

# Loyalty or Fairness: A Reexamination of the Relationship Between Fairness and Support for the Supreme Court

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## ABSTRACT

In light of evidence that loyalty can trump fairness, and on the immense—and growing— influence of group loyalty in American politics (e.g., Iyengar and Westwood 2015), I believe now is an appropriate time to reexamine the relationship between fairness and support for the Supreme Court. Great rifts between, and cohesion among, groups in the United States have occurred in recent decades, such that individuals increasingly align with the political in-group and increasingly avoid and dislike the out-group (Huddy, Mason, and Aarøe 2015; Iyengar, Sood, and Lelkes 2012; Iyengar and Westwood 2015). Group members feel pride for conformity and shame for disloyalty (Suhay 2015). This Balkanization, and the motivations that accompany social identity-based polarization, provides fertile ground for loyalty to confront sociopolitical and moral norms like fairness. This study sets out to determine whether individuals are willing to forgo fairness on the part of the Supreme Court when their group benefits. I take “fairness” to encompass a host of characteristics, like trustworthiness, ethicality, integrity, honesty, and believability. I ask whether individuals will accept Court procedures that violate these principles, provided that they view themselves as policy “winners.” To find out, I conducted a nationally representative survey with an embedded experiment, as well as a convenience sample survey experiment.

## KEYWORDS

*Supreme Court; Group loyalty; Procedural fairness; Support.*

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## 1. Introduction

To confirm that the average American actually perceives the Court to be fair (an important first step, given the assertion that shocks to such a belief should prove influential), I quantify such beliefs and determine their relationship to other constructs of normative and empirical interest. I find that individuals have coherent perceptions of the Court’s fairness, that they believe the institution to be generally fair, and that fairness relates to other important characteristics (e.g., legitimacy and Court politicization) in the expected manner. Then, to

explicitly investigate willingness to forgo fairness in favor of loyalty, I use two experimental designs which build on one another. In the first experiment, I find that individuals punish the Court for unfair procedures under two conditions: (1) when they cannot determine whether the group (here, partisan) to which they are loyal benefits or is disadvantaged and (2) when they believe their group is disadvantaged. However, individuals whose group stands to benefit from the Court's unfair procedures fail to rebuke such behavior, which offers evidence for the central hypothesis that many will set aside fairness to promote favoritism, or in the name of loyalty. Finally, to place the effects of loyalty into greater context, I compare these effects to another powerful influence on Court evaluations: satisfaction with a particular decision. I find that results hold when considering outcome support and that some actually increase support when their group benefits. These findings have normative implications for the Supreme Court. Preexisting positivity toward the judiciary is, at least partially, responsible for the Court's large stores of public support (Gibson and Caldeira 2009; Hansford, Intawan, and Nicholson 2018), and the Court is able to operate more freely when it is buttressed by public support (Clark 2009; Ura and Wohlfarth 2010). Yet, the evidence presented here indicates that positivity can be combated by loyalty's demand for favoritism. Generally, the greatest concern for the Supreme Court is the loss of support. It is also concerning if the Court maintains its support in the aggregate but is individually supported only by those benefiting from its unfairness. The micro-foundations of support matter for the macro-levels thereof.

## **2. Procedural Fairness and Group Loyalty**

What happens when people think the Court is using unfair procedures? Conventional wisdom suggests that support for the institution and for specific decisions would decrease. Indeed, this hypothesis has been rigorously tested; though not the only influence on evaluations of the Court (e.g., positivity bias; see Gibson and Caldeira 2009), procedural fairness has a substantial influence on attitudes regarding the Court (Gibson 1989; Mondak 1993; Ramirez 2008). Even when disappointed with the Court's decisions, belief that the process has been fair relates to compliance with the decision (Baird 2001; Gibson and Caldeira 1995) and institutional support (Gibson 1991; Tyler 2006). Despite general adherence to fairness, and the well-established relationship between fair procedures and Court support, other social and moral norms may also influence support for the Supreme Court and its decisions. In particular, loyalty is a basic moral norm (Haidt 2007), influences political assessments (Iyengar, Sood, and Lelkes 2012), and is occasionally in direct conflict with fairness (Waytz, Dungan, and Young 2013). It is plausible that loyalty to one's political group may offset the robust influence of procedural fairness when it comes to Court support. Although the American public is uncommonly positive toward the judiciary (Caldeira and Gibson 1992; Gibson, Caldeira, and Baird 1998), positivity-based support may be no match for identity-based group loyalty. Some may trade fairness for favoritism.

Loyalty—or“the principle of partiality toward an object (e.g., group)” (Hildreth, Gino, and Bazerman 2016)—is important to consider when assessing attitudes toward the judiciary because members of the American mass public, now more than ever, view the political landscape in terms of“us” versus“them.” Often, one considers herself, in terms of identity, a“Democrat” or“Republican” (Huddy, Mason, and Aarøe 2015), or in similarly divisive and mutually exclusive terms. Merely identifying with a group is sufficient to produce strong feelings about both the in- and out-group (Iyengar, Sood, and Lelkes 2012). Thus, loyalty is part and parcel of group identification.

While the fairness norm demands equal treatment, the loyalty norm demands favoritism. Thus, fairness and loyalty are clearly at odds. More importantly, traditionally paramount fairness may be“over-ridden in contexts that pit fairness against loyalty” (Waytz, Dungan, and Young 2013, 1028). This is especially true when resources are scarce, as is true with policy victory. Still, group-specific loyalty is required to rival fairness. In the absence of a group consideration, priming loyalty fosters ethical behavior (Hildreth, Gino, and Bazerman 2016). In other words, even if a specific group appeal is made, when one cannot ascertain whether her group

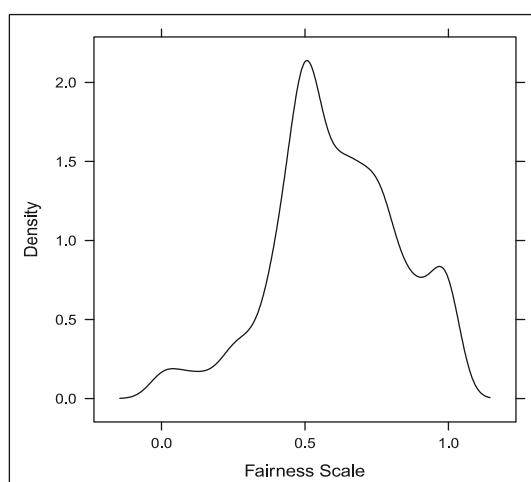
stands to benefit or suffer from some unsanctioned behavior, she is likely to promote the ethical behavior and censure the unfair action (in keeping with the fairness norm). However, when group considerations are obvious, more loyal individuals are less committed to ethical behavior (Hildreth, Gino, and Bazerman 2016). Importantly, the decision to condemn unfair behavior is driven by fairness, but the decision to accept unfair behavior is motivated by loyalty (Waytz, Dungan, and Young 2013).

### 3. Assessing Fairness

To measure beliefs about the Court's fairness, I use Lucid, a survey platform which provides academic researchers with quota-based nationally representative samples from multiple survey partners (see Coppock and McClellan 2019). In February 2019, I surveyed a total of 1,001 U.S. adults; 500 are considered here, and the remainder are described later in this paper.<sup>4</sup> Sample demographic characteristics are available in the Supplemental Appendix. Table 1 lists the survey items used to construct the fairness scale. The items ask about the Court's believability (items 1 and 7), ethicality (2), integrity (3), propensity to tell the truth (4 and 6), honorability (5), honesty (8), and use of fair procedures (9). Each of these properties relates to a generalized form of fairness, or impartial, just behavior free from favoritism. Responses ranged from strongly disagree (1) to strongly agree (5). The items form a highly reliable scale (Cronbach's  $\alpha = 0.93$ ), and the scale explains a high percentage of the variance in the items (80%).

**Table 1.** Fairness Scale Items, Summary Statistics, And Psychometric Properties.

	<i>M</i> (1–5)	Factor score
I believe what the Supreme Court says	3.37	0.77
The Supreme Court is not ethical (R)	2.55	–0.69
The Supreme Court has integrity	3.60	0.84
I trust the Supreme Court will tell the truth	3.46	0.83
The Supreme Court is honorable	3.59	0.79
The Supreme Court lies (R)	2.65	–0.78
The Supreme Court is not believable (R)	2.56	–0.76
The Supreme Court is very honest	3.34	0.79
The Supreme Court does not use fair procedures (R)	2.69	–0.70
Cronbach's $\alpha$		0.93
Proportion variance explained by first dimension		0.80



**Figure 1.** Distribution of fairness scores.

#### 4. Forgoing Fairness for Loyalty

The data for this survey experiment come from the Lucid sample described above. A total of 1,001 individuals were surveyed. A total of 500 respondents—the same 500 described in the Assessing Fairness section above—serve as the control group; these respondents were randomized into the control group/observational portion of the survey. They saw no information regarding the Court’s decisions, decision-making, or any report about the Court’s fairness. The remaining 501 respondents were randomized into one of three treatment groups.<sup>7</sup> Some are led to believe the Court engages in favoritism—an affront to fair procedures—although the direction of the favoritism is withheld. Others are led to believe the Court’s unfair procedures benefit Republican groups, and others still Democratic groups. These latter two treatments serve to prime group concerns in an obvious manner; an individual can plainly determine whether her group “wins” or “loses” from the Court’s unfair procedures.<sup>8</sup> Specifically, subjects are told<sup>9</sup>: Recently, the Judiciary Oversight Committee—which is comprised of three Republicans, three Democrats, and three non-partisan members who are permitted to practice law—unanimously concluded that the U.S. Supreme Court regularly ignores evidence presented by [particular groups/Republican groups/Democratic groups]. In addition, though the Supreme Court does not, technically, assess evidence, there are myriad ways one could perceive the Court to “ignore evidence” presented by one group, such as selectively citing attorneys or briefs, discriminating in interrupting counsel, or simply failing to give equal weight to both arguments.<sup>10</sup> Clearly, such behavior is an affront to fair procedures. This study merely seeks to demonstrate the substantive and causal role of unfair procedures. Examples of real-world unfairness are unlikely to be as blatant as the treatment. Still, the Court does not need to be truly unfair for that perception to matter. Perceptions—even demonstrably inaccurate ones—still influence subsequent political evaluations (e.g., Gaines et al. 2007; Nyhan and Reifler 2010). Thus, the connection between the perception of fairness—whether it is manufactured or arises organically—and support in the face of group benefits is of interest.

#### 5. Hypotheses

Hypothesis 1: Respondents who receive no information regarding which group the Court’s unfair procedures help (i.e., unclear) will be less willing to accept Supreme Court decisions, relative to the control group.

Hypothesis 2: Unclear respondents will be lower in diffuse support, relative to the control group.

Hypothesis 3: Respondents led to believe the Court’s unfair procedures harm their group (i.e., losers) will be lower in decision acceptance, relative to the control group.

Hypothesis 4: Losers will be less diffusely supportive, relative to the control group.

Hypothesis 5: Respondents led to believe the Court’s unfair procedures help their group (i.e., winners) will report equal levels of decision acceptance, relative to the control group.

Hypothesis 6: Winners will report equal levels of diffuse support, relative to the control group.

Hypothesis 7: Winners will report greater levels of decision acceptance, relative to the control group.

Hypothesis 8: Winners will report greater levels of diffuse support, relative to the control group.

#### 6. Empirical Results

To determine the effect of group considerations on evaluations of the judiciary, I simply regress acceptance and legitimacy onto a categorical variable that indicates presence in the control group, in the unclear category,

in the winners category, or the losers category. Because this is a randomized design, I omit control variables (though results hold in the face of controls). See Supplemental Appendix for ordinary least squares regression coefficients, with and without control variables. Linear predictions are displayed graphically in Figure 2. Each outcome is scaled 0–1. Within each panel, a dashed horizontal line represents the average response for the control group. Estimates for the respondents in the losers category are represented by the leftmost bar, the unclear category at center, and winners at right. Each bar represents the predicted response for subjects in that category, and vertical bars represent upper bounds of 95 percent confident intervals around those estimates. Note that when confidence intervals overlap a horizontal dashed line, differences between that category and the control group are not statistically significant; the same is not true of overlapping confidence intervals (see Bolsen and Thornton 2014). The main test of the central premise is whether the winners category differs from the control group.

Linear predictions are displayed graphically in Figure 1. Each outcome is scaled 0–1. Within each panel, a dashed horizontal line represents the average response for the control group. Estimates for the respondents in the losers category are represented by the leftmost bar, the unclear category at center, and winners at right. Each bar represents the predicted response for subjects in that category, and vertical bars represent upper bounds of 95 percent confident intervals around those estimates. Note that when confidence intervals overlap a horizontal dashed line, differences between that category and the control group are not statistically significant; the same is not true of overlapping confidence intervals (see Bolsen and Thornton 2014).

Consistent with hypothesis 5, I find that it does not. These individuals do not differ from respondents who have not considered the Court's fairness. In other words, even though individuals should be less prone to accept decisions when confronted with information that the Court is systematically unfair (according to previous work and the evidence among those in the unclear category), this is not the case when one benefits from those unfair procedures. Individuals may be willing to turn a blind eye to perceived institutional unfairness when it benefits their group. Information in Table 2 places these effects in substantive terms. Across the board, effect sizes for the unclear and loser categories are moderate in size, while they are very small (indeed, negligible) for winner respondents. The average percent decrease, relative to the control group, for unclear and loser groups is 15 percent; for the winners group, it is 3.5 percent (which is indistinguishable from 0). The average standardized effect size for the unclear and loser groups is 0.34, which means nearly two-thirds (around 64%) of treatment respondents will have lower evaluations of the Court than the control group average. For the winner group, the average standardized effect size is four times smaller, only 0.085. Finally, I note that, in the Supplemental Appendix, I consider heterogeneity across levels of loyalty. Among a (relatively small) subsample ( $n = 206$ ), the effect of unfairness is heterogeneous across partisan loyalty, such that more strongly loyal partisans are more disappointed by unfair procedures than less loyal partisans among losers, but effects are fairly homogenous for winners.

**Table 2.** Summary of substantive effects.

	<i>Acceptance</i>		<i>Legitimacy</i>	
	% decrease	Cohen's <i>d</i>	% decrease	Cohen's <i>d</i>
<i>Unclear</i>	19	0.45	9	0.20
<i>Losers</i>	15	0.34	18	0.37
<i>Winners</i>	4	0.11	3	0.06

## 7. Discussion

In this paper, I set out to understand how group loyalty impacts the relationship between perceptions of fair Supreme Court procedures and support for the judiciary. I believe this is one of the first attempts to simultaneously consider dedication to two norms that may influence evaluations of the judiciary—fairness

and loyalty. Using a broad array of data—including a nationally representative survey with an embedded experiment, and a convenience sample-based experiment—I find that, despite believing institutional fairness is important (see Baird 2001), and despite negatively influencing individuals in the general sense, unfair Court procedures that benefit one's group are seen as acceptable. More specifically, "winners," or the beneficiaries of perceived systematic judicial impropriety, fail to penalize the Court (in terms of legitimacy and decision acquiescence) like other respondents do. In some instances, they even increase their evaluations of the Court.

What these experimental results suggest about realworld institutional arrangements may depend on who perceives themselves to be winning and losing due to the Court's unfair procedures (regardless of where that perception arises). Say the winners of unfair Court procedures comprised a majority of the electorate. In such an instance, we might expect the failure to punish the Court (as found in the experiment) to play out in reality. If most people accept the policy resulting from the unfairness, the Court will probably go unsanctioned and people (and, subsequently, their elected officials) will acquiesce to decisions. If, however, a majority of the electorate was made up of losers of unfair procedures, the loyalty norm could manifest as electoral mobilization. Perhaps voters would cast their ballots for senators and presidents who could "fix" the Court. Individuals may urge their elected officials to eschew enforcement of decisions with which they disagree. Or, perhaps the Court itself may sense it is in need of course correction and alter its decision-making in future cases (a la Casillas, Enns, and Wohlfarth 2011). The most normatively concerning scenario, with respect to the Court's rights-protection function, is if a plurality of people are losers, but find themselves unable to sanction the Court either via electoral success or the constraining capacity of public opinion alone.

In addition, individuals in the mass public are not likely to read reports by oversight committees (the nature of the experimental treatment). Although I suspect such reports would make headlines, it is still the case that the public has not been exposed to systematic evidence of unfair judicial procedures. Nevertheless, as is true in many facets of political life, subjective perceptions matter more than objective reality (Bartels and Johnston 2013; Enders and Armaly 2019). One need not know the Court is unfair, but need only to believe it. I believe the likeliest avenues by which individuals would reach conclusions that the Court is unfair are (1) the outcomes of specific cases, (2) cues offered by political figures, or (3) the changing nature of media coverage.

Finally, the Court has always been attacked (e.g., Roosevelt's Court-packing plan). Why should concern be greater regarding the modern Court than those of days past? I believe the battle over the Court is now more accessible to the average American than it once was. The way the Court is discussed in the American public has changed (Solberg and Waltenburg 2014); the "cult of the robe" now shares media space with "cult of personality" stories that have come to typify coverage of the Court (much like coverage of other institutions). Similarly, when public figures speak out about the Court, their communications reflect clear partisan content (Krewson, Lassen, and Owens 2018). I do not necessarily argue that the Court is viewed as more or less legitimate now than in the past. Instead, a modern audience—that now better connects all elements of politics with their existing predispositions and attitudes (e.g., Enders and Scott 2019; Levendusky 2009)—may be more receptive to attacks on the judiciary, which may come to bear on long-run support.

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