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# WHAT WE SAY AND WHAT THEY DO: PUBLIC PERCEPTIONS OF SUPREME COURT NOMINEES AND JUDICIAL ACTIVISM ON THE SUPREME COURT

Valerie Hoekstra\*

Stefanie A. Lindquist & Frank B. Cross, *Measuring Judicial Activism* (Oxford U. Press 2009). Pp. 192. \$70.00.

James L. Gibson & Gregory A. Caldeira, *Citizens, Courts, and Confirmations: Positivity Theory and the Judgments of the American People* (Princeton U. Press 2009). Pp. 178. \$25.95.

Whenever a search for a new Supreme Court justice begins, so does the inevitable political rhetoric that surrounds such affairs. Politicians and pundits alike warn of nominees who intend to “legislate from the bench,” rather than observe a judicial philosophy that embodies “strict construction.” Behind this rhetoric lies a simple truth liberals prefer liberal nominees and conservatives prefer conservatives. But, as both books reviewed in this essay reveal, from very different perspectives, ideology and activism are theoretically independent concepts, despite the tendency of some to conflate them. And, unlike the rhetorical public battles, the authors of these books provide thoughtful evidence about the nature of judicial activism as well as public perceptions of what we expect from our judges. Taken together, these two seemingly different books provide important insights into the actual, on-Court behavior of Supreme Court justices as well as Americans’ expectations of that behavior. Moreover, both books offer first-rate examples of how empirical, quantitative work on law and courts can and should inform normative debates regarding the way we select judges and what we expect from them once they are confirmed to the Court.

In their book, *Measuring Judicial Activism*, Stefanie A. Lindquist and Frank B. Cross set out to measure the extent of judicial activism on the Supreme Court.<sup>1</sup> Toward that end, they provide a workable definition of activism as well as an empirical strategy for measuring it.<sup>2</sup> As they note, while politicians and pundits are quick to utter the phrase “activist,” and legal scholars spend a great deal of time thinking and fretting about how it relates to the counter-majoritarian problem, considerably less attention has been devoted

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1. Stefanie A. Lindquist & Frank B. Cross, *Measuring Judicial Activism* (Oxford U. Press 2009).

2. *Id.* at 133-149.

to defining and measuring activism.<sup>3</sup> Moreover, while many people have a particular Supreme Court justice in mind as personifying judicial activism, it is often based on nothing more than ideological disagreement with that justice. Thus, Lindquist and Cross set out to create empirically testable measures of judicial activism and to apply that to the behavior of Supreme Court justices in an attempt to assess to whom the label appropriately applies.<sup>4</sup>

The second book reviewed in this essay, *Citizens, Courts, and Confirmations: Positivity Theory and the Judgments of the American People* by James L. Gibson and Gregory A. Caldeira, examines public perceptions of nominee Samuel Alito during the confirmation process as well as how the intense confirmation battle affected the Court's institutional legitimacy.<sup>5</sup> Although these books appear, at first blush, to tackle very different subjects and employ very different research strategies, they share a very important common underlying assumption - that American citizens, scholars, and policy makers have certain expectations about what makes for a good judge and how judges should behave while on the bench. Central to that assumption is that judges should understand that their role is to render decisions on cases and to avoid "legislating from the bench." While a thorough summary of the findings of both books is beyond the scope of this essay, I do provide a brief overview of the main research questions, analytic strategies, and empirical findings of both books. The primary focus of this essay, however, is to explain how each book furthers our understanding of the role of judicial activism on the Supreme Court and public perceptions of judicial activism.

#### DEFINING AND MEASURING JUDICIAL ACTIVISM

As mentioned previously, the Lindquist and Cross book uses data from the actual behavior of Supreme Court Justices to provide the first comprehensive, systematic look at activism among Supreme Court Justices.<sup>6</sup> While there is a substantial body of research on the nature of ideological voting among Supreme Court justices, there has only been a smattering of empirical research on activism as separate from judicial preferences. One obstacle to the development of this research has been the lack of consensus over a workable definition. While Lindquist and Cross agree that ideology is an element of activism (in that judges may engage in activist behavior to achieve ends consistent with their judicial preferences), they insist that any definition must have some operational definition beyond the observer's dislike of an outcome.<sup>7</sup> Sadly, as they note, this bias plagues not just popular work, but scholarly work as well.<sup>8</sup>

In devising empirically testable measures, Lindquist and Cross survey the non-empirical literature to extract some common understanding of the elements of judicial activism. The elements they find include: 1) deference to other branches of government, 2) legal stability, 3) institutional aggrandizement, and 4) results orientation/policy

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3. *Id.* at 1-28.

4. *Id.* at 138.

5. James L. Gibson & Gregory A. Caldeira, *Citizens, Courts and Confirmations: Positivity Theory and the Judgments of the American People* (Princeton U. Press 2009).

6. See Lindquist & Cross, *supra* n. 1.

7. *Id.* at 29-46.

8. *Id.* at 9-14, 21-24.

making.<sup>9</sup> To create operational definitions, they define activism as ruling federal and state laws as unconstitutional, overturning executive agency decisions, and the reversal of precedent.<sup>10</sup> These are straightforward and have appeared in some other empirical research. More novel to the study of activism is the inclusion of Supreme Court decisions opening access to courts as an indicator of activism.<sup>11</sup> In particular, they include rulings to expand the set of justiciable cases since it represents an attempt at institutional aggrandizement.<sup>12</sup>

For each of these indicators of activism, the authors evaluate how individual justices from the Warren, Burger, and Rehnquist Courts vary in the degree to which they engage in the various forms of activism.<sup>13</sup> In addition, they also present data on aggregate Court behavior dating back to the Fuller Court.<sup>14</sup> The individual level data is further parsed into what they refer to as institutional or ideological activism.<sup>15</sup> Institutional activism is simply the frequency with which a justice engages in the activist behavior over all cases and ideological activism is the degree to which the justices engage in the behavior in pursuit of a specific ideological outcome.<sup>16</sup> From those two dimensions, they create a two-dimensional measure where justices can be high on both, low on both, or high on one but low on another.<sup>17</sup>

Each chapter evaluates a single indicator of activism (overturning federal laws, overturning state laws, overturning executive agencies, etc.) among the different Courts and justices.<sup>18</sup> Each chapter follows the same basic formula of analyzing the activism of the different courts over time first, and then they turn their attention to the behavior of the individual justices.<sup>19</sup> In the final empirical chapter, the authors create a composite measure of activism by creating an additive scale of the individual indicators analyzed in previous chapters.<sup>20</sup>

The empirical results confirm some prior wisdom (i.e., Frankfurter exhibits the most restrained behavior across most dimensions of activism, and Douglas exhibits some of the most activist behavior across the dimensions).<sup>21</sup> However, some results prove more surprising. For example, while the top activists tend to be liberal justices, in the aggregate measure of activism, Justice Clarence Thomas is the sixth most activist justice in the sample.<sup>22</sup> He follows on the heels of Justices Brennan and Marshall.<sup>23</sup> While that may not be too surprising to many scholars of judicial behavior, it must be a surprise to conservative proponents who constantly bemoan judicial activism when it comes from

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9. *Id.* at 133.

10. *Id.* at 135.

11. Lindquist & Cross, *supra* n. 1, at 105-120, 135.

12. *Id.* at 105-120.

13. *See generally id.*

14. *Id.* at 50, 71.

15. *Id.* at 63, 81, 102, 119, 131.

16. Lindquist & Cross, *supra* n. 1, at 62-63.

17. *Id.* at 133-137.

18. *See generally id.*

19. *See generally id.*

20. *Id.* at 133-149.

21. Lindquist & Cross, *supra* n. 1, at 136.

22. *Id.* 138.

23. *Id.*

the left. Moreover, when one examines the data for legal stability (the decision to overturn precedent), the most activist justices are contemporary conservative justices Thomas, Scalia, and Kennedy.<sup>24</sup>

While the book is an exemplar of careful and transparent research, I am left with a few questions. First, I found the overlap between ideology and activism puzzling. Specifically, even though the authors are careful to control for judicial preferences, the justices who occupy more centrist positions on the Court tend to be moderate in their activism as well. Theoretically, these two concepts should be separate. I am not sure what to make of this finding and I hoped for the authors to discuss this in more detail.

I am also somewhat skeptical of the authors' decision to create a composite measure of judicial activism. In their final empirical chapter they create an additive scale of the individual activism measures (willingness to overturn federal laws, state laws, executive agency decisions, overturning of precedent, and institutional aggrandizement).<sup>25</sup> Their justification for the ranking is that since each is measured on a similar scale (percent activist), they can be aggregated by simply adding them together.<sup>26</sup> My concern is that the measure may not perfectly reflect the difference in the frequencies with which these different activities occur. For example, overturning state laws happens with greater frequency than overturning federal laws or reversing precedent. Therefore, one may wonder whether it is appropriate to accord them equal weight in the composite measure. Moreover, one might also question whether the decision to overturn precedent is capturing something different. The results for this measure seem to differ from the results for the other measures.

In the chapter on overturning precedent, the authors acknowledge that some justices have provided principled explanations for why overturning precedent is not equivalent to judicial activism.<sup>27</sup> In particular, they point to Justices Douglas and Thomas (among others) who have both argued, from different ends of the ideological continuum, that current justices need not be bound by precedent in all circumstances.<sup>28</sup> While I agree that adherence to precedent is part of the Court's institutional legitimacy and thus is appropriate to include as a measure of activism, the empirical results suggest that it is somewhat different than the other measures. Thus, while I appreciate the desire to create a single measure of judicial activism, I think this aggregate measure just needs more justification.

Finally, the research does not provide a theoretical account of judicial activism. To be fair, the authors do not claim to be doing so, and are much more interested in the empirical question. I am confident that this book will generate further research toward developing a theoretical framework for understanding judicial activism and restraint. In particular, further research might pursue an explanation for variation between the justices in their inclination to engage in activist behaviors. Do presidents gage not only a nominee's ideology but also her willingness to assert that agenda? Is activism driven by

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24. *Id.* at 131.

25. *Id.* at 133-149.

26. Lindquist & Cross, *supra* n. 1, at 137.

27. *Id.* at 123-125.

28. *Id.*

the larger political context? Research aimed at these questions might help situate the study of judicial activism in larger theoretical debates regarding the nature of judicial decision making and the role of separation of powers in constraining judicial behavior.

These minor questions aside, this book is a fantastic addition to the literature on judicial decision making. The authors devise a clever and pleasingly simple empirical strategy to study judicial activism - undoubtedly a topic that is one of the most important subjects of inquiry for scholars of law and courts. The results are quite interesting and will, I fully expect, inform scholars about the different dimensions of judicial activism as well as the variation between courts and justices over time.

#### PUBLIC PERCEPTIONS OF SUPREME COURT NOMINEES AND EXPECTATIONS FOR JUDICIAL BEHAVIOR

Turning to the second book included in this review essay, *Citizens, Courts, and Confirmations*, James L. Gibson and Gregory A. Caldeira examine American attitudes toward the confirmation of Samuel Alito to the Supreme Court.<sup>29</sup> The research presented in this book builds upon years of research on the legitimacy of the Supreme Court by extending their theories to the confirmation process. The main findings for this book come from an impressive three-wave panel study of a nationally representative sample of Americans on their perceptions of Samuel Alito during the confirmation process and how the confirmation process affected institutional support for the Supreme Court.<sup>30</sup> The book first elaborates their theory of institutional legitimacy - a theory they have developed and refined in their work together and with other collaborators.<sup>31</sup> The central part of that research has been the development of what they call positivity theory.<sup>32</sup> According to positivity theory, “anything that causes people to pay attention to courts even controversies winds up reinforcing institutional legitimacy through exposure to the legitimizing symbols associated with law and courts.”<sup>33</sup> The main prediction of positivity theory “is that legal controversies tend to reinforce judicial legitimacy by teaching the lesson that courts are different from the other institutions of the American democracy, and are therefore worthy of respect.”<sup>34</sup>

In the first chapter of the book, they elaborate upon positivity theory as well as their general theory on institutional legitimacy.<sup>35</sup> Importantly, they impress upon the reader the utility of studying public opinion toward Supreme Court nominees.<sup>36</sup> Although the public does not vote on nominees, confirmation hearings have become increasingly public affairs and Americans are becoming increasingly attentive to confirmation battles. Moreover, there is good reason to believe that confirmation politics are an important ingredient in the overall level of institutional legitimacy of the Supreme Court. The second chapter examines public awareness of the Supreme Court and

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29. Gibson & Caldeira, *supra* n. 5.

30. *Id.*

31. *Id.* at 1-10.

32. *Id.*

33. *Id.* at 3.

34. Gibson & Caldeira, *supra* n. 5, at 3.

35. *Id.* at 1-16.

36. *Id.* at 12-14.

effectively dispels the conventional wisdom that the public is woefully ignorant about the Supreme Court.<sup>37</sup> The findings here go a long way toward establishing the relevance of research on public attitudes toward a Supreme Court. The third chapter includes an overview of their work developing this theory.<sup>38</sup> For those unfamiliar with the work on institutional legitimacy, diffuse/specific support, and the role of democratic values in explaining support for the Court, this chapter is essential reading for understanding the theoretical arguments presented in the later chapters.

The heart of the book can be found in Chapters 4 and 5.<sup>39</sup> It is in these chapters that the authors turn to examining the Alito confirmation itself and how the politics of the confirmation affected the Court's institutional legitimacy.<sup>40</sup> Here, the authors describe the confirmation battle, including the unprecedented public campaign waged by various interest groups to sway public opinion in support or opposition to the nominee. They describe that campaign as a battle of frames.<sup>41</sup> Those opposed to Alito attempted to frame his nomination in ideological terms—that he was outside of the ideological mainstream and too intemperate to serve on the Supreme Court.<sup>42</sup> According to Gibson and Caldeira, Alito's opponents were not successful in overcoming the "judiciousness" frame advocated by his supporters which instead focused on Alito's technical and legal qualifications.<sup>43</sup> Although they introduce a number of hypotheses, the central hypothesis is that "preexisting institutional loyalty plays a crucial role in how people perceive and judge confirmation processes" and that

institutional loyalty interacts with events surrounding the confirmation, leading citizens with a sense of loyalty toward the Court to rely primarily upon criteria of judiciousness in judging the nominee. In contrast, those without a sense of institutional loyalty are likely to judge the confirmation process largely in terms of ordinary political criteria.<sup>44</sup>

Before they evaluate that hypothesis, they first evaluate how the public perceived Alito.<sup>45</sup> Somewhat surprisingly, the majority of respondents found Alito to be fairly similar to them ideologically.<sup>46</sup> Gibson and Caldeira maintain that this represents the "opposition's abject failure at portraying Alito as excessively and illegitimately conservative."<sup>47</sup> They also find that the majority of respondents were "reasonably satisfied" with Alito's judicial temperament.<sup>48</sup>

An interesting note is that in creating their measure of "judiciousness," Gibson and Caldeira include one item tapping into the idea of *stare decisis*.<sup>49</sup> Specifically, one

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37. *Id.* at 17-35.

38. *Id.* at 36-62.

39. Gibson & Caldeira, *supra* n. 5, at 63-120.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 124.

44. Gibson & Caldeira, *supra* n. 5, at 70.

45. *Id.* at 71-85.

46. *Id.* at 75.

47. *Id.*

48. *Id.* at 82.

49. Gibson & Caldeira, *supra* n. 5, at 80.

question asks how important it is for judges to respect existing precedent.<sup>50</sup> Respondents attach much less weight to upholding precedent than many other items in their overall index of judiciousness.<sup>51</sup> In fact, only 37.3 percent of their respondents felt that this is “very important” whereas 75.5 percent rated fairness and impartiality as “very important.”<sup>52</sup> Thus, as with the Lindquist and Cross book, adherence to precedent may not fit in with other indicators of activism and judiciousness. In Lindquist and Cross, the results for activism on overturning precedent differed from the results for activism on the other indicators.<sup>53</sup> In Gibson and Caldeira’s book, the public is surprisingly less adherent to the idea of *stare decisis* than one might expect given the public rhetoric about it.<sup>54</sup> I think this may indicate a need to consider whether overturning of precedent is simply not analogous to other measures of judicial activism and whether it carries the same rhetorical baggage in public debates. At the very least, it suggests that neither the public nor the justices view it as the same as other behaviors.

In their analysis of confirmation preferences, Gibson and Caldeira find that judiciousness outweighs the partisan and ideological considerations.<sup>55</sup> Both are important, as one might expect, but consistent with their hypothesis judiciousness counts more.<sup>56</sup> Moreover, when institutional loyalty is added to the analysis, they find support for their central hypothesis.<sup>57</sup> Those who were higher on institutional loyalty were more likely to weigh judiciousness in their evaluation than were those lower on preexisting institutional loyalty.<sup>58</sup> The findings in this chapter are carefully analyzed and the authors go to great lengths to rule out alternative explanations.

Finally, in Chapter 5, Gibson and Caldeira examine whether the confirmation process affected institutional support for the Supreme Court.<sup>59</sup> The authors hypothesize the politicized nature of the process outside of the Senate could have a corrosive effect on institutional legitimacy.<sup>60</sup> The authors effectively demonstrate that interest groups’ advertisements during the Alito confirmation - even those in support of Alito- were all political in tone.<sup>61</sup> The result was that exposure to these ads decreased the Court’s legitimacy.<sup>62</sup> On the other hand attention to the confirmation battle itself did not.<sup>63</sup> Presumably, watching the Senate confirmation process was more civil and emphasized the legal nature of the Court and thus served to reinforce institutional legitimacy. Gibson and Caldeira conclude that while institutional legitimacy is usually an enduring quality, the politicization of the confirmation process by interest group advertisements threatens

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50. *Id.* at 80-81.

51. *Id.*

52. *Id.*

53. See Lindquist & Cross, *supra* n. 1.

54. Gibson & Caldeira, *supra* n. 5, at 80-81.

55. *Id.*

56. *Id.* at 70.

57. *Id.*

58. *Id.* at 93-95.

59. Gibson & Caldeira, *supra* n. 5, at 96-120.

60. *Id.* at 96-97.

61. *Id.* at 107.

62. *Id.* at 113.

63. *Id.*



the legitimacy of the Court.<sup>64</sup> Moreover, these results endured for some time. This finding is especially important given that their own prior research suggested that Court's legitimacy did not suffer appreciably in the wake of *Bush v. Gore*.<sup>65</sup> This suggests that the recent involvement in interest group activity for confirmations poses more of a threat than even the most controversial Court actions. It is also clear that interest group activity on confirmations is not likely to wane in the near future.

Overall, the research in this book is exceptional and should be considered required reading for scholars of the American judiciary. The research design—a multiple-wave panel-study of a representative sample of American citizens—is truly unique and enables the authors to make generalizable claims as well as being able to pin-point the causal dynamics. At the same time, some critics might note that this is a study of a single confirmation and thus, may not be generalizable to other confirmations. While this may limit the findings somewhat, the authors were presented with an ideal nominee. Since Alito was so polarizing, his confirmation provided a strong case against which to test their positivity hypothesis and the effect of judiciousness frames. The controversy surrounding Alito works against their hypotheses. Moreover, many of their findings are not just about Alito himself, but also about what Americans generally expect of their judicial nominees. That being said, it should be noted that this kind of research design is incredibly costly to implement. Future research might consider smaller scale designs to assess how other kinds of nominees and other kinds of political advertisements affect confirmation attitudes as well as institutional legitimacy.

Although the two books reviewed in this essay ask different questions and use very different research strategies, they share much in common. Taken together, these two books contribute a great deal of insight into the nature of judicial activism as well as how perceptions of judicial behavior can affect the confirmation of future Supreme Court justices. Both books note the importance of the judicial role. In the Lindquist and Cross book, the questions are about the extent to which judges express their role of judicial activism/restraint in their voting behavior.<sup>66</sup> Underlying the research is the often heated normative debate concerning the counter-majoritarian problem. Although Lindquist and Cross remain agnostic about the normative questions, they correctly note that many other observers of the Court perceive activism negatively.<sup>67</sup> I think it is safe to say that no public official has ever praised a nominee or a judge for being an “activist.” Similarly, Caldeira and Gibson also do not weigh in with their view of what makes for an ideal nominee or whether Alito satisfies their own expectations of judiciousness.<sup>68</sup> However, their research is steeped in the assumption that the American public has views about what makes a judicious nominee, and one of those views is that judges ought not to assert themselves politically, or in other ways to “legislate from the bench.”<sup>69</sup> Although Gibson and Caldeira's notions of judiciousness do not map perfectly onto the indicators of judicial activism in Lindquist and Cross, there is considerable overlap in the general

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64. Gibson & Caldeira, *supra* n. 5, at 119-120.

65. *Id.* at 144-151.

66. See Lindquist & Cross, *supra* n. 1.

67. *Id.*

68. See Gibson & Caldeira, *supra* n. 5.

69. *Id.* at 81.

ideas.<sup>70</sup> Thus, they both note that activism is something that the American public dislikes and that members of the Senate exploit this in their rhetorical campaigns in support of or opposed to nominees.<sup>71</sup>

The Lindquist and Cross book starts with the premise that charges of judicial activism are levied by those who disagree with the likely politics of judicial nominees, but that beyond that, the accusation is not a principled one.<sup>72</sup> Democrats are suspicious of the activism of Republican nominees but not Democratic nominees, and vice-versa. Gibson and Caldeira's work is less pessimistic. Although there were clear partisan divisions over support for Alito's confirmation, many were still willing to perceive Alito as meeting their expectations of what a judge should do, and while the interest group activity surrounding the confirmation eroded support for the Court, the confirmation process itself did not. Only time will tell whether interest groups are better able to mount attacks on a nominee's judiciousness and more effectively frame the confirmation process. I think this research suggest that if they focus more on a nominee's legal and technical qualifications, they might be more successful in affecting confirmation preferences. In sum, both books are terrific examples of first rate empirical scholarship by political scientists addressing questions of interest to political scientists, legal scholars, and one would hope, those responsible for selecting and confirming judges to our national courts.

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70. See Gibson & Caldeira, *supra* n. 5; Lindquist & Cross, *supra* n. 1.

71. See Gibson & Caldeira, *supra* n. 5; Lindquist & Cross, *supra* n. 1.

72. See Lindquist & Cross, *supra* n. 1.

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