpretive approach. This makes his decision illegitimate, thus causing the Court to lose legitimacy.*

### **Conversely**

*A living constitutionalist judge makes liberal decisions that appeal to the Democratic agenda, therefore, if a living constitutionalist judge makes a conservative decision, then he must not be using living constitutionalist reasoning. If a living constitutionalist judge is not using living constitutionalist reasoning, then he is not following his preferred interpretive approach. This makes his decision illegitimate, thus causing the Court to lose legitimacy.*

Essentially, my findings suggest a direct and simultaneous relationship between the Court's specific and diffuse support in certain scenarios such as shown in the earlier Second Amendment example, but they do not do so in the same manner as recent studies have. For instance, Bartels' and Johnstons' study showed a relationship between specific and diffuse support by both types of support being influenced by political preferences. Specifically, a citizen

may disagree with a judicial decision due to it conflicting with his political views, and as a result, consider the Court a less legitimate institution. My study does not claim that performance satisfaction is the foundation of both specific and diffuse support, thus showing a clear relationship between the two. Instead, it suggests that the principled factors that comprise diffuse support are politicized themselves. Judicial interpretive methodologies are not innately political nor related to the policy preferences of the public; rather, they are associated with partisan outcomes. An individual decision of the Court may influence the way in which the public view the Court's legitimacy if the public wrongly believe that justices with certain judicial approaches or philosophies must satisfy a particular political agenda. Ultimately, diffuse support may contain a partially political basis, therefore, making way for a possibly strong specific-diffuse support relationship.

### CONCLUDING THOUGHTS

Everyone is an expert when it comes to the U.S. Constitution—at least that is how it seems in American society. Conservative gun owners in Western NY proclaim the SAFE Act a Second Amendment violation, while liberal activists deem NFL officials constitutionally restricted in whom they can fire, but in what manner are citizens interpreting constitutional provisions to draw these conclusions? This study, by focusing on interpretive approaches—namely, originalism and the living Constitution—showed that citizens largely do not utilize a form of constitutional interpretation to determine the constitutionality of specific issues. Study participants were inconsistent in applying a broad interpretive method to their opinions of Supreme Court decisions that dealt with the issues of abortion, impeachment, gun control, flag burning, and capital punishment. Participants were, however, exceedingly consistent

in applying their ideological view of the issues to their opinions of the judicial decisions. This means that political preferences comprise the Supreme Court's specific support, while the principled factor of interpretive approaches does not. It would be interesting for future research to study if there are other forms of legal reasoning that *do* contribute to citizens' constitutional views of judicial decisions. Until then, the conservative gun owners and liberal activists may not be the constitutional experts that they seem to think they are.

As for the study's diffuse support results, the vast majority of citizens in the survey agreed that the Supreme Court gains legitimacy when justices make their decisions by following originalist or living constitutionalist approaches to interpreting the Constitution. A slight majority of those same respondents also agreed that an originalist judge makes decisions that appeal to Republicans, while a living constitutionalist judge makes decisions that appeal to Democrats. This means that a factor of the Court's diffuse support (the justices' ability to follow an interpretive approach) is politicized, as it contains partisan connections in the public mind. If this is applicable to the majority of the American public, then individual citizens may allow their opinion of Supreme Court decisions (specific support) to directly influence the way in which they view the Court's institutional legitimacy (diffuse support).

Interestingly, the notion that conservative judicial approaches are associated with conservative political preferences has already unveiled its problems. In *Bostock v. Clayton County* (2020), Justice Neil Gorsuch employed textualism in upholding that L.G.B.T.Q. workers are protected by a landmark federal civil rights law—a decision that appealed to liberals and infuriated conservatives. The question remains of whether “conservatives want a justice who will follow the judicial method favored by conservatives” or if “they want a justice who uses all the tools available to reach conservative policy results?” (Liptak 2020).

With all of this stated, I must acknowledge that my findings, particularly from the diffuse support results, are not intended to produce a definitive conclusion on Supreme Court legitimacy. Rather, they are intended to demonstrate flaws in current legitimacy research that may contribute to ongoing debates in the literature. Addressing such flaws in future studies is what I hope my own research to prompt.

I recognize that interpretive approaches are merely one of many possible factors that contribute to the way in which the public view the Court. This means that even if *originalism* and the *living Constitution* are politicized in the public mind, such only demonstrates that one aspect of the Court's diffuse support contains a political tenor. There are likely other elements of diffuse support that are objective in nature, thus ensuring that the Court's legitimacy is not premised on a purely political foundation. This brings me to a more detailed explanation of why this research might then matter in the first place.

Among other factors, current literature on court legitimacy acknowledges that justices' ability to consistently follow principled approaches to interpreting the U.S. Constitution comprises the Court's diffuse support. What is lacking in previous and ongoing studies is not *what* factors comprise diffuse support but *how* such factors are perceived by the public. Although my own study focused on a very specific type of judicial decision-making—interpretive approaches—there are many additional and related forms of legal reasoning that are yet to be examined regarding the way in which the public understand their usage. Such legal reasoning includes that which is based on other related theories such as formalism or legal realism; deductive reasoning; or reasoning based on precedent (Ellsworth 2005; Lamond 2016). Exploring this realm can provide further insight into the often contested myth of legality, and



more importantly, contribute to the currently disputed topic of the Court's specific-diffuse support relationship.

Moreover, although much quantitative work has been conducted as a way to better understand public opinion on the Court, a qualitative perspective of this type of research would also prove worthwhile. Survey responses are limited in discovering how the public perceive the Court. Questions included in survey studies are often guided in a manner that does not reveal respondents' authentic view of the Court. For example, in my own study, respondents were asked to indicate whether they agreed that the Supreme Court gains legitimacy when justices follow principled interpretive approaches. Many individuals who did agree with this statement would likely not have suggested interpretive approaches if explicitly asked how they measure the Court's legitimacy. Conversing with a variety of citizens on these kinds of topics—if, why, and how they view the Court as legitimate—would garner more valuable information concerning the Court's diffuse support than is possible through aggregate data from a quantitative based study.

In not so many words, my study uses empirical data to suggest that the way in which the public perceive factors of diffuse support may determine the relationship between the Court's performance satisfaction and the Court's legitimacy. Although my study contained a narrow scope, it prompts future research to examine the public opinion-Supreme Court relationship in a more extensive manner than exists in current literature on the topic. Better understanding the way in which factors of diffuse support are perceived by the public will allow scholars to obtain greater knowledge of the way in which the public perceive the Court more generally. By skipping to the latter, we miss out on valuable information that may explain ongoing debates on the specific-diffuse support relationship.

## LIST OF REFERENCES

- Abt Associates (2019). March 2019 Political Survey Methodology Report. *Pew Research Center*. pp. 5. <file:///media/archive/Mar19-public.zip/Mar19%20Methodology.pdf>.
- Anderson, H. Jeffrey (2012). Exposing the ‘Living Constitution’ View. *Washington Examiner*. para. 3. [www.washingtonexaminer.com/weekly-standard/exposing-the-living-constitution-view](http://www.washingtonexaminer.com/weekly-standard/exposing-the-living-constitution-view).
- Annenberg Public Policy Center (2019). Most Americans Trust the Supreme Court, but Think it is too ‘Mixed up in Politics.’ *Cision PR Newswire*. [www.prnewswire.com/news-releases/most-americans-trust-the-supreme-court-but-think-it-is-too-mixed-up-in-politics-300939726.html](http://www.prnewswire.com/news-releases/most-americans-trust-the-supreme-court-but-think-it-is-too-mixed-up-in-politics-300939726.html).
- Bartels, Brandon and Christopher Johnston (2012). On the Ideological Foundations of Supreme Court Legitimacy in the American Public. *American Journal of Political Science*. [onlinelibrary.wiley.com/doi/abs/10.1111/j.1540-5907.2012.00616.x](http://onlinelibrary.wiley.com/doi/abs/10.1111/j.1540-5907.2012.00616.x).
- Barber, A. Sotirios and James E. Fleming (2007). Constitutional Interpretation: The Basic Questions. *Oxford University Press*.
- Barnett, Randy (2017). Presenting a ‘Unified’ Theory of Originalism. *Stanford Law from the Washington Post*. para. 3. [law.stanford.edu/press/presenting-unified-theory-originalism/](http://law.stanford.edu/press/presenting-unified-theory-originalism/).
- Bialik, Kristen (2018). Growing Share of Americans Now Say Supreme Court Should Base its Rulings on What Constitution Means Today. *Pew Research Center*. [www.pewresearch.org/fact-tank/2018/05/11/growing-share-of-americans-say-supreme-court-should-base-its-rulings-on-what-constitution-means-today/](http://www.pewresearch.org/fact-tank/2018/05/11/growing-share-of-americans-say-supreme-court-should-base-its-rulings-on-what-constitution-means-today/).
- Caldeira, Gregory and James Gibson (2011). Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court? *Law, Society, and Review*. [onlinelibrary.wiley.com/doi/abs/10.1111/j.1540-5893.2011.00432.x](http://onlinelibrary.wiley.com/doi/abs/10.1111/j.1540-5893.2011.00432.x).
- Caldeira, Gregory and James Gibson (1992). The Etiology of Public Support for the Supreme Court. *The American Journal of Political Science*. [www.jstor.org/stable/2111585](http://www.jstor.org/stable/2111585).
- Chawawa, Morgan (2019). The United States Constitution and the Bible: Conflict or Compromise. *WestBow Press*.
- The Clinton Foundation (2019). 5 Inspiring Quotes from Justices Ruth Bader Ginsburg’s Lecture in Little Rock, Arkansas. *Medium*. para. 6.

stories.clintonfoundation.org/five-inspiring-quotes-from-justice-ruth-bader-ginsburgs-lecture-in-little-rock-arkansas-5b034176e485.

Ellsworth, C. Phoebe (2005). Legal Reasoning. *The Cambridge Handbook of Thinking and Reasoning*. repository.law.umich.edu/book\_chapters/51/.

Enns, Peter and Patrick Wohlfarth (2017). Making Sense of the Supreme Court-Public Opinion Relationship. *University of Maryland Department of Government and Politics*. gvpt.umd.edu/publicationprofile/1564.

Gallup (2021). Party Affiliation. 2021 Apr 1-21. news.gallup.com/poll/15370/party-affiliation.aspx

Gibson, James and Michael Nelson (2014). The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms, and Recent Challenges Thereto. *Annual Review of Law and Social Science*. www.annualreviews.org/doi/abs/10.1146/annurev-lawsocsci-110413-030546.

Gramlich, John (2020). 5 Facts About the Supreme Court. *Pew Research Center*. para. 4–7. www.pewresearch.org/fact-tank/2020/10/05/5-facts-about-the-supreme-court/.

Grove, Tara (2019). The Supreme Court’s Legitimacy Dilemma. *Harvard Law Review*. harvardlawreview.org/2019/06/the-supreme-courts-legitimacy-dilemma/.

Hartig, Hannah (2020). Before Ginsburg’s Death, a Majority of Americans Viewed the Supreme Court as Middle of the Road. *Pew Research Center*. www.pewresearch.org/fact-tank/2020/09/25/before-ginsburgs-death-a-majority-of-americans-viewed-the-supreme-court-as-middle-of-the-road/.

Harvard Political Review (2014). Just How Liberal Are College Students? para. harvardpolitics.com/just-liberal-college-students/.

Justia U.S. Law (2021). Judicial Review. Chief Justice John Marshall. para. 6. law.justia.com/constitution/us/article-3/23-judicial-review.html.

Justia U.S. Law (2021). South Carolina v. United States, 199 U.S. 437 (1905) Opinion. para. 4. supreme.justia.com/cases/federal/us/199/437/.

Kiley, Jocelyn (2014). Americans Divided on how the Supreme Court Should Interpret the Constitution. *Pew Research Center*.

[www.pewresearch.org/fact-tank/2014/07/31/americans-divided-on-how-the-supreme-court-should-interpret-the-constitution/](http://www.pewresearch.org/fact-tank/2014/07/31/americans-divided-on-how-the-supreme-court-should-interpret-the-constitution/).

Lamond, Grant (2016). Precedent and Analogy in Legal Reasoning. *The Stanford Encyclopedia of Philosophy*. plato.stanford.edu/archives/spr2016/entries/legal-reas-prec/.

Law and Liberty (2017). Original Methods Originalism is Public Meaning Originalism. *Liberty Fund Network*. lawliberty.org/original-methods-originalism-is-public-meaning-originalism/.

Liptak, Adam (2020). In a Term Full of Major Cases, the Supreme Court Tacked to the Center. *New York Times*. www.nytimes.com/2020/07/10/us/supreme-court-term.html.

Marcus, Jon (2019). The Degrees of Separation Between the Genders in College Keep Growing. *The Washington Post*. para. 5–6.  
[www.washingtonpost.com/local/education/the-degrees-of-separation-between-the-genders-in-college-keeps-growing/2019/10/25/8b2e5094-f2ab-11e9-89eb-ec56cd414732\\_story.html](http://www.washingtonpost.com/local/education/the-degrees-of-separation-between-the-genders-in-college-keeps-growing/2019/10/25/8b2e5094-f2ab-11e9-89eb-ec56cd414732_story.html).

Millhiser, Ian (2020). Originalism, Amy Coney Barrett’s Approach to the Constitution, Explained. *Vox*. para. 12–13.  
[www.vox.com/21497317/originalism-amy-coney-barrett-constitution-supreme-court](http://www.vox.com/21497317/originalism-amy-coney-barrett-constitution-supreme-court).

Patel, Ushma (2012). Scalia Favors ‘Enduring’ not ‘Living’ Constitution. *Princeton University*. para. 9-15.  
[www.princeton.edu/news/2012/12/11/scalia-favors-enduring-not-living-constitution](http://www.princeton.edu/news/2012/12/11/scalia-favors-enduring-not-living-constitution).

Paulsen Stokes, Michael (2015). Citizens, Unite! Part Two of Your Constitutional Premier. *The Journal of the Witherspoon Institute*. para. 17. [www.thepublicdiscourse.com/2015/05/15016/](http://www.thepublicdiscourse.com/2015/05/15016/).

Raban, Ofer (2020). The Silent Prologue: How Judicial Philosophies Shape Our Constitutional Rights. *George Mason University Press*.

Segall, Eric (2017). Judicial Engagement, New Originalism, and the Fortieth Anniversary of ‘Government by the Judiciary.’ *Fordham Law Review*. pp. 2–5.  
[papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3066764](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3066764).

Smith, Samantha (2017). Americans Remain Divided on how the Supreme Court Should Interpret the Constitution. *Pew Research Center*.  
[www.pewresearch.org/fact-tank/2017/04/06/americans-remain-divided-on-how-the-supreme-court-should-interpret-the-constitution/](http://www.pewresearch.org/fact-tank/2017/04/06/americans-remain-divided-on-how-the-supreme-court-should-interpret-the-constitution/).

- Stanglin, Doug (2018). Kagan, Sotomayor: Viewing the Supreme Court as Politically Divided Hurts its Legitimacy. *USA Today*. para. 4.  
[www.wvltv.com/amp/article/news/nation-world/kagan-sotomayor-viewing-the-supreme-court-as-politically-divided-hurts-its-legitimacy/507-601543541](http://www.wvltv.com/amp/article/news/nation-world/kagan-sotomayor-viewing-the-supreme-court-as-politically-divided-hurts-its-legitimacy/507-601543541).
- Strauss, A. David (2010). *The Living Constitution*. Oxford University Press.
- Swanson, A. Rick (2007). The Dynamics of Specific and Diffuse Support for the U.S. Supreme Court: A Panel Study. *Social Science Journal*. Abstract. DOI:10.1016/j.soscij.2007.10.014.
- Toobin, Jeffrey (2007). *The Nine: Inside the Secret World of the Supreme Court*. Anchor Press.
- Wurman, Ilan (2020). What is Originalism? Debunking the Myths. *The Conversation*. para. 12–14. [theconversation.com/what-is-originalism-debunking-the-myths-148488](https://theconversation.com/what-is-originalism-debunking-the-myths-148488).

## APPENDIX A — SURVEY QUESTIONS

In *Texas v. Johnson* (1989) the Supreme Court ruled that burning the American flag is protected by the First Amendment's Free Speech Clause. Do you agree with the Court's decision?

- Yes; flag burning is symbolic speech which is fundamentally protected by the Constitution and the Founding Fathers' efforts to create a government not ruled by tyranny.
- Yes; flag burning should be constitutional according to today's meaning of the term free speech which protects not only verbal but also symbolic speech.
- No; today, the American flag's unique status as a symbol of national unity outweighs symbolic speech concerns, therefore, the government should be permitted to constitutionally prohibit flag burning.
- No; flag burning should not be protected as free speech because documented debates from 1791 indicate that the First Amendment was not written to protect nonverbal speech.

In *Roe v. Wade* (1973) the Supreme Court ruled that a woman's right to choose abortion is constitutionally protected. Do you agree with the Court's decision?

- Yes; abortion was a common and legal practice at the time the Constitution was written in 1787, therefore, abortion should be protected by the document today.
- No; modern medical findings show that a fetus is a person, therefore, abortion infringes on the equal protection of an unborn person and violates the Fourteenth Amendment's Equal Protection Clause.
- No; the framers did not write any provisions regarding abortion in the U.S. Constitution, therefore, a woman's right to choose abortion should not be guaranteed protection by the document.
- Yes; today the Fourteenth Amendment's Due Process Clause should be interpreted as guaranteeing the right to privacy, which includes that of women's right to choose.

Imagine that the Supreme Court ruled the death penalty violates the Eighth Amendment's Cruel and Unusual Punishment Clause. Would you agree with the Court's decision?

- Yes; capital punishment is cruel and unusual according to modern-day standards, therefore, it violates the Eighth Amendment's Cruel and Unusual Punishment Clause.

- Yes; several of the Eighth Amendment’s framers are documented as opposing the death penalty, therefore, the death penalty should be deemed in violation of the Cruel and Unusual Punishment Clause.
- No; capital punishment is NOT cruel and unusual according to modern-day standards, therefore, it does not violate the Eighth Amendment’s Cruel and Unusual Punishment Clause.
- No; the death penalty was a common and legal practice at the time the Eighth Amendment was written in 1791, therefore, the death penalty should not be deemed in violation of the Cruel and Unusual Punishment Clause.

Imagine that the Supreme Court ruled semi-automatic weapons are guaranteed protection by the Second Amendment’s right to “keep and bear arms.” Would you agree with the Court’s decision?

- Yes; the Second Amendment protects the types of weapons in “common use of the time.” Since semi-automatic weapons are a type of firearm commonly used among citizens today, they ought to be protected by the Second Amendment.
- Yes; the framers of the Second Amendment did not intend for specific weapons to be excluded from an individual citizen’s right to “keep and bear arms.”
- No; semi-automatic weapons did not exist at the time the Second Amendment was ratified in 1791, therefore, they do not need to be included as part of citizens’ right to “keep and bear arms.”
- No; semi-automatic weapons are commonly used in violent disputes, and once certain types of weapons prove to be a significant danger to the public they should not be protected by the Second Amendment.

Imagine that the Supreme Court ruled former President Donald Trump’s recent impeachment trial was unconstitutional. Would you agree with the Court’s decision?

- Yes; no former government officials in recent times have been tried for impeachment as private citizens, therefore, Trump’s impeachment trial should have been deemed unconstitutional.
- Yes; the framers of the Constitution did not state that former government officials can be impeached, therefore, Trump’s impeachment trial should have been deemed unconstitutional.
- No; the framers of the Constitution did not exclude former government officials from impeachment, therefore, Trump’s impeachment trial should be considered constitutional.

- No; contemporary legal scholars agree that presidents who commit misconduct late in their terms are not immune from impeachment, therefore, Trump's impeachment trial should be considered constitutional.

#### DEMOGRAPHIC QUESTIONS HERE

Are you politically pro-life or pro-choice?

- Strongly pro-choice
- Moderately pro-choice
- Moderately pro-life
- Strongly pro-life

Are you politically pro or anti-death penalty?

- Strongly pro-death penalty
- Moderately pro-death penalty
- Moderately anti-death penalty
- Strongly anti-death penalty

Please indicate your level of agreement with the following statements.

I would support legislation restricting the sale of semi-automatic weapons.

- Strongly agree
- Agree
- Disagree
- Strongly Disagree

It should be illegal to burn an American flag.

- Strongly Agree
- Agree
- Disagree
- Strongly Disagree

Donald Trump should NOT have been impeached for a second time.



- Strongly Agree
- Agree
- Disagree
- Strongly Disagree

The following 5 questions ask for your opinion on constitutional interpretation and the decision making of the Supreme Court.

Which of these two approaches to interpreting the U.S. Constitution do you believe is more legitimate?

- **Originalism**: interprets constitutional provisions based on what the people who adopted them understood them to mean
- **Living Constitution**: considers the Constitution an evolving document whose meaning changes over time and adapts to new circumstances

Please indicate your level of agreement.

The Supreme Court gains legitimacy when justices follow a principled approach to interpreting the U.S. Constitution.

- Strongly Agree
- Agree
- Disagree
- Strongly Disagree

Please indicate your level of agreement with the following statements.

If a judge is an originalist, this means that their decisions appeal to Republicans.

- Strongly Agree
- Agree
- Disagree
- Strongly Disagree
- Unsure

If a judge is a living constitutionalist, this means that their decisions appeal to Democrats.

- Strongly Agree
- Agree
- Disagree
- Strongly Disagree
- Unsure

