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Keeping up Appearances: Non-Policy Court Responses to Public Opinion

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ABSTRACT



Existing studies of Supreme Court behavior largely have focused on the Court's policy responses to non-judicial institutions. Recognizing the Court's need to maintain its institutional legitimacy, we examine whether Supreme Court justices respond to public opinion in a non-policy setting: the State of the Union address. We find that public confidence in the Supreme Court has an effect on justices' decisions to attend the address, but that ideological factors play less of a role. These findings suggest that Supreme Court justices respond to public pressure in ways beyond their role as arbiters of legal questions on the bench.

KEYWORDS

Supreme Court; separation of powers; judicial behavior; legitimacy

From John Marshall's adroit political maneuvering in *Marbury v. Madison* to Owen Roberts's famed "switch in time that saved nine," scholars have long recognized that the Supreme Court cares about its perception among Congress and the president and works to maintain its institutional support among the public. Beginning with the work of Murphy (1964), strategic conceptions of judicial action on the Supreme Court have posited justices as strategic actors who attempt to transform their policy preferences into law while operating within a system of constraints. However, existing studies of the Court's strategic reactions to Congress, the president, and the public largely have focused on the Court's policy-oriented activities, that is, Court actions shaping law and establishing legal precedent such as the Court's case selection, its merits decisions, and the opinion-writing process. For example, judicial scholars have examined internal constraints on the Court's policy decisions, such as the certiorari process (Perry 1991), the politics of the opinion process (Epstein and Knight 1997), and the dynamics of opinion coalition formation (Maltzman, Spriggs, and Wahlbeck 2000). The Court also is constrained by the potential for backlash from the "political branches" when they are out of step with public opinion through such actions as court-curbing legislation, executive noncompliance, or congressional overrides of legislation (Clark 2010; Eskridge 1991; Epstein and Knight 1997) and is responsive to public opinion when issuing decisions (McGuire and Stimson 2004).

In contrast to the literature's focus on policy-oriented areas of Court action, we assert that the strategic behavior of Supreme Court justices in response to perceived public approval and the actions of the elected branches is not confined to their policy decisions and that justices have incentives to engage in strategic action in non-policy settings. Unelected, the Supreme Court is ever cognizant of its need to maintain legitimacy in the eyes of the public. However, given the mystique built around the Court and its typically camera-shy justices, opportunities to engage in non-policy reactions are limited. With the elusive nature of the Supreme Court in mind, this article tests whether the Court responds to public approval in a non-policy manner by examining the decision of Supreme Court justices to attend the State of the Union address. As the only regularly scheduled political event in which members of the

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Supreme Court appear on television, we use insights from strategic conceptions of judicial behavior and the theory of positivity bias to argue that the State of the Union presents a unique opportunity for members of the Supreme Court to remind the public—and the other branches—of the role of the judiciary in the United States' system of separation of powers with checks and balances.

We first explore the history of judicial attendance at the State of the Union and consider the decline of an institutional norm of attendance among the justices. We then articulate the relationship between public opinion and the Court, situating justices' decisions to attend the State of the Union within the strategic interaction, positivity bias, and judicial audience perspective frameworks, focusing specifically on how public opinion constrains the Court. Finally, we detail the data and methods employed and evaluate justices' decisions to attend the State of Union by pitting theories of strategic interaction against ideological explanations.

Justice Attendance at the State of the Union Address

I think it's very, very, very important ... for us to show up at that State of the Union, because people today, as you know, are more and more visual. I'd like them to read, but they are visual. And what they see in front of them in that State of the Union is the federal government, every part—the president, the Congress, the cabinet, the military, and I would like them to see the judges, too, because federal judges are also part of that government. And I want to be there. —Justice Stephen Breyer¹

As suggested by Justice Stephen Breyer, some justices feel that attending the State of the Union is of the utmost importance. However, this view is not universal among the justices. For example, Justice Antonin Scalia called the State of the Union “a childish spectacle,”² and Justice Clarence Thomas remarked that he no longer attends “because it has become so partisan and it's very uncomfortable for a judge to sit there.”³ Even Chief Justice Roberts laments that the State of the Union has become “a political pep rally.”⁴ The uncomfortable nature of the State of the Union was made readily apparent when Justice Samuel Alito appeared to break judicial decorum⁵ by mouthing “not true” in response to President Obama's denouncement of the Court's decision in *Citizens United v. Federal Elections Commission*⁶ as a reversal of “a century of law that I believe will open the floodgates for special interests, including foreign corporations, to spend without limit in our elections.”⁷ Alito has not attended the event since this incident. Nevertheless, despite these sentiments, a majority of the justices have attended the address in every year since Alito's action. Six justices attended in 2011, 2013,⁸ 2015,⁹ and 2016, and five attended in 2012¹⁰ and 2014.¹¹ For all of his apparent distaste for the partisan nature of the address, Chief Justice Roberts has never missed an address.

¹Lee Ross, *Supreme Court Justices Could Be No-Shows for Obama's State of the Union Address*, foxnews.com (January 24, 2011), <http://www.foxnews.com/politics/2011/01/24/chief-justice-state-union-alito-begs/>.

²Scalia is quoted in Jessica Hill, *Scalia: State of the Union "Has Turned into a Childish Spectacle."* CBS News (February 13, 2013), <http://www.cbsnews.com/news/scalia-state-of-the-union-has-turned-into-a-childish-spectacle/>.

³Thomas was speaking to students at Stetson University College of Law. Quoted from Stephanie Condon, *Clarence Thomas: State of the Union Too Partisan for a Justice*, CBS News (Feb. 4, 2010), <http://www.cbsnews.com/news/clarence-thomas-state-of-the-union-too-partisan-for-a-justice/>.

⁴Roberts stated that: “To the extent the State of the Union has degenerated into a political pep rally, I'm not sure why we're there.” Quoted in Bill Mears, “Chief Justice Chides State of the Union as ‘Political Pep Rally.’” CNN (March 11, 2010), <http://www.cnn.com/2010/POLITICS/03/10/obama.supremecourt/>.

⁵The assumption of judicial decorum at the State of the Union has not always existed. See Peppers and Giles (2012, 62–63).

⁶558 U.S. 310.

⁷President Barack Obama, State of the Union Address (January 27, 2010) (transcript available at <http://millercenter.org/president/speeches/detail/5706>).

⁸Justices Alito, Thomas, and Scalia did not attend. Attendance numbers retrieved from Byron Tau, “Conservative Justices skip State of the Union,” Politico44 Blog (February 12, 2013), <http://www.politico.com/blogs/politico44/2013/02/conservative-justices-skip-state-of-the-union-156834>.

⁹Alito, Thomas, and Scalia again skipped the address. Information obtained from Ariane de Vogue, “A 6-3 Supreme Court Majority Attends the State of the Union,” CNN (January 20, 2015), <http://www.cnn.com/2015/01/20/politics/supreme-co>.

¹⁰Roberts, Kennedy, Ginsburg, Breyer, and Kagan attended. Attendance numbers retrieved from Bill Mears, “To Go or Not to Go: Supreme Court at the State of the Union,” CNN (February 12, 2013), <http://www.cnn.com/2013/02/08/politics/state-of-the-union-court/>.

¹¹Again, Roberts, Kennedy, Ginsburg, Breyer, and Kagan attended. Attendance numbers retrieved from Dylan Scott, “Four Supreme Court Justices Skip State of the Union Address,” Talking Points Memo (January 28, 2014), <http://talkingpointsmemo.com/livewire/sotus-sotu>.

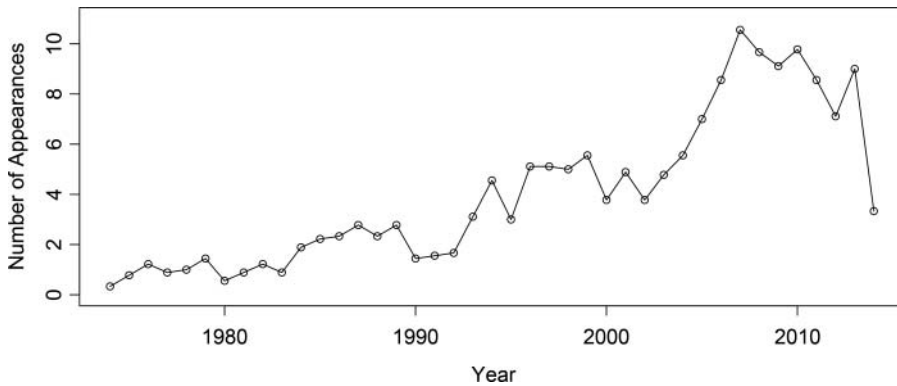


Figure 1. Average Yearly Public Appearances by Justice.

Given the vitriol some justices harbor toward the address, as well as the Court's institutional position, it is curious that justices do attend the State of the Union. After all, the Supreme Court is composed of unelected, lifetime-tenured members with no direct public constituency, and the Court has historically maintained an apolitical image driven by its members' desires to be considered above politics and beholden only to the law and past Court precedent. However, attendance by the justices at this address may signal something more strategic on the part of the members of this institution. In particular, we argue that justice attendance may be representative of a Court cognizant of its standing among the public and concerned for its legitimacy relative to the other branches.

It is also important to note that, apart from the State of the Union address, one usually does not expect to see members of the Court on television. Justices have continually resisted having cameras brought inside the courtroom to televise Supreme Court cases. In addition, public appearances by justices outside the Court are rare. Using publicly available data, we calculate the average number of yearly appearances per justice since 1974 (Hasen 2016; see Figure 1). While the public visibility of Supreme Court justices has risen to some extent in recent years, the average number of public appearances per Supreme Court justice is below ten per year in that period. Additionally, many of these events are speeches at law schools or bar associations and are not televised or generally accessible to the broader public. Finally, the total number of appearances by all nine justices is significantly smaller than the number of non-campaign-related public appearances made by the president (Ragsdale 2014; see Figure 2), thus underscoring why the Supreme Court is unlikely to be a top-of-the-mind concern for most voters.

How do we explain Supreme Court justices' attendance at the State of the Union given that some of the justices themselves express their unwillingness to attend?¹² The first consideration that merits attention is that an institutional norm of attendance could compel justices to attend the State of the Union. However, data on attendance demonstrates that such a norm has not always existed (Peppers and Giles 2012). Before 1965, the State of the Union was delivered during the day and Supreme Court justices attended only seven of the thirty-five State of the Union addresses given orally between 1913 and 1964. Once the address was moved to the evening, attendance skyrocketed, with an average of 84 percent of the justices attending between 1965 and 1980. Since 1980, however, attendance has fluctuated greatly, with attendance declining until the mid-2000s and then rising again in the 2010s.¹³ Thus, attending this address is not a time-honored norm in American history, nor does it appear consistent over time.

¹²Retired Justice Sandra Day O'Connor remarked that attendance at the State of the Union has "always been uncomfortable. There were always people who thought: 'God, do we have to go? Let's don't.'" Quoted from "More State of the Union No-Shows Predicted," *New York Times*, April 7, 2010, at A19.

¹³This data can be observed further in Figure 3.

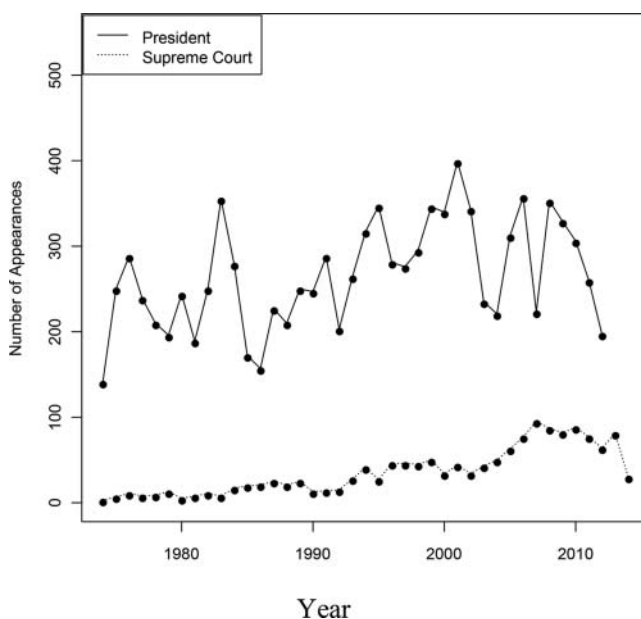


Figure 2. Presidential and Judicial Public Appearances.

The high attendance numbers between 1965 and 1980 correlate well with evidence from the personal papers of former justices Earl Warren and Harry Blackmun. Chief Justice Warren circulated memoranda and took polls ascertaining the other justices' interests in attending the State of the Union (Peppers and Giles 2012). Thus it seems that the decision to attend in this period seems institutional rather than individual, as multiple justices expressed their willingness to attend if a majority of the Court did so. Furthermore, the fact that Warren circulated these memoranda after the address became televised suggests that the justices were aware from an early stage that the State of the Union presented a rare circumstance in which justices as a group could appear on television on a regular basis in front of a large, primetime audience.

This institutional norm seems to have carried over to the Burger Court, and, moreover, both Warren and Burger believed that decisions to attend joint sessions of Congress were subject to a majority of the Court being willing to attend (Peppers and Giles 2012). However, Burger seemed to express the importance of the State of the Union over other joint sessions. "My impression is...that we have confined our attendance to State of the Union messages...it could well be because the State of the Union derives from the Constitution whereas ad hoc appearances before a Joint Session generally tend to be on large political issues."¹⁴ In contrast, Chief Justice Roberts's public position is that the decision is a personal one for each justice; the Chief Justice remarked in 2010 that the decision to attend the address was "up to each individual member of the Court."¹⁵ Given the inconsistency in this norm, it is clear that such an institutional rule does not completely govern the decision of the justices to attend. As demonstrated by attendance records, Burger did not always achieve a quorum of justices despite this norm, and a majority of justices have attended the State of the Union since Roberts became Chief Justice despite there being no expectation of attendance. Thus we turn to articulating a theory of how public opinion operates as a constraint on the justices, going beyond the one previous study on the Court and the State of the Union by applying the logic of strategic interaction models, positivity bias, and the judicial audience perspective to the judicial decision to attend the State of the Union address.

¹⁴Memorandum from Chief Justice Warren E. Burger, U.S. Supreme Court (April 8, 1975) in Blackmun Papers (on file with the Library of Congress, Box 192, Manuscript Division).

¹⁵Debra Cassens Weiss, "Chief Justice Roberts Admits He Doesn't Read the Computer Fine Print," A.B.A. J. (October 20, 2010, 7:17 AM), <http://www.abajournal.com/mobile/article/chiefjusticerobertsadmitshedoesntreadthecomputerfineprint/>.

Public Opinion and State of the Union Attendance

Strategic models of Court action argue that the Court recognizes the institutional position it occupies relative to the other branches and acts accordingly. The Court's inability to force compliance with its decisions requires reliance on the president to implement its decisions. Likewise, the congressional power of the purse means they control the Court's budget and its jurisdictional purview. Thus, concern for the efficacy of its rulings and its institutional legitimacy should create incentives for the Court to engage in strategic action vis-à-vis Congress and the executive. Such propositions form the crux of separation of powers' models, which explain Court decision-making in terms of this anticipation and reaction to the actions of the other branches (Marks 2012; Baum 2009; Gely and Spiller 1990; Vanberg 2001; Helmke 2002).

While the Court's recognition of its institutional position relative to the other branches is an integral part of strategic conceptions of Court behavior, we expect the Court to look to the constraint of public opinion when deciding whether to attend the State of the Union address. Justice Felix Frankfurter noted in his dissent in *Baker v. Carr*¹⁶ that "the Court's authority—possessed of neither purse nor sword—ultimately rests on sustained public confidence in its moral sanction." Like the attitudinal model, discussed below, strategic conceptions assert that justices are policy-motivated and wish to see their policy preferences become law. Yet, without the cooperation of the elected branches, the Court's institutional insularity prevents it from acting on its decisions after handing them down. It follows then that the Court would be attentive to the preferences of those who must implement the Court's decisions and, likewise, to those whom those elected officials are responsive. The Court, therefore, is concerned about its diffuse support (Gibson and Caldeira 1992; Caldeira and Gibson 1992; Gibson, Caldeira, and Baird 1998; Hoekstra 2000, 2003). This is the broad support for the Court as an institution, rather than the specific support that comes from public approval of individual decisions. However, the loss of specific support can lead to a subsequent loss in diffuse support if unpopular decisions build up over time. The Court relies on this diffuse support to bolster its decisions, and a Court wary of its institutional legitimacy will avoid straying too far from the general tenor of public opinion for fear of alienating those who must implement their decisions. As Mondak and Smithey (1997) write: "A disgruntled public may not only refuse to cooperate with a Supreme Court decision but may also pressure elected officials to resist implementation of judicial orders" (1114).

While existing research on public opinion and the Supreme Court indicates that the Court is cognizant of and responds to or rules in line with public opinion¹⁷ (Dahl 1957; Mishler and Sheehan 1993, 1996; Flemming and Wood 1997; McGuire and Stimson 2004; Epstein and Martin 2010; Casillas, Enns, and Wohlfarth 2011),¹⁸ Clark (2010) and Blackstone (2013) provide evidence to support Mondak and Smithey's (1997) hypothesis. The authors find that diminished public support for the Court is associated with a greater probability that Congress will seek to punish the Court through the introduction of Court-curbing bills or attempts at overturning the Court's decisions. Moreover, evidence that Supreme Court justices recognize the importance of the Court's legitimacy to its judicial function comes from the justices themselves, as Justice O'Connor writes in *Planned Parenthood v. Casey*:¹⁹ "The Court's power lies, rather, in its *legitimacy*, a product of substance and *perception* that shows itself in the people's *acceptance* of the Judiciary as fit to determine what the nation's law means and to declare what it demands."

In addition, Bickel's (1986) concern with the counter-majoritarian difficulty, the ability of an unelected institution, the Supreme Court, to strike down the publicly supported rulings of elected branches, has proven largely unfounded. In his classic study of majoritarianism on the Court, Dahl (1957) found that the Court rarely overturned the enacted policies of the majorities in Congress and

¹⁶369 U.S. 186.

¹⁷A related literature has examined how the Court's decisions impact public opinion. See Caldeira and Gibson (1992), Franklin and Kosaki (1989), Hoekstra (2000), and Mondak (1992).

¹⁸But see Casper (1976) and Giles, Blackstone, and Vining (2008).

¹⁹505 U.S. 833.

the White House. Marshall (1989, 2009) concludes that, overall, the Supreme Court is about as responsive to public opinion as the elected branches. Moreover, studies in each of the last three decades have found direct effects of public opinion on justices' decisions collectively (Mishler and Sheehan 1993; McGuire and Stimson 2004; Casillas, Enns, and Wohlfarth 2011) and individually (Unah, Rosano, and Milam 2015).

Although previous work has examined the relationship between the Court and public opinion with respect to the Court's decisions, previous studies have not sought to apply the logic of the Court's concern for its public legitimacy to understanding if justices take non-policy actions to preserve its perceived support. Non-policy actions include speeches before bar associations or appearances on news or late-night talk shows. Given the infrequency of public appearances by the justices, the decision to attend or not to attend the annual State of the Union address is perhaps the most high-profile and important non-policy Court action. Members of a Court concerned for its institutional legitimacy may feel compelled to attend the premier political event of the calendar year as a show of symbolic participation in the political system. Besides, the mystique of the robe adds to public intrigue and support for the Court. An unpopular Court may fear that failure to attend the address signals to those watching on television the Court's apathy toward government and the policies it produces.

The quote from Justice Breyer earlier in this article expresses a similar sentiment. It would be conspicuous for the Court to be the only branch not represented at the only event on the political calendar where the three branches of government are typically seen together at the same time and place. Moreover, because cameras are not allowed in the courtroom, the State of the Union is one of the few instances where members of the Supreme Court are captured on camera as a group. Indeed, since the address is broadcast in prime time, the audience of people who will potentially see—or not see—the justices is typically in the tens of millions of people.

A particularly compelling reason to expect the Court to use the State of the Union address to shore up its support among the public comes from the theory of positivity bias, which states that events drawing public attention to courts provide exposure to legitimatizing symbols of law and courts that reinforce underlying support for the Supreme Court's legitimacy (Gibson, Caldeira, and Spence 2003a; Gibson and Caldeira 2009). Events such as Court confirmations and landmark decisions teach “the lesson that courts are different from other institutions of the American democracy, and are therefore worthy of respect” (Gibson and Caldeira 2009, 3).²⁰ Faced with images of justices in robes and the language of legal precedent and process, the public observes that the Court is special and its decision-making is unlike the decision-making of the “political” branches. Essentially, positivity bias works as a frame of “judiciousness”²¹ through which the public can evaluate courts, a frame centered on expectations that judges and courts should act in ways that match common notions of proper judicial behavior. For example, courts should eschew policy-making in favor of judicial deference or restraint, and judges should be well qualified, fair, and impartial (Gibson and Caldeira 2006). In sum, the theory of positivity bias indicates that attention to courts leads to exposure to symbols of law and courts that reinforce underlying institutional loyalty to the Supreme Court. The public then increases its support for the Court because it evaluates it on criteria related to judiciousness.

If the evaluative frame the public uses to evaluate the Court is one of judiciousness, we expect positivity bias to be operative for our study. In the context of the State of the Union address, the appearance of the justices in their judicial robes, their conspicuous seating apart from members of Congress, and their refusal to participate in the standing ovations, clapping, and cheering that are hallmarks of the address expose the public to legitimizing symbols of the judiciary. Seen in this light, as distinct from the “political branches,” positivity bias indicates that such exposure to the Supreme Court should improve their standing with the public.

²⁰To further illustrate the concept, Gibson, Caldeira, and Baird (1998) write: “Generally, to be aware of a court is to be supportive of it. This positivity bias may be associated with exposure to the legitimizing symbols that all courts so assiduously promulgate” (356).

²¹For an overview of research on frames and the framing process, see Chong and Druckman (2007).

For the purposes of our article, we assume that the justices are aware of the potentially powerful influence judicial symbols can have on their support. Evidence to support this notion comes from the Court's reliance on judicial symbols in their decision-making and from the confirmation process. To the first point, justices can shirk responsibility for unpopular decisions and avoid undermining the Court's legitimacy by falling back on the nature of their decision-making. To the extent that the public subscribes to the "myth of legality" (Scheb and Lyons 2000),²² judges' reliance on the language of stare decisis and legal procedure can obviate blame by reinforcing the notion that judges are not politicians engaged in policy-making but are simply applying legal principles to make fair and impartial determinations (Caldeira and Gibson 1995). Second, Gibson and Caldeira (2009) indicate that the importance of judicial symbols for public approval is not simply an academic theory: "we predict that this theory is ... well understood (de facto) by the central actors in the confirmation process" (66). In this light, we assume that Supreme Court justices are aware of the power that judicial symbols confer and that they tap into their influence to preserve the Court's institutional legitimacy.

As such, our first hypothesis is based on an expectation that justices understand the fact that public opinion about the Supreme Court affects their ability to achieve success in strategic interactions with other branches. Justices care about the long-term legitimacy of the Court and see attendance at the State of the Union as one of many opportunities to preserve that legitimacy.

Hypothesis 1: As public confidence in the Supreme Court increases, Supreme Court justices will be less likely to attend the State of the Union address.

In addition to the strategic goal of maintaining the Court's legitimacy, judicial behavior can also be understood from a judicial audience perspective (Baum 2006). Beyond abstract legal and public policy goals, justices care deeply about their individual public reputations and seek to win approval from potential audiences that include legal scholars, lawyers, their social peers, and their Court colleagues. As Baum (2006) writes: "Judging can be understood as self-presentation to a set of audiences. Judges seek the approval of other people, and their interest in approval affects their choices on the bench" (158). Although often absent from the public eye, when justices give speeches before law students and bar associations, write articles for law reviews, or participate in interviews, they seek concrete benefits from their judicial and non-judicial peers that go beyond their desire for intangible legal or policy goals. That justices have more than solely strategic motives for responding to the public has important implications for our study of non-policy Court responses to public opinion. Baum (2006) writes: "Some justices devote time and energy to activities that put them in contact with the general public. Because these activities are hardly mandatory, the willingness to engage in them is not simply a matter of duty. Indeed some justices believe they have a public reputation and care about it" (68).

The data presented in Figure 1 indicates that justices in recent years have largely increased their non-mandatory public appearances, suggesting that the justices consider greater public visibility a valuable benefit. As argued above, the State of the Union address represents a particularly significant non-mandatory activity for the justices, and it is possible that justices present themselves before a large audience to seek benefits from their visibility. At the very least, justices may consider their Court colleagues as an audience. If justices care about their esteem among and their interpersonal relationships with their Court colleagues, attending the address may provide a signal of collegiality. Such a signal may even be noticed by certain non-Court audiences about whom justices care, including segments of the general public. Ultimately, whether due to concern for their own public reputation or for the Court's institutional legitimacy, strategic interaction models, positivity bias, and the judicial audience perspective predict that justices are concerned with the public's approval and lend theoretical support for Hypothesis 1.

²²The myth of legality is the "belief that judicial decisions are based on autonomous legal principles" and "that cases are decided by application of legal rules formulated and applied through a politically and philosophically neutral process of legal reasoning" (Scheb and Lyons 2000, 929).

Social Psychology, the Attitudinal Model, and State of the Union Attendance

On the other hand, research on cognitive dissonance (Kunda 1990; Taber and Lodge 2006), ingroup favoritism (Tajfel 1974; Tajfel and Turner 1986), and the attitudinal model (Segal and Spaeth 2002) provide expectations for why justices may choose to avoid non-policy responses to public opinion such as attending the State of the Union address. According to dissonance research, individuals are frequently confronted with ideas or beliefs that may conflict with or challenge their own (Kunda 1990). Confronting these other ideas can cause discomfort for the individual, particularly when the individual finds it necessary to reconcile her previous actions in light of this new information, thereby reducing dissonance (Festinger 1957). While this literature suggests that attitude change may result when the individual is faced with uncomfortable information, in the context of the State of the Union, we would expect the justices to engage in avoidance rather than attitude change. Rather than attend an event where their decisions may be questioned or their political values assailed, justices may simply choose to stay home. Similarly, we can apply social identity theory's (Tajfel 1974; Tajfel and Turner 1986) explanation of intergroup behavior to an expectation for why judges may refrain from taking non-policy action in response to public opinion. The tendency for individuals to favor their own groups can explain why justices may choose to avoid attending the State of the Union address. Justices' group identifications, particularly their partisanship, serve as a powerful ingroup that influences their choices and drives their negative attitudes toward the outgroup, the other political party (Brewer 1999).²³ Therefore, justices may refrain from attending the address in order to avoid associating with a president or members of Congress from another political party.

This expectation from social psychology fits nicely with research on the attitudinal model in the judicial politics literature, which also posits ideological or partisan reasons for skipping the address. In contrast to emphasizing the institutional context in which the Court is a part and the need for strategic action on the part of the justices, attitudinal explanations of Court decision-making argue that the institutional structure of the American political system affords the Court sufficient insulation from the constraining influences of Congress and the president. According to Rohde and Spaeth (1976), Court decisions depend on three factors: goals, rules, and situations. Goals refer to the policy preferences of the justices. Rules are the institutional norms that form the framework by which the decision is made, and situations refer to, in the case of the Court, the stage of decision-making, whether certiorari, merits, or opinion. Rohde and Spaeth (1976), as well as Segal and Spaeth (2002), argue that the configuration of the American political system, in terms of its rules, allows the Court sufficient insulation to operate effectively on their policy preferences. Neither elected nor subject to reelection and serving lifetime tenures, the Supreme Court justices lack the direct electoral connection that pervades the politics of Congress and the president. Moreover, progressive ambition does not characterize justices, because the Supreme Court sits atop the judicial hierarchy. Importantly, the Court's discretionary docket control provides great latitude for the Court in deciding which issues it will and will not hear. Finally, the presence of multiple veto points in the legislative process means that congressional attempts to overturn Supreme Court statutory rulings face difficulty in achieving success. This implies that the Supreme Court enjoys a certain degree of protection from congressional oversight.²⁴

Thus, according to the attitudinal perspective, justices should not feel compelled to attend the State of the Union out of fear of losing any legitimacy, since the Court's institutional insulation shields it from the prevailing winds of politics.²⁵ Rather, justices should attend for more ideological reasons. One such reason may be a given justice's ideological alignment with the sitting president delivering the address. Justices may want to attend an address when a president with whom they share political views is giving the address. In contrast, both the dissonance and attitudinal model literatures predict that justices may choose not to sit through a speech in which they are likely to disagree with most of what is

²³Brewer (1999) writes that "politicization... may contribute to a positive correlation between ingroup love and outgroup hate" (438).

²⁴See Ignagni and Meernik (1994) and Meernik and Ignagni (1995, 1997) for more work on the congressional decision to override Court decisions.

²⁵Segal and Spaeth (1996, 2002) conduct an exhaustive examination of the attitudinal model's efficacy, as well as arguing against the role of precedent in constraining Court decision-making.

Table 1. State of the Union attendance by justice serving since 1965.

Justice	Percent Attendance	N
Alito	40	10
Black	85.7	7
Blackmun	81	21
Brennan	73.9	23
Breyer	95	20
Burger	73.3	15
Clark	100	3
Douglas	50	10
Fortas	100	4
Ginsburg	52.4	21
Goldberg	100	1
Harlan	100	7
Kagan	100	6
Kennedy	66.7	24
Marshall	52.4	21
O'Connor	42.9	21
Powell	78.6	14
Rehnquist	62.1	29
Roberts	100	10
Scalia	26.9	26
Sotomayor	71.4	7
Souter	37.5	16
Stevens	23.3	30
Stewart	86.7	15
Thomas	31.8	22
Warren	80	5
White	60	25

said by the president. Thus our second hypothesis follows from expectations of dissonance and the attitudinal model in positing an ideological explanation for Supreme Court attendance at the State of the Union.

Hypothesis 2: As the ideological distance between sitting presidents and Supreme Court justices increases, justices will be less likely to attend the State of the Union address.

Data and Methods

Trends in Judicial Attendance at the State of the Union

The empirical analysis for this study covers the years 1974–2014,²⁶ and the unit of analysis is the individual justice. The dependent variable measures whether a justice attended the State of the Union address in a given year and is coded as 1 if the justice attended.²⁷ Table 1 presents the percentage of State of the Union addresses attended by each justice serving since 1965 through the 2016 State of the Union address. Figure 3 shows the number of justices attending the State of the Union address from 1954 to 2016. Attendance at these addresses exhibits a large variance by justice, ranging from the very low attendance percentages of John Paul Stevens, Antonin Scalia, Clarence Thomas, and David Souter to the perfect or near perfect attendance records of John Marshall Harlan II, Stephen Breyer, Elena

²⁶Thank you to Todd Peppers and Micheal Giles for providing data on Supreme Court justice attendance at the State of the Union from 1965–2008. Although we have data for certain variables extending backward in time to 1965 and forward in time to 2015, after that year's State of the Union the public opinion data begins in 1973. Moreover, the Bailey (2013) ideal point scores used to calculate the distance between justices and presidents are currently available only through 2011. When using Martin-Quinn and Segal-Cover scores, however, we are able to extend our analysis to 2014.

²⁷There are a few instances where Supreme Court justices attended the State of the Union after their retirements from the bench. Justice Stanley Forman Reed attended Nixon's address in 1974. Potter Stewart attended Reagan's 1982 and 1983 addresses. Lewis Powell attended State of the Unions in 1988 and 1990, and Justices Blackmun and White attended Clinton's addresses in 1996 and 1997, respectively. These cases are omitted from the empirical analysis.

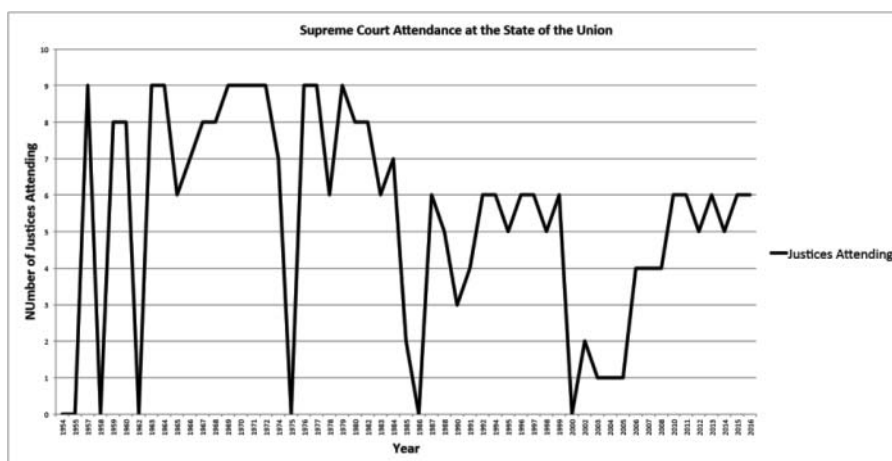


Figure 3. Yearly Justice Attendance at the State of the Union.

Kagan, and current Chief Justice John Roberts, who have attended regardless of the ideological views of the president.²⁸

There are a number of years where no justices attended the State of the Union. No oral address was given in 1973, 1981, 1989, 1993, 2001, and 2009, so justices did not have the opportunity to attend, and, as such, these years are omitted from our analysis.²⁹ President Reagan's 1986 State of the Union was rescheduled in the wake of the Challenger space shuttle explosion, and no justices attended the rescheduled address. Finally, no justices attended addresses in 1975 and 2000. The lack of attendance in 1975 may result from the Court's unanimous decision against executive privilege six months earlier in *United States v. Nixon*, 418 U.S. 683 (1974), although this claim is not supported by contemporary evidence (Peppers and Giles 2012). The absence of the Court from President's Clinton's last State of the Union in 2000 could be tied to Clinton's impeachment in 1999, though this is undercut by the fact that six justices attended the previous address, which took place in the midst of the impeachment proceedings (Peppers and Giles 2012). Overall, attendance is relatively high in the mid- to late 1960s and 1970s, declining after the start of the 1980s and then rising again over the last decade.

The primary independent variable of interest is a measure of public confidence in the Supreme Court. To construct this measure, we begin by collecting public opinion data from the Roper Center for Public Opinion Research.³⁰ As the Gallup organization is the only firm that consistently asks a question related to public confidence in the Supreme Court, we begin by collecting survey questions from this organization.³¹ We then collect all questions from other survey organizations that have a comparably designed question about public confidence in the Supreme Court; in total we were able to find 65 Gallup and non-Gallup survey questions from 1973–2015 that tap into public confidence in the Supreme Court. Adding the percentage of respondents giving the first two answers (a “great deal” or “quite a lot” of confidence), we then use the Wcalc6 software created by James Stimson to create a measure of confidence in the Supreme Court.³² This measure allows us to estimate the percentage of people expressing confidence in the Supreme Court at the same point each calendar year. Wcalc6 implements a method that is similar to principal components analysis in order to construct a time series of public opinion data (Stimson 2015, 2–3). The primary difference with principal components analysis and the

²⁸Kagan has served under only one president so far who has given an official State of the Union address.

²⁹1989, 1993, 2001, and 2009 had newly elected presidents. Written addresses were submitted in 1973 and 1981.

³⁰See <http://ropercenter.cornell.edu/>.

³¹The question asked by Gallup each year from 1973–2015, excepting 1974, 1976, 1978, 1980, 1982, and 1992 is: “Now I am going to read you a list of institutions in American society. Please tell me how much confidence you, yourself, have in each one—a great deal, quite a lot, some, or very little? The United States Supreme Court.”

³²This software is available at <http://stimson.web.unc.edu/software/>.

dyad ratios algorithm implemented by Wcalc6 is that Wcalc6 does not require as large a number of cases in order to build such a time series. This software has been used to generate time series measures of public opinion data in an array of contexts. Most similar to our study, Durr, Martin, and Wolbrecht (2000) use an earlier version of this software to also construct a measure of attitudes toward the Supreme Court from 1973–1993 by using survey data from the Roper Center. As these authors note, this software allows researchers to avoid the problem of sparse polling data by combining semi-overlapping time series of polling data from various sources to obtain an overall time series measure of support for the Court.³³

In keeping with the fact that justices are likely to make decisions whether to attend in the period of time immediately before the speech, this variable estimates public confidence in the Supreme Court one week before the State of the Union address.³⁴ As stated in Hypothesis 1, we expect that as the percentage of respondents who express “a great deal” or “quite a lot” of confidence in the Supreme Court increases, justices will be less likely to attend the State of the Union address. In order to measure the impact of ideology, in keeping with Hypothesis 2, we include a measure of a justice’s ideological distance from the sitting president giving the State of the Union address. To construct this variable, we take the absolute value of the difference between a given justice’s Bailey (2013) ideal point and the sitting president’s ideal point.³⁵ The attitudinal model of judicial decision-making asserts that justices make decisions based on their ideological predispositions. Thus one should expect that as the ideal points of a given justice and sitting president diverge, a justice will be less likely to attend the State of the Union. As this measure is available only through 2011, we alternatively use Martin-Quinn scores, a dummy variable for the party of the president, and an interaction between these two variables to tap into the role of ideology in a justice’s decision on whether to attend the State of the Union. If ideological similarity with the president plays a role, we would expect more liberal justices to attend when there is a Democratic president and more conservative justices to attend when the president is a Republican. Third, we also test attitudinal explanations by using Segal-Cover scores, a dummy variable for the party of the president, and an interaction between these two variables. As with Martin-Quinn scores, support for attitudinal explanations would require more liberal justices to attend the State of the Union when there is a Democratic president and more conservative justices to attend when there is a Republican president.

In addition to these focal independent variables, we also include a number of control variables related to personal considerations facing the justices. First, we expect that justices receiving more confirmation votes will be less likely to attend the State of the Union address. Justices receiving fewer votes may feel compelled to attend in order to assert their individual legitimacy as a rightful member of the Court, so we include a control variable measuring the number of votes received during the confirmation process.³⁶

Second, we include a variable measuring the tenure of justices on the Supreme Court. As such, we include a variable that measures a count of the number of years a justice has been on the Supreme Court. We expect that older, more senior judges will be less likely to attend State of the Union addresses. This may reflect justices whose health wanes in their later years on the bench or senior justices who feel less compelled to attend what some observers have called a “political pep rally” for the president and his partisans.

³³Also similar to our measure of public confidence in the U.S. Supreme Court, Green and Jennings (2012) use Wcalc6 to construct a measure of voters’ evaluations of the competence of political parties in the UK, which they refer to as “macro-competence.” Like the measure in our study, Wcalc6 is used to construct a measure of something other than direct approval in an institution or individual that may not vary in a predictable swing or cycle. Further, a group of scholars used this software to construct measures of public approval for executives in an array of countries in Latin America (see Carlin, Love, and Martinez-Gallardo 2015).

³⁴We measured public confidence one week prior to the State of the Union because we consider the one-week threshold to signify the approximate last point at which a justice could decide to attend the address. Moreover, as specified below in note 39, our measure is robust to various time specifications. When approval is measured two weeks, a month, and six months before the State of the Union, public opinion remains negative and significant.

³⁵These scores bridge across time and institutions in order to allow comparisons across the three branches.

³⁶There may also be an interactive effect here. Justices with fewer confirmation votes may feel compelled to attend addresses earlier in their tenures. However, as these justices gain seniority, they may feel less pressure to attend. However, this result is not borne out in column 4 of Table 5 in the appendix.

Table 2. Summary statistics.

	Mean	SD	Min	Max
Attendance	0.60	0.49	0	1
Confidence in Court	42.68	5.35	31.56	52.04
Tenure	14.04	8.88	0	36
Ideological Distance from President	0.98	0.72	0	2.57
Martin-Quinn Score	0.07	2.19	−6.62	4.41
Segal-Cover Score	0.42	0.32	0	1
Republican President	0.55	0.50	0	1
Number of Confirmation Votes	85.05	15.89	52	100
Polarization in House	0.72	0.20	0.49	1.10
Appointing President	0.14	0.35	0	1
Chief Justice	0.11	0.31	0	1
Court-curbing Bills	11.89	11.88	1	53

Third, we also include a dummy variable denoting whether the president giving the State of the Union address appointed the justice. It is reasonable to hypothesize that a justice may feel more compelled to attend State of the Union speeches given by the president who appointed them. These justices may feel a sense of loyalty to their appointing presidents. Moreover, these justices will, by default, be in the earlier years of their tenure, which harks back to the expectation posited for the impact of tenure. Fourth, we include a dummy variable indicating whether a justice served as the chief justice when a particular State of the Union was given. As Fettig and Benesh (2016) note, chief justices are particularly concerned with public opinion in order to protect the legitimacy of the Court. Specifically, these scholars point out that evidence of the chief’s particular concern with legitimacy can be found in his discussion in private correspondence with other justices of how rulings on issues in front of the Court might affect support for the Court. Additionally, Fettig and Benesh suggest that the chief justice sometimes votes or otherwise behaves in a manner that is at odds with his ideological beliefs in order to protect the legitimacy of the Court. Therefore, we expect that chief justices will be more likely to attend the address than associate justices due to a sense of institutional duty and the need to provide symbolic representation of the Court at the State of the Union.

We also include several control variables related to the ideological/partisan climate that justices face by attending the State of the Union address. We include a variable that taps into the nature of partisan conflict in government in which the Court works: the level of polarization in the United States House of Representatives. We measure this concept using the annual difference in the ideological means of Democrats and Republicans in the House of Representatives made available by Keith Poole at voteview.com.³⁷ It is conceivable that a highly charged partisan environment may deter justices from attending an address where half of its audience applauds and the other half sits in disapproval. Members of the Court may feel that such an environment does not become an institution whose members wish to appear apolitical and removed from partisan conflict. This desire to cultivate an apolitical persona speaks directly to the justices’ concern with the Court’s institutional legitimacy. While the theory of positivity bias suggests that exposure to judicial symbols improves public support for the Court, justices may worry that their attendance alongside a highly polarized Congress necessarily ties them to politics and an approval of the current political climate. Thus we expect that as polarization increases, the likelihood of a justice attending decreases.

Finally, we include a count of the number of court-curbing bills introduced each year in Congress in some of our models. Data for this variable is provided by Clark (2010), who argues that these bills are signals of public displeasure with the Court. This negative public opinion leads members of Congress to follow constituent wishes and punish the Court by introducing these court-curbing measures. Clark (2010) argues further that the Court pays attention to these bills. Thus we would expect that the more

³⁷As described in more detail below, we also measure the concept using the annual difference in the ideological means of Democrats and Republicans in the Senate.

Table 3. Public opinion, ideology, and State of the Union attendance.

	Model 1	Model 2	Model 3	Model 4
(Intercept)	11.24* (1.90)	10.55* (2.06)	10.06* (1.88)	
Public Opinion	−0.16* (0.03)	−0.14* (0.04)	−0.14* (0.04)	−0.13* (0.04)
Ideological Distance from President	0.26 (0.24)			0.42 (0.27)
Martin-Quinn Score		−0.05 (0.23)		
Republican President		−1.04* (0.35)	−0.92 (0.56)	
Martin-Quinn*Republican President		−0.0003 (0.19)		
Segal Cover Score			0.55 (1.29)	
Segal Cover*Republican President			−0.34 (1.47)	
Tenure	−0.11* (0.04)	−0.09* (0.04)	−0.09* (0.04)	−0.08 (0.08)
Votes to Confirm	0.002 (0.01)	0.01 (0.01)	0.02 (0.01)	−0.3 (0.49)
House Polarization	−4.54* (1.37)	−5.07* (1.36)	−4.97* (1.38)	−8.18 (5.58)
Appointing President	0.71 (0.57)	0.70 (0.75)	0.66 (0.74)	0.36 (0.72)
Chief Justice	0.98 (0.54)	1.02 (0.54)	1.06 (0.59)	1.09 (1.15)
Court-curbing Bills				−0.01 (0.02)
N	296	323	323	270

Robust clustered standard errors in parentheses.
*indicates significance at $p < 0.05$.

court-curbing measures introduced, the higher the likelihood of Court attendance. Table 2 presents summary statistics for each of these variables.

Results

Table 3 presents the results of the logistic regression models we use to test our hypotheses.^{38,39} The first three models differ in the method by which ideology is measured. For each model, we report robust clustered standard errors, with the errors clustered by justice. We find support for Hypothesis 1 across the four model specifications in Table 3, as the variable for public opinion is negative and significant, indicating that as the percentage of respondents who expressed a great deal or quite a lot of confidence in the Supreme Court increases, a justice is less likely to attend the State of the Union address. That

³⁸Court curbing is excluded from this model. The variable measuring these bills was excluded from the original model due to concerns of including two measures of public opinion in the same model. However, the two variables have a weak negative correlation of −0.17. There is a medium correlation of −0.49 between the tenure and appointing president variables; we run models with each of these variables excluded, and the public opinion result holds.

³⁹We also run our first model with various other specifications. Approval remains negative and significant when measured a month before the State of the Union instead of a week before. Approval is also negative and significant when measured two weeks and six months before the State of the Union. We do not find support for a quadratic operationalization of public opinion. However, the quadratic operationalization of ideological distance is statistically significant. When we include a control variable for whether or not an address took place before or after the Bork confirmation hearings; this variable is not significant, and the public opinion variable remains significant. When we use Senate polarization instead of House polarization, public opinion remains negative and significant, while Senate polarization is significant. Finally, when we include a control for total number of public appearances as an independent variable, this measure is not significant. Again, public opinion remains significant. When used as a dependent variable, the public opinion measure significantly predicts the total number of public appearances, suggesting that this may be another non-policy response to public opinion for future research.

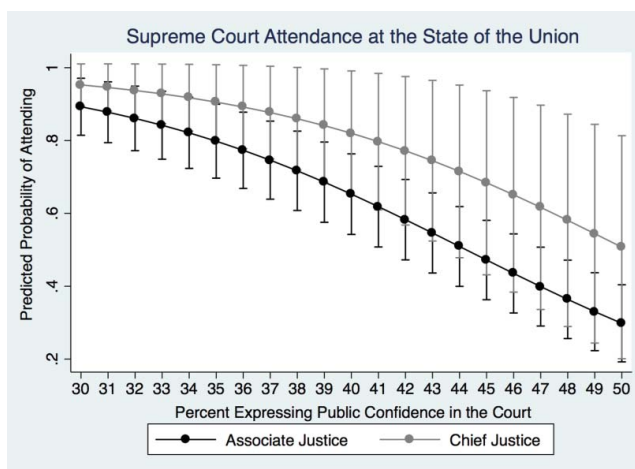


Figure 4. Predicted Probability Plot for Public Opinion.

justices seem responsive to public opinion in our models provides support for positivity bias and judicial audience perspectives, as judges may be relying on the legitimizing symbols of law and courts to shore up institutional support. The principal hypothesis of this study, then, is borne out in our analysis. Moreover, chief justices appear more likely to attend the State of the Union, as the variable for chief justice is significant at the $p < 0.10$ level in Models 2 and 3. We noted John Roberts's perfect attendance record earlier, but glancing at Table 1, one sees that the other chief justices (Warren, Burger, and Rehnquist) all attended State of the Unions in more than sixty percent of their eligible addresses, demonstrating the relative consistency of this effect over time.

We do not find support for Hypothesis 2, as there is no statistically significant relationship between ideological distance from the president and attendance at the State of the Union address. As one might expect, justices further away from the president ideologically would be less likely to attend the State of the Union. The significance of our results does not change when using Martin-Quinn or Segal-Cover scores to tap into justices' ideologies in Models 2 and 3. Thus it appears that in the context of attendance at the State of the Union, ideological factors have less explanatory power than strategic concerns related to public opinion. The insignificance of ideological factors in these models is an interesting finding and seems to indicate that Supreme Court justices rely more on strategic factors in this context than ideology as a guide to their interactions with the other branches. This finding speaks to the importance of understanding the Court and its members as more than ideologically motivated and insulated actors.

The fourth column in Table 3 presents results for a model with fixed effects, with an indicator variable for each justice. The substantive result for public opinion remains unchanged.⁴⁰ We have also estimated alternative versions of the models in Table 3, and these results are presented in the Appendix. The effect we find for public opinion is robust to all alternative specifications, including random effects and the inclusion of a linear time trend for year.⁴¹

Finally, several control variables attain significance in our models. The variable measuring tenure reaches significance in the expected negative direction, meaning that as justices accrue experience on

⁴⁰Interestingly, the other variables lose their significance upon the addition of these variables, but this may be due to a loss of statistical power resulting from the estimation of many extra parameters.

⁴¹The first column in Table 5 presents the results for a random effects model. Again, public opinion remains significant, as does tenure and House polarization. Ideology is not significant at the $p < 0.05$ level, but it does reach the $p < 0.10$ level. Column 2 introduces a linear trend by including a variable for year to control for a possible time trend. However, public opinion remains unchanged, and the variable for year is insignificant. Ideology is significant at the $p < 0.10$ level. Ultimately, the effect found for public opinion appears robust to all model specifications.

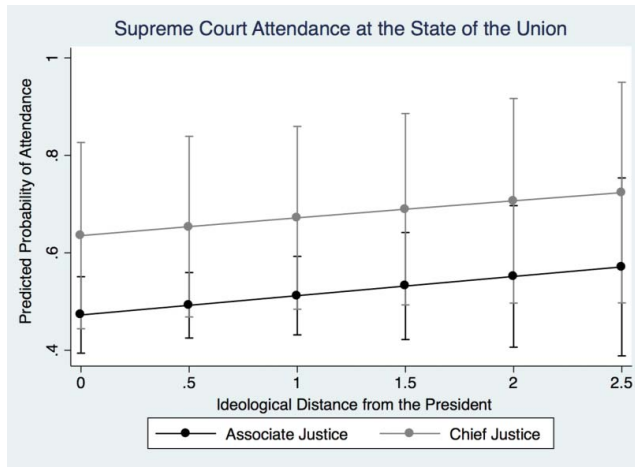


Figure 5. Predicted Probability Plot for Ideological Distance from President.

the bench (or age), they are less likely to attend State of the Union addresses. However, although the coefficient for appointing president is in the expected positive direction, it does not attain significance at the $p < 0.05$ level in any model in Table 3. Additionally, the variable measuring the number of confirmation votes a justice received also does not attain significance in any model. Finally, we expected that justices would be less likely to attend State of the Unions delivered in partisan environments. This expectation is supported in the first three models. As the House becomes more polarized, justices are less likely to attend the State of the Union address. This finding has important implications for the Court's emphasis on its apolitical persona, a point to which we return in our conclusion.

To better understand the substantive results presented in Table 3, we present predicted probability plots from the first model for the two variables relating to our hypotheses. Figure 4 shows the predicted probability of a justice attending the State of the Union for the range of public opinion values, holding the other variables in the model at their mean values. Because we find differences between associate justices and chief justices in their rates of attendance, we present two plots in the figure. The bottom line in Figure 4 shows the predicted probability of associate justice attendance, while the top line shows the predicted probability of chief justice attendance. Both plots reveal the same substantive pattern, although chief justices have a higher baseline rate of attendance. On average, 42.68 percent of respondents express confidence in the Court. Looking at Figure 4, if one goes from one half a standard deviation below the average percentage expressing confidence (about 40 percent of respondents) to one half a standard deviation above the average percentage expressing confidence (about 45.4 percent of respondents), the predicted probability of associate justice attendance decreases from 64 percent to 50 percent, a decrease of 14 percentage points. A similar pattern emerges for chief justices, although the effect is somewhat smaller.⁴² Figure 5 shows the change in predicted probability of an associate justice and a chief justice attending the State of the Union for the range of values of ideological distance from the president. Although there is some movement for both chief and associate justices, both lines demonstrate an increase in the predicted probability of attendance for justices as their ideological distance from the president increases, moving in a direction not consistent with the expectation that greater distance between judges and presidents should

⁴²In Figure 4, going from the minimum value of 31 percent of respondents expressing confidence in the Court to the maximum value of 52 percent of respondents expressing confidence in the Court results in a drop in predicted probability of attendance of more than 40 percentage points for associate justices (from more than 80 percent to less than 40 percent). Again, a similar pattern emerges for chief justices.

Table 4. Model with court curbing included.

	Court Curbing
(Intercept)	11.41* (1.82)
Public Opinion	−0.14* (0.02)
Tenure	−0.12* (0.04)
Ideological Distance from President	0.42 (0.22)
Votes to Confirm	−0.003 (0.01)
House Polarization	−5.20* (1.63)
Appointing President	0.83 (0.56)
Court-curbing Bills	−0.01 (0.01)
Chief Justice	1.03 (0.76)
N	278

Robust clustered standard errors in parentheses.
*indicates significance at $p < 0.05$.

Table 5. Appendix models.

	Random Effects	Time Trend	Court Curbing	Interaction
Intercept	11.41* (2.76)	−80.56 (198.41)	5.96* (1.51)	13.06* (2.15)
Public Opinion	−0.14* (0.04)	−0.14* (0.02)		−0.14* (0.02)
Tenure	−0.12* (0.03)	−0.12* (0.04)	−0.10* (0.03)	−0.24* (0.11)
Ideological Distance from President	0.42 (0.25)	0.43 (0.24)	0.38 (0.24)	0.41 (0.22)
Votes to Confirm	−0.003 (0.02)	−0.004 (0.01)	−0.01 (0.01)	−0.02 (0.02)
House Polarization	−5.20* (1.39)	−8.06 (6.55)	−5.26* (1.33)	−5.39* (1.60)
Appointing President	0.83 (0.62)	0.81 (0.56)	0.88 (0.60)	0.87 (0.56)
Court-curbing Bills	−0.01 (0.02)	−0.002 (0.01)	0.02* (0.01)	−0.01 (0.01)
Chief Justice	1.03 (0.66)	1.04 (0.75)	0.74 (0.67)	1.16 (0.86)
Tenure * Confirmation Votes				0.00 (0.00)
Year		0.05 (0.10)		
N	278	278	351	278

Robust clustered standard errors in parentheses.
*indicates significance at $p < 0.05$.

lead to less attendance.⁴³ These plots provide additional support for our hypothesis that public opinion is an important concern for justices in deciding whether to attend the State of the Union, while again underscoring the limited—and, in this case, puzzling—effect of ideological factors.

⁴³We ran a model that included an interaction between public opinion and ideology, which was not significant.

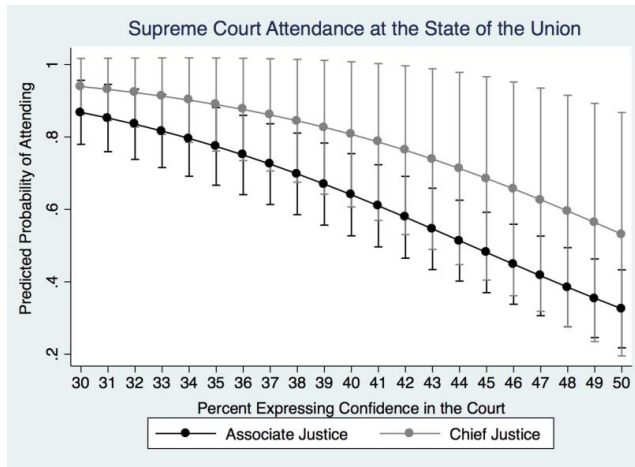


Figure 6. Predicted Probability Plot for Public Opinion in Court-curbing Model.

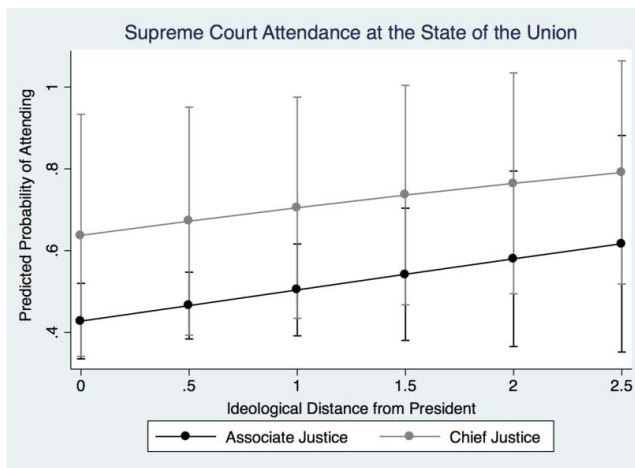


Figure 7. Predicted Probability Plot for Ideological Distance from President in Court-curbing Model.

Given Clark's (2010) argument that court-curbing bills are an indirect signal of public opinion, the variable measuring these bills was excluded from the original model due to concerns that we were including two measures of public opinion in the same model.⁴⁴ Thus, to ensure the results from the first model are not the result of the exclusion of this variable, we have estimated a second logistic regression model that adds court-curbing bills as a predictor. The results of this model are presented in Table 4. As can be gleaned from the table, the addition of this variable does not change the sign or significance of the other variables. Most importantly, public opinion is still negative and significant, and the other variables perform in a comparable manner. Court curbing, however, is not significant.⁴⁵

⁴⁴However, the two variables are only weakly correlated. The correlation coefficient between the two is only -0.17 .

⁴⁵However, the model in Column 3 of Appendix Table 5 estimates justice attendance without public opinion, but with court curbing. In this specification, court curbing is positive and significant, which is what we would expect if court curbing is a measure of public displeasure with the Court. This result is further evidence that the Court reacts to public opinion when considering whether to attend the State of the Union. As the number of court-curbing bills increases, a justice is more likely to attend this address out of concern for its long-term institutional legitimacy.

To further compare the impact of the addition of this new variable, we present a plot of the predicted probability of attending for values of public opinion and ideological distance from the president, holding the other variables in the model constant. Again, we include plots for associate justices and chief justices. As can be observed in Figures 6 and 7, the effect sizes are comparable to those presented in Figures 4 and 5.

Conclusion

The State of the Union address is the only annual event on the American political calendar at which members of all three branches of government are present at the same time. As such, the results presented in this article have important implications for the study of Supreme Court justice behavior and the Court's relationship with the other branches. Couched in a theoretical framework of positivity bias and judicial audience perspective, our results suggest that even in a non-policy setting such as the State of the Union address, the Court's concern for maintaining its institutional legitimacy, and, potentially, the justices' desires for individual approval lead to justices' responses when public confidence turns against the Court. Thus the Supreme Court responds to its institutional constraints in ways that go beyond its judicially defined role as arbiters of legal conflict.

Broadly, our findings suggest that attendance can be used as an indicator of the state of the relationship between the Court and the polity. As noted by Alexander Hamilton in *Federalist* 78, the judicial branch "is beyond comparison the weakest of the three departments of power" because of the Court's reliance on the other branches to carry out its rulings (Madison, Hamilton, and Jay 1788). Understanding the Court's position in the American system of separation of powers with checks and balances, justices are most likely to attend when the standing of the Court with the public is the weakest in order to bolster its position as compared to the other branches. In contrast, justices are least likely to attend when public opinion is favorable and other branches would be most likely to counter resistance from the public for not carrying out a Supreme Court ruling. Whether or not a justice is a conservative or a liberal, the other branches must take seriously the need to carry out rulings in order for them to take effect.

Our results also speak to the importance of understanding Court action as influenced by its political setting. In the context of State of the Union attendance, strategic variables outperform ideological factors as justices appear attentive to their level of support among the public. Even though justices act with an eye toward fulfilling their ideological preferences, the Court pays heed to its standing among the public and the other branches in an effort to avoid incurring perceived retribution. Despite its institutional design, our findings follow a long tradition in the judicial politics literature of demonstrating the Court is far from presenting a countermajoritarian difficulty (Bickel 1962). Designed to be free from public and political pressure, the Court nonetheless responds to public opinion, and our article makes an important contribution in showing that justices consider public opinion in ways that go beyond legal decision-making.

Moreover, our findings suggest that the Court's concern for its legitimacy manifests in how the Court and its justices emphasize the symbols of judicial office and seek to present themselves as apolitical. While positivity bias indicates that public exposure to legal symbols improves public support, our finding that increased House polarization decreases a justice's likelihood of attending the State of the Union supports the notion that justices may wish to distance themselves from polarized, partisan politics in order to cultivate an image of apolitical actors intent only on the law. That justices seem to eschew polarized environments reinforces the importance of the Court's apolitical persona to its legitimacy and gives credence to studying judicial behavior from a self-presentational or audience perspective (Baum 2006).

We do not claim that judicial attendance at the State of the Union necessarily causes public opinion of the Court to increase. While this is a natural implication of our argument, particularly with respect to the theory of positivity bias, we are arguing that the Court thinks attending the State of the Union can help to preserve its long-term legitimacy. Whether the public does, in fact, respond is beyond the scope of this article and can be examined in future research.

Finally, given the elusive nature of the Supreme Court and the distaste that a number of justices have expressed toward attending this event, our results show the extent to which justices must go to preserve their place in the polity. For a member of Congress or a president, appearing at a largely ceremonial event barely merits attention due the frequency of such an occurrence. In contrast, for a Supreme Court justice, attendance at an event such as the State of the Union represents a departure from the norm that is likely to occur only when justices feel it is necessary in order to preserve their position relative to the other branches. While some justices clearly prefer not to attend this event, this article demonstrates they may be willing to do so when the Court must push back against other branches to protect their institutional legitimacy.

Acknowledgments

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