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Political Ideology and the Judiciary: Conservatism in the Supreme Court

The dichotomy experienced today of the two most common political ideologies in the United States, liberalism and conservatism, has become influential and pervasive in virtually every facet of government bureaucracy, social institutions, and political thought. Although a relatively recent phenomenon by some standards, the role of liberalism and conservatism (and the relationship between both ideologies) has become a mainstay within the American political system, most notably within American political institutions and political thought. These two ideologies, together, dictate and greatly influence the outcomes of elections, the passage or failure of congressional policy, and the actions of the President himself. Additionally, these two ideologies (with conservatism being the focus of this paper) influence the processes and outcomes of the political and ostensibly apolitical aspects of the judiciary in the venue of the Supreme Court. All aspects of the Supreme Court are, today, subjugated to the influence of political ideology, most notably that of conservatism.

Political Ideology in the High Court

As has been the case in recent years, political ideology is at the forefront in analyzing any aspect of government and public policy. The gross and uncompromising opposition of liberal and conservative ideologies has come to characterize American politics today. This opposition can be found in the realm of the highest court—the Supreme Court. The role of ideology in the Supreme Court is twofold. First, ideology dictates and influences the many political aspects of the Court, including the presidential nomination of justices, Senate confirmation of judicial nominees, as well as the role of the politically appointed solicitor general within the Court. Secondly, political ideology is pervasive in the seemingly non-political (or apolitical) facets of the High Court, including the formation of the decisions and opinions (both aggregate and individual) of the justices of the Court. Even those features of the Supreme Court that
by design appear to be inherently politically disconnected and apolitical in nature (e.g. the opinions and decisions of the justices) are in fact affected by the influence and power of political ideology. The lifetime appointment of justices, the role of the High Court in regard to judicial review, and the constitutional guarantee against a reduction in salary, all ensure the judiciary a certain independence, with the purpose (at least theoretically) of protecting the justices from outside political influences, including political ideology (U.S. Const. art. III, § 1). However, despite these safeguards, political ideology has become as noteworthy in the judiciary as it is within the other branches of government, such as the office of the President and both congressional houses. Political ideology, and the influence of political ideology, can be seen throughout the institution of the Supreme Court in a myriad of ways.

Structure and Ideology

The Supreme Court, although expressly a part of the checks and balances system of government that allows considerable autonomy (as detailed in the Constitution), is inextricably political through the structure of the nomination process of Supreme Court justices as well as with the direct link between the executive and judicial branches through the role and influence of the solicitor general.

Appointing Justices

The process of becoming a justice of the Supreme Court today is characteristically, and by nature, political. Because of the political actors who are involved, the Supreme Court is impacted and influenced by the pervasive role of political ideology. The influence of political ideology is present all the way from the presidential nomination to the Senate confirmation of a justice. From the very beginning of the process, political ideology dictates whom the president will formally nominate. As appointments to the Court are seen as avenues for a long-lasting legacy (as per the lifetime judicial appointment of Supreme Court justices), presidents seek to nominate candidates who are not only relative in ideology to themselves,
but also those who are good candidates for confirmation by the Senate. Strauss (2009) asserts that the “Republican Party is...deeply committed to making sure that judicial appointments carry out its principles” and that, accordingly, presidents “pursue a political agenda” through the nomination of justices to the Supreme Court. Additionally, research by Hall (2012) illustrates how the “governing regimes...ensure that the Court promotes their interests by appointing like-minded justices.”

In the next step of the process—Senate confirmation—political ideology is likewise salient. It is worth noting that while Senate confirmation hearings today are notoriously political in nature, this was not always the case. Judicial nominees did not regularly attend or appear at their own Senate confirmation hearings before 1955. Only after the nominees began to regularly attend and participate in their own hearings, did it become commonplace and, in a sense, unsurprising and expected (Rotunda, 2001). Similar to the presidential nomination, Senate confirmation is used to perpetuate the political ideology of the majority within the sphere of the federal judiciary (Hall, 2012). The nomination and appointment process of a justice is inherently, both in structure and in practice, greatly influenced by political ideology.

The Solicitor General

The solicitor general acts as a direct connection or link between the Supreme Court and the executive branch, asserting a certain amount of political influence within the supposedly apolitical judiciary. In their study of the role of the solicitor general in relation to the Supreme Court, Bailey, Kamoie, and Maltzman (2005) find that “the executive branch—via the solicitor general—influence[s] the Court.” As the “chief litigator” for the executive branch, the solicitor general and the justices on the Court forge a relationship and become intimately linked (Bailey et al. 2005; Curry, Pacelle, & Marshall, 2008). With regard to political ideology, the solicitor general extends the sphere of influence within the Court expressly in terms of the political
ideology of the executive branch. As previously mentioned, the structure of the executive branch is recognizably political in nature and is therefore susceptible to the influence of political ideology. Indeed, most, if not all, political scholars today would readily acknowledge the expansive and significant role of political ideology throughout the Office of the President in particular, perhaps due to the “widespread and increasingly consequential” role of ideology within the American electorate (Carmines, Ensley, & Wagner, 2012). Thus, as the solicitor general acts to circumvent the Constitutional autonomy of the federal judiciary while establishing a direct path of influence from the executive to the Court, the Court experiences, and is thus influenced by, an infusion of political ideology.

**Judicial Opinion and Ideology**

In the same way that political ideology influences the Court through the structure of establishing justices on the Supreme Court bench as well as the unique and influential role of the solicitor general, the effect of political ideology can also be observed in the formation of the opinions and decisions set forth by the justices. Once past the initial structures of nomination and confirmation, the institution of the justices appears to be constitutionally apolitical in nature. After successful confirmation, the political ties forged throughout the process of becoming a justice of the Court seem to be broken as the justices are then insulated from the political arena through the constitutional protection from wage decreases, as well as the life-term appointments of the justices. However, as demonstrated, the nature of the Court does not necessarily become apolitical in nature nor does it “escape” the scope of ideological influence once the new term begins. The solicitor general, for example, provides an enduring link between the Court and the Executive, helping to promote the proliferation of political ideology into the Court.

The unavoidable influence of political ideology within the Supreme Court has consequently led to a trend of more ideologically-based individuals being selected for the
Supreme Court bench, resulting in decision-making largely based on, and heavily influenced by, ideology (Wetstein, Ostberg, Songer, & Johnson, 2009). The voting behavior and decision-making of the justices, especially in recent years, has empirically demonstrated the vast effect of political ideology, particularly in relation to the executive-judicial ideological relationship and ties. For instance, Sunstein, Schkade, and Ellman’s 2004 study found that “the political [ideology] of the appointing president is a fairly good predictor of how the individual judges will vote.” Today, Supreme Court justices are tied (either positively or negatively) to the president via political ideology. In Clark and Whittington’s study of judicial ideology (as cited in Hall, 2012), the tendency is for justices to “invalidate laws enacted by ideologically distant coalitions” to that of the coalition that provided them with a seat on the bench. In short, the decisions and opinions by the Supreme Court are, in fact, influenced by political ideology because of the inherent and necessary linkage of the Court to the executive and legislative branches not only in terms of appointment of judges, but also in terms of the very enforcement of the Court’s opinions and decisions.

**Conservative Ideology in the United States Supreme Court**

As detailed above, political ideology is present within the Supreme Court of the United States and is influential in all the structural and practical aspects of the Court. In the United States, the two major political ideologies are liberalism and conservatism, representing the left-to-right ideological spectrum. This pervasive effect is carried through to the principal ideologies that influence the judiciary. It is important to recognize that although there seem to be innate differences and distinctions that exist between political ideology and judicial ideology in the sphere of academia, at the very foundation they are one and the same with the same underlying themes and implications. In other words, judicial ideology is simply political ideology as applied to the judiciary, and likewise conservative judicial ideology is simply conservative political ideology as applied to the judiciary.
Judicial Ideology

Judicial ideology (as defined by Wetstein et al., 2009) is “judicial behavior that is animated by a consistent set of beliefs about the scope and purpose of government and its impact on the lives of individuals.” Through this basic definition, one can easily see the components of political ideology within judicial ideology. For instance, the underlying aspect of a set of beliefs or a belief system that is moved towards action is present in this definition as a “behavior.” Also, at the very core of judicial ideology, as in political ideology, there is a foundational set of beliefs that are specifically designed to be understood and applied by the general public.

Conservative Judicial Ideology

Fundamentally, conservative judicial ideology is one and the same with conservative political ideology. Modern conservative ideology is a classically liberal ideology that tends to favor individual rights, free enterprise, limited government, and federalism. It is beneficial to remember that when compared to the ideology at the other end of the spectrum (modern-day liberalism), conservatism appears to be more fluid and short-term oriented as a pragmatic ideology. In terms of conservatism within the specific judicial context, it is much the same as in the political sphere. Today’s judicial conservatism has been characterized by the judicial principle of judicial activism. At the core of modern judicial activism, according to academic scholars, is a general inclination against deference to the other branches of government and, more broadly, “judges making rather than following the law” or “disallowing...policy choices made in the ordinary political process that the Constitution does not clearly disallow” (Chemerinksy, 2011; Graglia, 2003).

Judicial conservatism, much like purely political conservatism, is also always in flux—it is constantly developing and changing. Strauss (2009) concludes that today’s judicial conservatism does not have a cohesive, standard, or accepted belief in the role of the court
system. Moreover, a phenomenon known as ideological drift persists within the Supreme Court bench; this is a pattern of ideological fluctuations by the individual justice (some studies illustrate consistent leftward movement) throughout their tenure as a Supreme Court Justice (Epstein, Martin, Quinn, & Segal, 2007).

Just as political conservatism today is different in many aspects from the conservatism championed in the 1980s by President Reagan, modern-day judicial conservatism is vastly different from the judicial conservatism of the past. This evolution of political ideology has led many scholars to conclude that today’s perceived “conservative” Supreme Court is not actually conservative at all. For instance, contemporary judicial conservatism, as mentioned above, is characterized by judicial activism while, traditionally, conservatives have opposed judicial activism and favored judicial restraint (the judicial practice of deferring to the other branches of government when lacking clear unconstitutionality). For instance, much of the “liberal” judicial activism of the Warren Court of the mid-twentieth century was despised by the political conservatives of the time, while today the so-called “conservative” Roberts Court has been very active in the practice of judicial activism as opposed to judicial restraint. One potential cause of this recurring change in the Court’s ideology is most likely due to the changing composition of the Court in terms of the individual justices themselves. As mentioned above, political ideology is perpetuated in the Court through the importance placed on it through the nomination process. Additionally, the enduring impact of the relationship forged between the executive and judiciary through the solicitor general leads to changes in ideology. These aspects all work together to create the overall ideology of the Court during any given period of time, as the individual ideologies of the justices become an important and integral aspect of the Court. This process leads to the aggregated importance of ideology on the Court and the ideological tendencies the Court is perceived to have.

Conservatism can also be evaluated within the Court through analysis of its decisions. For instance, the 2010 case of Citizens United v. Federal Election Commission was an
act of judicial activism, as practiced by today’s judicial conservatives, which placed limits on the government and protected individual rights by asserting that corporations were guaranteed the rights given by the First Amendment (Chemerinsky, 2011). Another example of conservative ideology impacting Supreme Court decisions is the role of the principles of federalism and the seeming rightward shift during the tenure of the Rehnquist Court as it “struck down acts of Congress on the grounds that they exceeded Congress’ powers under the Commerce Clause” (Strauss, 2009). Chemerinsky (2011) also notes that the well-known case McDonald v. City of Chicago effectively incorporated the Second Amendment to the States. This case in particular illustrates the general susceptibility of the Supreme Court to modern political ideology. The “right to bear arms” has not traditionally, or historically, been a feature of conservative ideology. However, the validity of the interpretation of the Second Amendment with regard to asserting the right to own a gun has become centered upon ideological lines, with liberals opposing it and conservatives supporting the “right.” As Chemerinsky (2011) points out, McDonald was decided by the nine justices along purely ideological lines, with the five conservatives of the court upholding the Second Amendment right with regards to ownership of a gun, while the four liberals dissented. This example illustrates the power of ideology today within the Court as a newly formed (and not traditional) ideology invaded the Court and directly influenced the outcome of a specific case.

**Conclusion**

The Supreme Court of the United States, one of the most revered and esteemed of American institutions, is constitutionally designed to uphold the laws and statutes of the United States as well as to ensure that the other branches of government do not over-assert their constitutional authority. At the surface, the Supreme Court may appear to some as an inherently apolitical institution, isolated and outside the influence of politics and political ideology. However, this is simply not the case. Today’s Supreme Court is receptive to and influenced by political ideology on a daily basis through the inherent political relationship
of the Court with the other branches of government in the process of appointing justices, as well as the immediate relationship of the Court with the executive through the solicitor general. Additionally, judicial ideology and political ideology are one and the same in theory and in practice. Judicial conservatism, like political conservatism, is an ideology that is always adapting and growing while demonstrating preference to classical liberal ideas in favoring individual rights and limiting government, although deviations do certainly exist. It is necessary today to take special care to examine and analyze the Supreme Court in terms of ideology due to the role of political (and judicial) ideology as a primary aspect of the Court. Contrary to the institution as it was originally established, today’s ideology permeates the Supreme Court from the time the justices are appointed to the final decisions made at the end of each term.
References


U.S. Const. art. III, § 1