

The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms, and Recent Challenges Thereto

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Perhaps no concept in the social sciences has received as much renewed attention as the nearly age-old concept “legitimacy.”¹ Scholars of many different intellectual persuasions are being attracted to the concept, even including conventional rational choice researchers (e.g., Vanberg 2001). , and interest in legitimacy extends across several disciplines within the social sciences (e.g., Jost and Major 2001; Tyler 2006).

While legitimacy is a concept that can be associated with many different objects (e.g., nations, governments as a whole, cultural values²), our focus here is on *institutional* legitimacy, and in particular on the institutional legitimacy of the U.S. Supreme Court. Scholarship on various aspects of the Court’s legitimacy has exploded in the past decade or so, with many new studies contributing to the well-established conventional wisdom – even if many new studies also challenge established dogma, raising a host of significant empirical and theoretical issues.

Legitimacy is a concept particularly relevant to courts, especially non-elected courts like the U.S. Supreme Court. In a democratic polity, accountability and the consent of the governed form the most common source of institutional legitimacy. For many political institutions, legitimacy arises from the social contract. While most state courts in the U.S. profit from this source of legitimacy (e.g., Gibson

¹Legal scholars in particular often distinguish between “sociological legitimacy” and “normative legitimacy” (e.g., Fallon 2005; Wells 2007). The latter refers to judging an institution by what the individual scholar thinks it ought to do. The former, the focus of this chapter, concerns empirical, non-normative consideration of the attitudes, expectations, and behaviors of citizens toward the institutions that govern them. Throughout this chapter, we make no normative judgments about whether more or less legitimacy is desirable. For some thoughts about whether it is possible for an institution to have too much legitimacy, see Gibson and Nelson forthcoming (a).

² See for examples the work of Norris (2011) and Booth and Seligson (2009)

2012a), the federal courts, of course, are almost perfectly unaccountable for their decisions and therefore can draw no legitimacy from this source. Indeed, as the Founders understood from the day they created the federal courts, the federal judiciary is an institution with a substantial legitimacy deficit. Creating and maintaining institutional legitimacy is therefore an omni-present concern of legal scholars and judges, and understanding the sources and consequences of legitimacy has been a major task for judicial scholars throughout the social sciences and the legal academy.

The particular problem of the U.S. Supreme Court³ is that it is heavily dependent upon legitimacy for its efficacy and survival. As all undergraduates learn, the federal courts have neither the power of the purse (carrots) nor the sword (sticks) and are therefore uncommonly dependent upon voluntary compliance from their constituents.⁴ Moreover, and perhaps even more important, the U.S. Supreme Court is particularly vulnerable to backlashes against its decisions because it often rules against the

³ Our focus in this chapter is on the U.S. Supreme Court and we therefore structure our arguments around this particular institution. Of course, nearly every claim we make about the legitimacy of the U.S. Supreme Court applies with equal if not greater force to the lower federal courts. We note as well that concern for judicial legitimacy extends far beyond the U.S. Supreme Court, with a great deal of contemporary interest in how state courts acquire and maintain legitimacy, for example. In terms of empirical research on judicial legitimacy, only a handful of studies has reported on courts other than the U.S. Supreme Court and the state supreme courts (e.g., Benesh 2006 – state court systems; Benesh, Scherer, and Steigerwalt 2009 – lower federal courts; Scherer and Curry 2010 – lower federal courts.)

⁴ The classic example scholars always cite is Andrew Jackson's response to the U.S. Supreme Court's decision in *Worcester v. Georgia*: "John Marshall has made his decision; now let him enforce it" (qtd. in Breyer 2007, 906).

preferences of the majority,⁵ and because, as an institution, it is unusually dependent upon the actions of other actors and institutions. The Supreme Court has little meaningful inherent or constitutional jurisdiction; instead, it gets its power to decide issues from ordinary legislation. What Congress giveth, Congress can taketh away. Even the fundamental structure of the institution – e.g., the number of justices on the Court – can change (and has throughout American history). Without legitimacy, the Supreme Court can be punished for the disagreeable decisions it makes, and/or those decisions can be ignored (for an important analysis of the Court/Congressional relations, see Clark 2011).

The justices of Court are keenly aware of the importance of legitimacy to their institution, often discussing the concept in their rulings. For example, Justices O'Connor, Souter, and Kennedy, in their well-known opinion in *Planned Parenthood v. Casey* (1992) write:

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. . . . The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation (865-866).

The *Casey* example is not unique; Farganis (2012, 207) reports that “since the Court’s 1954 decision in *Brown*, in fact, the justices have made seventy-one such references to the Court’s institutional legitimacy,

⁵ Actually, Marshall (1989, 2008) has shown that about one-third of the Court’s opinions run contrary to the preferences of the American people.

compared with just nine in the 164 years up to that point.”

Beyond the justices’ opinions, journalistic accounts of the Court often describe actions taken by the justices to preserve institutional legitimacy. In a particularly stark case, Crawford (2012) reports that Chief Justice Roberts acted strategically out of concern for institutional legitimacy during the opinion-writing process for *National Federation of Independent Business v. Sebelius*, changing his vote from one to strike down the Affordable Care Act to one that preserved the constitutionality of the legislation. Crawford writes, “As Chief Justice, [Roberts] is keenly aware of his leadership role on the Court, and he is also sensitive to how the Court is perceived by the public. There were countless news articles in May warning of damage to the Court – and to Robert’s reputation – if the Court were to strike down the mandate.” In short, legitimacy is a concept with both practical and scholarly importance.

With this in mind, legitimacy has become a commanding focus of a wide slew of social scientists, journalists, and judges. Over the past decade, research on this topic has flourished, with scholars probing the concept from all angles. Indeed, with so much new and concerted attention to issues of legitimacy, it should not be surprising that some of the longstanding conventional wisdoms are being challenged and revised. We focus here in particular on four such challenges, structuring this chapter as follows.

After defining legitimacy and embedding it within a theory of institutional support and efficacy, we present some fairly recent empirical evidence on the Supreme Court’s current level of institutional legitimacy.

Then, the first controversy we address concerns how the Court’s rulings affect or do not affect the institution’s legitimacy. This is at present both a critical theoretical and empirical issue among legitimacy scholars. If legitimacy is really nothing more than performance satisfaction, then the value of legitimacy is diminished greatly because the institution’s fortunes rise and fall with its ability to please the majority.

As a concomitant to the issue of whether Supreme Court outputs directly affect its legitimacy, we also consider the question of whether the highly polarized political context in the contemporary U.S. has

metastasized to attitudes toward the Court. If political polarization writ large in American politics does affect public perceptions of the Court, this would raise important questions about the efficacy and effectiveness of the Court.

A third area of study concerns the effects of the Court's decision-making procedures on its public support. Should it be the case that the American people view the Court's process of decision making as unacceptable (i.e., as a violation of their normative expectations⁶ for how the Court ought to make its decisions), then the decision-making process can wind up undermining the Court's rulings. In particular, we address the effects of public perceptions of the nature of the judicial decision-making process on public support for the Court, focusing on the state of the literature researching the effects of legal realism on the Court's public esteem.

A final major concern of this chapter has to do with the consequences of institutional legitimacy. Some scholarship seems to use compliance with an institution's decisions as evidence of the institution's legitimacy. We do not. We separate legitimacy and compliance, acknowledging that people can comply with policies for reasons having nothing at all to do with legitimacy; we then hypothesize that legitimacy is one important determinant of compliance.

The ability of legitimacy to induce acquiescence to judicial decisions is part of what scholars refer to as the "legitimacy conferring capacity" of the institution. Legitimacy is conferred on the decision, and because the decision is legitimate, citizens accept it, even when they disagree with it. But a second element of acquiescence is connected to the ability of the Court to change the substantive views of its constituents. Dubbed the "endorsement effect," this is nothing more than a process of persuasion by a credible source. Recent scholarship has explicated this process in some detail, and has provided evidence

⁶ On the normative expectations of judging held by the American people, see Gibson and Caldeira 2011.

on each of the individual linkages in the model.

Thus, this chapter addresses both the causes and consequences of the institutional legitimacy of the U.S. Supreme Court. We begin this inquiry by showing how much institutional legitimacy the Court currently enjoys.

Measuring the Supreme Court's Institutional Legitimacy

Scholars typically distinguish between two different types of public support for the court. The first, *diffuse support*, “refers to a ‘reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging their wants’” (Easton 1965, qtd. in Caldeira and Gibson 1992, 637). Diffuse support, or legitimacy, then, provides a “cushion” that buffers the Court against public backlash that can spring from unpopular opinions. The second type of support, *specific support*, is “satisfaction with the performance of a political institution” (Gibson and Caldeira 1992, 1126). Thus, while diffuse support refers to general attitudes toward an institution, specific support turns primarily on the congruence between the Court’s policy outputs and the public’s favored policy outcomes.

How legitimate is the U.S. Supreme Court? To answer this question, we rely upon the results of a 2011 nationally representative study fielded at Washington University in St. Louis.⁷ To develop empirical indicators of institutional loyalty, we follow a considerable body of research on theorizing about and measuring mass perceptions of high courts (e.g., Gibson, Caldeira, and Spence 2003a). That research conceptualizes loyalty as opposition to making fundamental structural and functional changes in the institution, and is grounded in the history of attacks by politicians against courts in the U.S. and elsewhere. As Caldeira and Gibson (1992, 638) describe it, those who have no loyalty toward the

⁷ For technical details on this study, see Gibson and Nelson forthcoming (b).

Supreme Court are willing "to accept, make, or countenance major changes in fundamental attributes of how the high bench functions or fits into the U.S. constitutional system." To the extent that people support fundamental structural changes in an institution, they extend little legitimacy to that institution.

Consequently, seven statements were put to the respondents, with the request that they indicate their degree of agreement or disagreement with each statement. Figure 1 shows the statements, as well as the margin of supportive responses, which is simply the difference between the percentage of respondents expressing support for the institution in response to the statement and the percentage of respondents who did not express support for the institution.⁸ The figure demonstrates that, on balance, Americans are quite supportive of the Court, with more Americans providing supportive responses than unsupportive responses for most of the questions posted.⁹

[FIGURE 1 HERE]

Yet, the variation shown in Figure 1 suggests that the Court's support may not be unlimited. While few want to do away with the U.S. Supreme Court, considerable support exists for changing the institution's balance between judicial independence and accountability. Generally, we conclude from these data that the Supreme Court does enjoy a "reservoir of goodwill," but that reservoir is far from bottomless.¹⁰

⁸ We present the data in this format because of the fairly large percentages of "don't know" replies to these statements.

⁹ The objective of using multiple indicators of institutional support is to provide statements to the respondents that vary in the degree to which institutional change is contemplated. Obviously, the most extreme change is to abolish the institution. As Figure 1 indicates, we succeeded in devising statements eliciting considerable variability in support for the Court.

¹⁰ The set of items can be used to produce an index that is quite valid and reliable. With regard to

Having demonstrated the Court's relatively high levels of legitimacy, we now turn to four current debates in the literature.

Controversy #1: Does the Court's Legitimacy Rest on Satisfaction with Its Performance?

One of the current key controversies in the literature concerns the theoretical and empirical connection between diffuse and specific support. The conventional view of the Court's legitimacy suggests that levels of diffuse support are relatively immune to short-term changes in specific support (Caldeira and Gibson 1992; Gibson and Caldeira 1992). Empirically, fundamental political values—particularly support for democratic institutions and processes—serve as the most important predictors of diffuse support; because these fundamental values tend to be formed early in life and are obdurate, an individual's level of diffuse support for the Court tends to remain relatively stable over time (Caldeira and Gibson 1992).

Moreover, existing theoretical and empirical evidence suggests that most individual-level change in the Court's support is temporary due to a process of regeneration. Mondak and Smithey (1997) suggest that the deleterious effect of dissatisfaction with a singular decision on individual-level support for the

validity, our analysis indicates that, with one exception, the responses to these statements are valid indicators of the legitimacy of the U.S. Supreme Court – the seven-item set is strongly unidimensional (the eigenvalue for the second extracted factor is only .81); all factor loadings are greater than .50. Regarding reliability, Cronbach's alpha is .81, and the average inter-item correlation is a moderately strong .39. The exception has to do with the “Supreme Court can be trusted” statement. As Gibson (2011) has shown, responses to this item appear to be more heavily influenced by performance satisfaction than institutional support. Indeed, the correlation between the item and the index of institutional support is only .27. These (and other) analyses indicate that the item is not a very valid measure of the concept.

court is short-lived; after a shock, diffuse support gradually increases, eventually returning to its equilibrium level, as democratic values regenerate support for the Court. This claim has been validated empirically using representative, national samples; Durr, Martin, and Wolbrecht (2000) show that short term disruptions in an individual's support for the Court have effects that only last for a short period.

Still, this is not to say that the U.S. Supreme Court is invincible. Baird (2001) suggests that the relationship between specific and diffuse support is a gradual, incremental one. Individuals seem to keep a "running tally" of decisions, crediting the Court when it makes a pleasing decision and subtracting from the tally when the Court makes a disagreeable decision. This running tally theory suggests that the Court's diffuse support could suffer once some accumulated threshold level of dissatisfaction is reached. Conversely, specific support can be transformed into obdurate diffuse support through a string of pleasing policy decisions; such a change is gradual, underscoring the varied and varying relationships observed between indicators of the two concepts (Gibson, Caldeira, and Baird 1998; Baird 2001). Thus, the relationship between diffuse and specific support is "sticky," and is far from a one-to-one correlation.

This theory is one way to account for variation in levels of diffuse support for the Court among African Americans. Gibson and Caldeira (1992) show that diffuse support for the Court is comparatively lowest among those African Americans who grew up before the Court acted to remedy civil rights violations against them, and among those growing up after the civil rights revolution. Post-civil rights African Americans provide some of the only evidence to date that accumulated grievances can undermine diffuse support in the institution. Yet the relationship is "sticky" inasmuch as the civil rights generation of African Americans did not adjust its attitudes toward the Court as the justices turned away from the expansion of civil rights.

However, new research on the Court's public support has challenged this conventional view, suggesting that individual-level performance dissatisfaction with the Court translates *directly and simultaneously* into a decrease in diffuse support. The strongest empirical support for this theory comes in

a recent article by Bartels and Johnston (2013), who claim that “[c]ontrary to conventional wisdom, a potent ideological foundation underlies Supreme Court legitimacy vis-à-vis subjective ideological disagreement with the Court’s policy-making” (Bartels and Johnston 2013, 197, emphasis in original). Relying on a nationally-representative survey, Bartels and Johnston present empirical evidence that, as individuals’ disagreement with the ideological direction of the Court’s decisions increases, their diffuse support for the Court decreases. Moreover, Bartels and Johnston report data from a survey experiment whose results suggest that even a singular unpopular decision can result in a decrease in individual-level diffuse support. Similarly, Christenson and Glick (2013), analyzing responses to the U.S. Supreme Court’s important 2012 Affordable Care Act decision, found that both exposure to information about the case and individual-level agreement or disagreement with the decision affect change in levels of diffuse support among respondents.

These are important empirical findings from the standpoint of legitimacy theory. If each individual decision issued by the Court has the potential to imperil its legitimacy, then we should expect the Court to change its behavior in order to protect the institution. Indeed, a Court whose public support rests on popular approval of its decisions, rather than a long-standing deep pool of public esteem, should be less likely to issue decisions that protect the rights of minorities, to exercise the power of judicial review to check the popularly-elected branches of government, and to issue decisions that counter the wishes of a majority of Americans. Given the important constitutional and political role of the Court in the American democratic system of governance, it is nearly impossible to overstate the importance of this theoretical and empirical contention.¹¹

¹¹ This view has also captured the attention of those outside academia, with journalists suggesting that ideologically divided decisions of the Court threaten its legitimacy (Liptak 2011).

We hesitate to accept this revisionist theory, noting that neither the Bartels and Johnston nor the Christenson and Glick studies include in their analyses measures of democratic values, which existing research has shown to be the single most important predictor of institutional support, nor traditional measures of specific support. In a recent paper, Gibson and Nelson (forthcoming (b)) demonstrate that, once we account for these two factors, individual evaluations of the Court's performance have some independent effect on support for the Court, though the magnitude of that effect is dwarfed by the effect of an individual's democratic values. Thus, it seems that, while specific support may have some direct relationship with diffuse support, that relationship is, at best, a small one.¹²

But even if the revisionist view is the correct one, a cascade effect resulting in a permanent diminution of the Court's support is unlikely to occur in practice in the contemporary era. As Gibson and Nelson (forthcoming (b)) note, the current U.S. Supreme Court is balanced ideologically, both in terms of the alignment of the Court's justices and the composition of its decisions; in fact, the distribution of the Court's decisions in recent terms have been nearly half liberal and half conservative, giving everyone—regardless of their ideology—some decisions to disagree with and about the same number to like. Scholars who focus only on the negative effects of unwanted decisions, without also taking into account the positive effects of decisions viewed favorably, overestimate the volatility in institutional legitimacy, and their alarmist views about the consequences of the Court deviating from the preferences of the majority are over-stated. Ironically perhaps, an ideologically divided Court most likely has some benefits for the legitimacy of the institution.

¹² Gibson and Nelson also argue that ideological evaluations are only one component – and perhaps not the dominant component – in evaluations of the performance of the Court. For example, some citizens may disapprove of the Court releasing so many highly divided decisions, whatever their substantive content.

As this discussion suggests, ascertaining the relationship between specific and diffuse support is a key unresolved area in the literature, with enormous substantive importance for our understanding of both the Court's role in the political system and its decision making. Crucial to this effort will be the use of panel data to observe within-individual change in diffuse and specific support over time, allowing researchers to move beyond studies of aggregate change to a more nuanced understanding of how individual-level dissatisfaction with the Court's decision affects its diffuse support immediately and the extent to which that effect persists over time. Building this understanding is essential in order to create a complete understanding of the Court's place in American democracy.

Controversy #2: Does Support for the Supreme Court Reflect the Polarization of Politics in the Contemporary U.S.?

The issues we have just considered connect to a broader question of ideological and partisan polarization in contemporary American politics. With such widespread polarization across a wide variety of substantive policy issues, one might suspect that support for political institutions has come to be infected by partisan and ideological differences. Moreover, if ideological disagreement with the Court does indeed spill over to affect support for the institution, then support, obviously, becomes connected to one's ideology. Finally, since the party affiliations and ideological stances of the justices now line up perfectly for the first time in decades (as noticed by Liptak 2011), the potential for polarization is alarmingly high.

By now, however, it is reasonably well established that institutional support for the U.S. Supreme Court is not polarized along partisan and/or ideological lines (Gibson 2007a; 2012b). Democrats and Republicans extend approximately equal support to the Supreme Court, as do self-identified liberals and conservatives. If ideological dissatisfaction with the rulings of the Court were an important determinant of support for the institution, one would expect to see stronger relationships than the data report.

Several processes may account for the lack of polarization in institutional support for the Supreme Court. This could be due to the fact that procedural concerns override policy dissatisfaction (see below), and that no partisan or ideological differences exist in American's views of *how* the Court makes its decisions. Lack of polarization may also reflect that fact that the Supreme Court is currently making about 50 % of its decisions in a conservative direction and 50 % in a liberal direction (see above). Consequently, conservatives are about half pleased with the Court's decisions, just as liberals are about half pleased with the rulings. Moreover, support for the Court seems to reflect more fundamental political values (such as support for democratic institutions and processes). Again, few ideological or partisan differences exist on basic democratic values. Finally, Americans seem to view Supreme Court decision-making processes as principled, not partisan (Gibson and Caldeira 2011).

Support for the Supreme Court may at some point become more polarized given the deep divisions among the American people (and especially among elites) on the wide variety of policy issues that wind up on the Court's plate. At present, however, ideological disagreement with the institution does not readily translate into diminished institutional legitimacy, and even if it did, an ideologically diverse Court cannot fuel strong divisions among the American people.

Controversy #3: Does the Legitimacy of the Supreme Court Rest Upon a “Myth of Legality”?

Even if attitudes toward the Supreme Court as an institution are not polarized, there can be little debate over the proposition that the U.S. Supreme Court is today deeply embedded in American politics. When Americans cast their votes for a presidential candidate, many are explicitly thinking about how their vote might shape the make-up of the Supreme Court (e.g., Stolberg 2012 – see also Ross 2012). The Court makes decisions on issues of momentous importance (e.g., Obamacare) for American politics. Moreover, the Court is often divided in its decisions, on occasion, bitterly so, and for the first time in ages, the partisan attachments of the justices line up perfectly with their ideological predilections (e.g., Liptak 2011). That the U.S. Supreme Court is a supremely politicized institution in contemporary American politics is undeniable.

But how is this fact of politicization compatible with the view that the American people subscribe to the “myth of legality” – “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; see also Casey 1974)? If the public believes that judges do nothing more than interpret and apply law through the discretionless processes of syllogisms and *stare decisis* (sometimes referred to as “mechanical jurisprudence” – see Pound 1908), many threats to judicial legitimacy dissipate. By this view, judges are legal technicians simply doing what they are supposed to do in an objective and value-free manner (see Dworkin 2009).¹³

¹³ The Supreme Court seems to agree with this hypothesis, as in the following assertion: “Our legitimacy requires, above all, that we adhere to *stare decisis*, especially in such sensitive political contexts as the present, where partisan controversy abounds.” *Bush v. Vera* (1996) 517 U.S. 952, at 985.

Denying judicial discretion pre-empts the need for direct political accountability, and thereby enhances judicial legitimacy.¹⁴

But what if the public, like scholars, understands the Court's decision-making process as ideological in nature? What if the American people agree with two of the most prominent analysts of the U.S. Supreme Court in their observation that: "Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal" (Segal and Spaeth 2002, 86).¹⁵ If it is true that Legal Realism has carried the day¹⁶ – indeed, as Packer (2006, 83) and others (e.g., Peller 1985, Singer 1988) have put it: "We are all realists now."¹⁷ – then how can the Court's

¹⁴ It is not uncommon to find judges who deny that their own ideological and policy preferences shape their decisions. Justice Scalia has told us, for instance, that "To hold a government Act to be unconstitutional is not to announce that we forbid it, but that the Constitution forbids it . . . Since the Constitution does not change from year to year; since it does not conform to our decisions, but our decisions are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense." *American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 201 (1990) (Scalia concurrence).

¹⁵ Although Segal and Spaeth have published widely in academic journals, their two books (1993, 2002) include most of the theory and much of the data on which the Attitudinal Model is based. This understanding of the causes of voting on the U.S. Supreme Court has also become influential within the mass media. See for example <http://www.nytimes.com/2010/04/18/us/18memo.html> [accessed 1/14/2014].

¹⁶ For a useful review of the evolution of thought about how judges make decisions see Fiscus (1991). On the history of Legal Realism, see Tamanaha (2009).

¹⁷ Legal Realism (and the Attitudinal Model of Segal and Spaeth) is of course a simplified model

legitimacy survive? As Bybee (2012, 750) put it: “. . . perceptions that judges may be deciding cases on the basis of personal political convictions raises questions about the legitimacy of the system. Where the public confronts a judicial process that always speaks in terms of legal principle and yet is sometimes governed by policy preferences, suspicions of judicial hypocrisy may easily arise, fueling the belief that judges are willfully affecting an air of legal impartiality in order to disguise their pursuit of political goals.” Thus, public beliefs that justices decide cases on the basis of ideology, rather than law, raise a potential threat to the legitimacy of the institution.

But is the realist model of judicial decision making, in which judicial ideologies and values play a large role in policy making, really incompatible with the popular legitimacy of the U.S. Supreme Court? Although this seems like a simple question, little extant empirical research has attempted to provide answers. And the American people’s views of how Supreme Court justices make their decisions are likely more complicated than simply specifying the answer as “yes, they rely on their own values, and are therefore not legitimate” or “no, they strictly follow the law, ignoring their own values, and therefore are

of judicial decision-making, with most scholars recognizing that judging at the level of the Supreme Court involves a complicated blend of legal, policy, and ideological considerations. (As Gibson (1983) once summarized it: “In a nutshell, judges’ decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do . . . Roughly speaking, attitude theory pertains to what judges prefer to do, role theory to what they think they ought to do, and a host of group-institution theories to what is feasible to do” (9).) At least one major contribution of Legal Realism has been to acknowledge that judges’ decisions reflect far more than legal determinants, even if judges’ decisions may not actually be based on what the judges happened to eat for breakfast (e.g., <http://notabug.com/kozinski/breakfast> [accessed 1/14/2014]). For a useful and insightful analysis of “New Legal Realism” and the traditional legal model, see Cross (1997).

legitimate.” Moreover, the empirical literature presents us with some important puzzles and unexplained findings and processes, suggesting that the views of the American people are more complex and perhaps even more sophisticated than typically imagined.

From existing research on public attitudes toward law and courts, we know that, generally, to know more about courts is to hold them in higher esteem. This finding holds in many parts of the world (e.g., Gibson, Caldeira, and Baird 1998), including the American states (Benesh 2006). It seems that knowing about courts often means knowing that courts are special institutions, different from ordinary political institutions, and, as such, that they are worthy of the esteem of the citizenry. However, the meaning of this simple empirical relationship is far from simple to understand.

The puzzle is this: Presumably, those who know more about courts also know more about the realities of how courts actually operate and how judges actually make decisions, and they therefore accept some version of Legal Realism because it is a veridical description of decision making. Yet, if realism undermines legitimacy, why do the most knowledgeable citizens extend greater legitimacy to the Court while simultaneously believing in some version of realism? Put statistically, if (1) increased awareness of courts is positively correlated with a more realistic understanding of how judges make decisions and (2) the realist reality is that judges are policy makers who rely on their own values in making decisions, then (3) awareness should be *negatively* correlated with institutional support. That positive correlations are so routinely found must indicate some sort of breakdown in the presumed causal chain. *Either knowledge does not produce a realistic understanding of decision making, or legitimacy does not depend upon citizens being duped into believing in theories of mechanical jurisprudence and the myth of legality.*

This conundrum was directly addressed by Gibson and Caldeira (2011) with nationally representative data. The most certain and important conclusion of their analysis is that the legitimacy of the U.S. Supreme Court does not depend on the perception that judges merely “apply” the law in some sort of mechanical and discretionless process. It seems that the American people know that the justices of

the Supreme Court exercise discretion in making their decisions. They are also aware that the justices' discretion is guided to at least some degree by ideological and even partisan considerations. None of these understandings seem to contribute to undermining the legitimacy of the Supreme Court. Instead, legitimacy seems to flow from the view that discretion is being exercised in a principled, rather than strategic, way.

These findings do not mean that the American people reject the rule of law (indeed, empirical evidence indicates that Americans are unusually strongly attached to the rule of law – Gibson 2007b); nor that judicial legitimacy would be maintained were the Court to eschew the trappings of law. Indeed, it seems likely that a key source of the belief that judges engage in principled decision making is the association of courts with symbols of fairness and legality (Gibson, Lodge, and Woodson 2014; see also Gibson and Caldeira 2009). Just as revisionist judicial scholars (e.g., Bailey and Maltzman 2011; Black and Owens 2009; Richards and Kritzer 2002) are today challenging the extreme variant of the Attitudinal Model by suggesting ways in which law is important to decision making, we suspect neither that the American people view law as irrelevant to judging, nor that judges engage in completely unconstrained policy making.

The empirical evidence Gibson and Caldeira adduce suggests that being informed about courts may mean that one understands that judges make decisions in a principled fashion; they are not merely politicians in robes. The mistake of some research might be to assume that principled decision making can only be understood as mechanical decision making. The most important argument these authors make is that the American people seem to accept that judicial decision making can be discretionary and grounded in ideology, while simultaneously principled and sincere. Judges differ from ordinary

politicians in acting sincerely, and their sincerity adds tremendously both to their legitimacy and the legitimacy of their institution.¹⁸

Baird and Gangl (2006) also investigate this hypothesis, although their analysis is based on the judgments of college students. They posit that perceptions of legalistic decision-making enhance the perceived fairness of the decision-making process, a key underpinning of judicial legitimacy. In their experiment, they used media reports to try to convince the students that a Court decision was based more on political (legal realism) than legal (mechanical jurisprudence) considerations. Tellingly, the experiment failed on this score, with a majority of the students believing that the justices followed legalistic considerations *even when* told about the role of ideological factors (2006, 602). Although this result limits the value of the experiment, it does demonstrate the powerful framing effects of the belief in legalistic decision making and how deeply embedded it is among the political beliefs of many Americans. Importantly, their analysis also demonstrates that greater belief in the myth of legality is associated with greater perceptions of fairness (see also Baird 2001).

Baird and Gangl also report an unexpected finding for which they have no explanation. Perceptions of legalistic decision making enhance fairness judgments, but perceptions of political decision making do not detract from fairness. Political decision making is portrayed in their experiment

¹⁸ Some research considers how processes and procedures of decision making affect the willingness of citizens (or students) to accept Supreme Court decisions with which they disagree (see also the next section of this chapter). Zink, Spriggs, and Scott (2009), for instance, show that students at the University of California, Davis, are influenced to accept Court decisions when they are unanimous and consistent with existing precedent. Gibson, Caldeira, and Spence (2005), using a nationally representative sample, find otherwise with regard to effect of the size of the Court majority. We tend to place more confidence in the Gibson, Caldeira, and Spence conclusion given the nature of its database.

by the belief that the “members of the Court engaged in bargaining and compromise to reach this decision.” Whether the student believed that bargaining was involved had no impact on perceived procedural fairness (2006, 605).¹⁹

What Baird and Gangl may not have appreciated, however, is that two forms of political decision making exist: principled and strategic. Bargaining and compromise can be principled; this process of decision making can focus on real issues and legitimate ideological and legal disagreement. But bargaining and compromise can also be strategic, especially when the actors are attempting to maximize their self-interest (e.g., political ambition) rather than reach a negotiated solution to the issue at hand. We suspect that to the extent that the American people view discretionary and ideologically based decision making as principled, those views will *not* undermine the Supreme Court’s legitimacy.²⁰

So, in the end, the generation of political scientists and journalists who have propounded Legal Realism and the Attitudinal Model seems to have done little to undermine the legitimacy of the Supreme Court. The American people seem to understand the true nature of decision making in the third branch,

¹⁹ In a similar vein, Ramirez (2008) finds that the support Texas college students extend to the Supreme Court is based on perceptions of procedural fairness, which in turn are influenced by how the mass media depicts decision making on the Court. However, his manipulation of decision-making procedures does not directly address whether justices rely on their on ideologies and values in making their decisions (see page 682).

²⁰ As a further complication, Simon and Scurich (2011) find that concern over the decision-making process is confined to those who are told of Court decisions contrary to their preferences. This fits well with the notion that “legitimacy is for losers” (Gibson, Lodge, and Woodson 2014) – those who win in disputes rarely question the fairness of the decision-making process. Those who lose, however, seek to understand their loss by examining the process leading to the decision.

but at the same time regard courts as highly legitimate within the American political scheme. Judges are certainly politicians, but what distinguishes judges in the minds of the American people is that judges exercise discretion in a principled fashion. Were other politicians to act more like judges, perhaps the legitimacy of all American political institutions would be elevated.

Controversy #4: Can Judicial Decisions Change Public Opinion?

The discussion to this point has focused on Supreme Court rulings and whether the Court's constituents disagree or agree with its policy decisions. Also important, however, is the *effects* that judicial opinions have on public opinion. Indeed, perhaps one of the most obvious consequences of institutional legitimacy is the ability of a court to pass its legitimacy to policies enacted by other branches of government. In the words of Dahl (1957) a major basis of the U.S. Supreme Court's power "is the unique legitimacy attributed to its interpretations of the Constitution" (293). In other words, the Court's decisions act to bolster public perceptions of the majority coalition's policies. Yet, the Court's ability to legitimize is not limited to policies. Dahl (1957) goes on to claim that "at its best the Court operates to confer legitimacy, not simply on the particular and parochial politics of the dominant political alliance, but upon the basic patterns of behavior required for the operation of democracy" (295).

We can observe the Court's legitimacy conferring capacity through two different outcomes. First, legitimacy conferring capacity can operate through substantive opinion change. This endorsement effect happens when an individual changes her their views on political or legal issues in response to a judicial opinion (see Zaller 1992). Second, even without substantive attitude change, people may come to accept the decision, to acquiesce to it, not to challenge the decision, not support punishing the institution for its decision. Thus, the Court's legitimacy conferring capacity also operates through a second pathway: by encouraging acceptance. Acceptance occurs when a court decision causes individuals to acquiesce to decisions with which they disagree.

The empirical literature documenting the Court's ability to change opinion has been mixed in its ability to document the existence of an effect. Indeed, the results of many observational studies have failed to show any ability of the Court to change public opinion (e.g. Marshall 1987; Rosenberg 2008). Some recent scholarship goes even further, suggesting that unpopular Supreme Court rulings can cause a backlash in public support. For example, Klarman argues that the U.S. Supreme Court's decision in *Brown v. Board of Education* aggravated, rather than ameliorated, racial tensions in the South (Klarman 2004; see also 1994; 2005). On the other hand, some recent studies have challenged this claim, particularly as it pertains to judicial rulings relating to same-sex conduct. For example, Stoutenborough, Haider-Markel, and Allen (2006) show that the public's response to the Court's gay civil rights rulings was complicated but, on balance, suggests that the Court plays a legitimizing role (see also Keck 2009). Additionally, in an examination of legitimization and backlash that spans the Court's docket, Ura (2014) examines how public mood changes in responses to variation in the ideological mixture of the Court's decisions, finding that both theories are partially correct: there is initially a backlash against changes in judicial policy, but, over time, the Court serves a legitimizing function. Finally, some observational studies have suggested that, among only some groups of individuals, the Court's opinions are able to affect public opinion (Franklin and Kosaki 1989; Hoekstra and Segal 1996; Johnson and Martin 1998).

The experimental literature on the topic tells a less complicated story, however. These studies (e.g., Bartels and Mutz 2009; Hoekstra 1995; Clawsen, Kegler, and Waltenberg 2001; Grosskopf and Mondak 1998) suggest that the Court's opinions can have both endorsement and acceptance effects. For example, Bartels and Mutz (2009) embed an experiment in a nationally representative sample and found "potent" endorsement effects from a judicial decision. Gibson, Caldeira, and Spence (2003b), writing after the U.S. Supreme Court's controversial opinion in *Bush v. Gore*, document independent and strong acceptance effects using a survey experiment embedded within a nationally representative sample.

Given experimental studies documenting both endorsement and acceptance effects, by what

mechanism might the Court legitimize policies? The early literature on this topic adopted a simple conceptual model that was largely silent on the mechanisms question. Implicitly it presumed a very simple model of influence. First, individuals hold an opinion. Second, the court decides a case. Third, that judicial decision either has (or does not have) an effect on individuals' views. Thus, this conceptual model assumes that information about a judicial opinion is omnipresent, complete, and readily communicated to the Court's constituents. Because it does not account for the breakdown in the process of information transmission between the Court and the public, any failure to document an effect is attributed to the inability of the Court to move opinion. It is this conceptual model upon which most of the observational studies finding a null result are based.

More recent research on this topic—particularly the experimental studies mentioned above—has built upon exciting interdisciplinary insights from the fields of political psychology and political communications to develop more sophisticated and complicated conceptual models. In these new conceptual models, the relationship between the Court's decisions and its eventual possible effect on public opinion is moderated by both the media's (non)coverage of the decision as well as individuals' preexisting attitudes toward the Court (e.g., Linos and Twist 2013). By paying increased attention to the factors that mediate how the public learns about the decision, this new line of research emphasizes that what may appear to be a lack of an observed legitimacy conferring effect may be a result of a lack of information about the decision or a result of the nature of preexisting attitudes toward the Court. By examining the processes of information transmission and the effects of individuals' preexisting attitudes, the new literature on this topic clarifies the mechanisms through which the Court can legitimize policy.

The first intermediary between the Court and the public is the media; because such a small proportion of the public reads judicial opinions, the media frame the predominant way that Americans learn about judicial decisions. Of course, the media do not cover every U.S. Supreme Court decision, and, among those opinions covered by the media, some cases are covered more heavily than others.

Indeed, one predominant way of measuring the salience of a case is to observe whether or not the case has been covered in major media outlets (Epstein and Segal 2000).²¹ The literature on political psychology (Barabas and Jerit 2009, 2010; Jerit, Barabas, and Bolsen 2006) demonstrates that more news coverage generally translates into additional public understanding of public policies.

Beyond the question of whether the media will cover the court's decision, how the media covers the decision also affects the ability of the opinion to confer legitimacy. At the most basic level, sometimes the information promulgated by the media is inaccurate. As the media's response to the U.S. Supreme Court's health care decision in the summer of 2012 illustrates, sometimes the media simply misreports a court's opinion. While the health care example may seem egregious, extant literature on media coverage of the Court shows that such inaccurate reporting is not as rare as one might think (Slotnick and Segal 1998).

Additionally, media coverage varies in the substantive information that it provides about the decision. One of the foundational findings in the field of political psychology is the fact that framing effects affect public opinion (e.g. Druckman 2001), and this literature suggests that individuals exposed to one-sided frames (in other words, one side of the argument) exhibit higher amounts of opinion change than do those exposed to two-sided, competing frames (Chong and Druckman 2007, 2013; see also Simon and Scurich 2011). In other words, when individuals have access to competing arguments, the amount of observed opinion change is less than when they observe only a single-sided argument.

Beyond the arguments that the media chooses to present, the political psychology literature is clear that the entity presenting the arguments also conditions opinion. In other words, source credibility matters, as Gibson and Gouws (2003) show in their study of the effectiveness of South Africa's Truth and

²¹ Recently, Collins and Cooper (2014) have expanded Epstein and Segal's focus on coverage in *The New York Times* to additional major newspapers.

Reconciliation Commission in getting people to accept its version of South Africa's historical truths.

This source credibility can operate in multiple ways, as individuals may privilege or discount the information coming from certain networks or newspapers or, at a more micro level, they may vary in the credibility they assign to particular individuals or groups whose views the media explain. For example, interest groups play an important role in communicating the Court's decisions, both on their own through their websites and social media accounts and by making themselves available to journalists so their views are available to the public through print or broadcast media. Whether interest groups are judged to be credible varies across individuals and groups.

Second, even if a case is covered (and covered well) by the media, members of the public vary substantially in their own attention to the media; even if the media decide to cover a decision, the public's variation in its attention to the news creates additional variation in the extent that a court opinion can influence public opinion. Thus, even if the media covers an opinion, a general inattentiveness to politics may prevent the Court from affecting the views of some citizens. If individuals do not know that the Court made a decision, it is difficult for that decision to affect their opinions.

To complicate matters further, no individual hears about a judicial opinion in a vacuum; rather, individuals have preexisting attitudes toward the court that shape the effect that any individual court opinion may have on individual-level public opinion. Indeed, given their fixed attitudes toward the institution, individuals may engage in motivated reasoning to justify their decision (see Lodge and Taber 2013). In other words, holding the outcome of a decision constant, individuals who are generally supportive of the Court are likely to find reasons to believe that the Court's decision is a "good" one, while those who are generally unsupportive of the Court are likely to find reasons to believe that the opinion is a "bad" one (see Simon and Scurich 2011).

Finally, even absent these processes, the context in which an individual learns about a Court opinion may also affect the effect it has on her opinions. Most notably, Gibson, Lodge, and Woodson

(2013) show that exposure to the symbols of judicial authority has a conditional effect on acceptance of judicial opinions. Being exposed to these symbols, as all who watch televised reports on Court decisions usually are, seems to significantly change the calculus through which citizens decide whether to accept or challenge an unwanted Court ruling.

Thus, this new interdisciplinary approach presents a wealth of innovative hypotheses that must be tested in order to understand fully the extent to which the Supreme Court, through its legitimacy, is able to influence responses to its decisions. By parsing media and framing effects separately from those derived solely from the Court's role as a credible source of persuasion, scholars will be able to isolate the extent to which compliance and opinion change result from judicial legitimacy in contrast to being merely a product of the environment in which citizens learn – or do not learn – about the work of the Court.

Concluding Thoughts

After decades of research, judicial scholars have learned a great deal about the legitimacy of the U.S. Supreme Court, both in terms of its causes and its consequences. Still, the unprecedented explosion of new work on judicial legitimacy has generated a number of challenges to the conventional wisdoms. Although much current research suffers greatly from a lack of external validity, some empirical findings seem to undermine existing theories in fundamental ways.

Perhaps the most basic question requiring additional research has to do with how citizens update the views toward legal policies and institutions. With only a handful of exceptions, this chapter has reported on cross-sectional research, which of course is limited in its ability to analyze change. The most pressing need for those seeking to understand judicial legitimacy is data capable of supporting dynamic analysis; even experimental research designs are no substitute for analyses of change over time. Attitudes toward legal institutions are not set in stone, even if they do not change easily; future research should seek to understand how and why these attitudes evolve.

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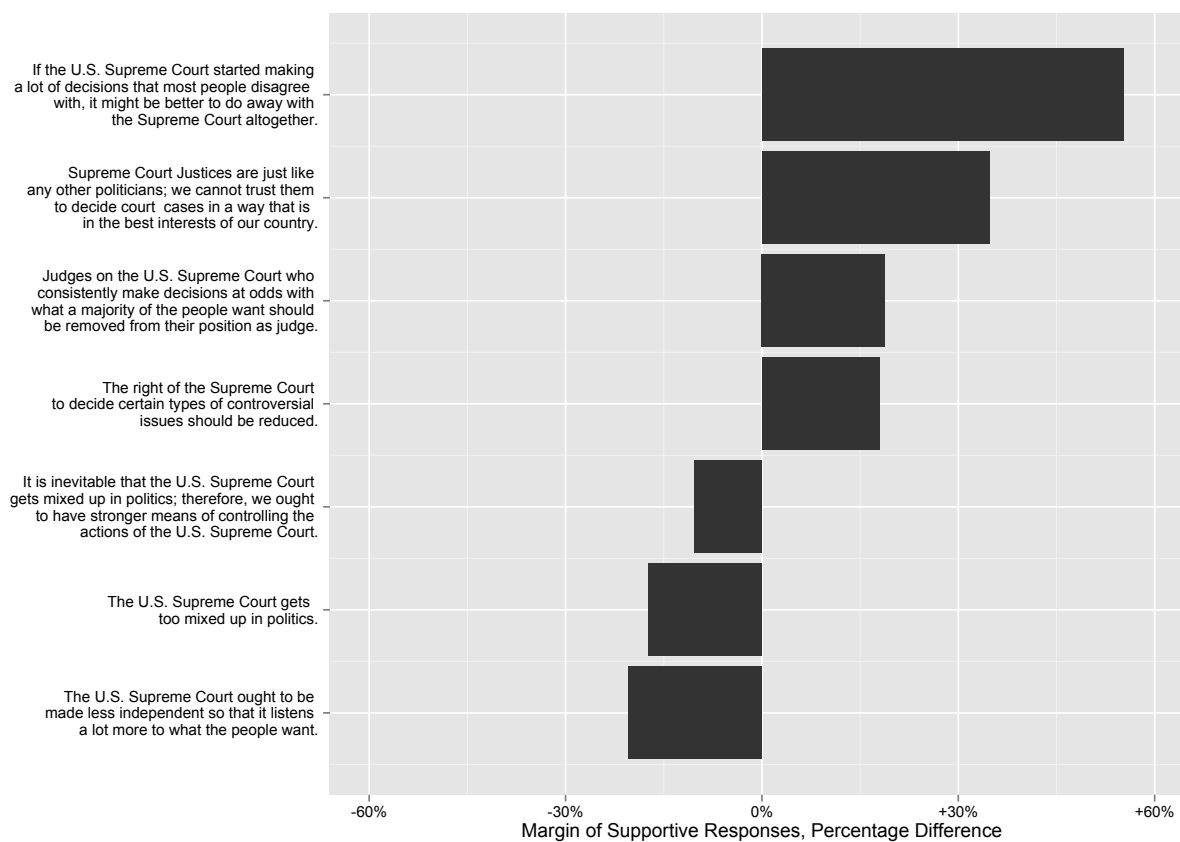
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Figure 1. Institutional Legitimacy of the U.S. Supreme Court, 2011



Note: “Margin of Supportive Responses” indicates the difference between the percentage of supportive responses and the percentage of non-supportive responses. This figure therefore ignores those without an opinion on the statement. $N \approx 750$.

Source: Freedom and Tolerance Survey, Washington University in St. Louis, 2011.