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**U.S. Supreme Court Legitimacy:  
Unanswered Questions and an Agenda for Future Research**

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## **Abstract**

In recent years, scholarly interest in the legitimacy of both individual judicial institutions and the judicial system as a whole has exploded, with new studies challenging and refining our understanding of diffuse support for the legal system. In this essay, we review the recent findings in this area of research, paying special attention to how individual-level legitimacy judgements are formed, how they are shaped by life experiences, and how shorter-term evaluations of institutional performance, such as displeasing decisions and perceptions of politicization, may or may not harm institutional support. Throughout, we emphasize fertile areas for further research, identifying key topics of inquiry that demand scholarly attention. As news breaks daily about protests as varied as those in Baltimore, Ferguson, and on the steps of the U.S. Supreme Court, and as the Court is poised to issue high-profile rulings on affirmative action, abortion, and religious liberty, understanding the etiology and dynamics of legitimacy has never been a more important area of inquiry.

In the last several decades, interest in the concept of “legitimacy” has exploded in the social sciences.<sup>1</sup> Indeed, in the subfield of judicial politics, perhaps no other research question with the exception of the determinants of judicial decisionmaking has consumed as many intellectual resources as the study of how both individual courts and the legal system generally acquire, maintain, use, and lose institutional legitimacy. The need for institutional legitimacy is not unique to the U.S. Supreme Court; U.S. state courts and courts throughout the world as well require legitimacy in order to be effective institutions (Gibson, Caldeira, and Baird 1998; Gibson 2012).

This interest in legal legitimacy has been even further stimulated by the events unfolding in the U.S. after the killings of Eric Garner in Staten Island (New York), Michael Brown in Ferguson (Missouri), and many other young black men. It is not hyperbole to assert that these killings have generated a legitimacy crisis for police organizations throughout the country, and that a spill-over effect for legal institutions in general is possible if not probable. Not surprisingly, scholars have jumped on these events to understand how legal legitimacy is formed and eroded.

This renewed interest –empirical and theoretical—in institutional legitimacy has greatly advanced our understanding of the Court’s support. However, some important conundrums remain. In particular:

(1) What is the etiology of legitimacy; from where and through what processes does legitimacy originate? What role does childhood legal socialization play, and how and to what

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<sup>1</sup>Useful reviews of Legitimacy Theory can be found in Tyler 2006, Gibson and Nelson 2014a, and Gibson 2015.

degree are the attitudes inculcated in children modified by adulthood experiences, personal and vicarious?

(2) Adulthood experiences come in at least two varieties. First, individuals have prior personal and vicarious experiences with institutions and assessments. Second, individual-level judgments of those institutions may or may not be grounded in these experiences. How do citizens develop and update their assessments of legal institutions? To what degree is legitimacy dependent upon sustained satisfaction with the performance of the institution? What exactly is the role of performance satisfaction in creating, maintaining, and eroding institutional legitimacy? What are the elements or dimensions on which institutional performance assessments are constructed? How do assessments of institutional legitimacy get updated? Under what conditions does short-term performance dissatisfaction have deleterious effects on individual-level legitimacy judgments?

(3) How do attitudes toward different institutions within the legal system interact with one another? Do attitudes toward the police, for instance, affect attitudes toward the Supreme Court?

(4) Politicization seems to threaten legitimacy; being recognized as a political institution does not. How do “politicized” and “political” differ from one another; how common is it for citizens to distinguish between these two concepts; and what can institutions do to shift perceptions from politicized to merely political?

(5) Finally, the symbols of legal authority seem to play some role in reinforcing judicial legitimacy. But do symbols play a similar role throughout the legal system (e.g., the police symbols of social control) and do symbols affect all segments of the population equally?

In this essay, we review the extant findings on each of these topics, assessing the state of our understanding on each and suggesting some areas of further inquiry. We hope that it is obvious that each of these issues is worthy of a paper by itself. Consequently, our goal is to raise more questions than we can possibly answer in this chapter. It is perhaps useful to begin with a brief overview of Legitimacy Theory.

## **LEGITIMACY THEORY**

Scholars agree on the basic contours of Legitimacy Theory. For instance, most concur that legitimacy is a normative concept, having something to do with the right (moral and legal) to make decisions.<sup>2</sup> “Authority” and “diffuse support” are sometimes used as synonyms for legitimacy (Easton 1965, 1975). As Tyler (2006) observes:

Legitimacy is a psychological property of an authority, institution, or social arrangement that leads those connected to it to believe that it is appropriate, proper, and just. Because of legitimacy, people feel that they ought to defer to decisions and rules, following them voluntarily out of obligation rather than out of fear of punishment or anticipation of reward. Being legitimate is important to the success of authorities, institutions, and institutional arrangements since it is difficult to exert influence over others based solely upon the possession and use of power. Being able to gain voluntary acquiescence from most people, most of the time, due to their sense of obligation increases effectiveness during periods of scarcity, crisis, and conflict (375).

In other words, institutions perceived as legitimate have a widely-accepted ability to make judgments for a political community; those without legitimacy find their authority contested.

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<sup>2</sup> Throughout this paper, 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 2014b.

Legitimacy (diffuse support) differs from a second type of institutional support: specific support. Whereas diffuse support might be conceptualized as a “reservoir of goodwill” that institutions can draw upon to achieve implementation of disagreeable decisions (Caldeira and Gibson 1992, 658), specific support is “satisfaction with the performance of a political institution” (Gibson and Caldeira 1992, 1126). In other words, institutional legitimacy represents longer-term, global judgments about an institution’s authority whereas specific support represents shorter-term and more fleeting opinions about particular actions made by an institution. While diffuse support might be thought of as a form of institutional loyalty, specific support reflects approval or disapproval of recent institutional actions. Thus, a crucial attribute of courts is the degree to which they enjoy the loyalty, *not just approval*, of their constituents.<sup>3</sup>

Legitimacy is particularly relevant when individuals disagree about political judgments. When an institution makes a decision that all of its constituents approve of, discussions of legitimacy are rarely relevant or necessary. In Gibson’s (2015) memorable phrasing, “legitimacy is for losers”; in other words, legitimacy takes on its primary significance in the presence of an *objection precondition*. As Friedman (1977) rightly noted long ago: “We do not need a theory of legitimacy to explain why people obey a person with a gun, or adhere to an order that brings them personal honor or gain; or obey their religions or their moral codes” (141). When an institution’s constituents disagree over a decision made by an institution, some of those people may ask whether the

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<sup>3</sup> The magnitude of the relationship between specific and diffuse support has been the subject of much recent scholarly interest, as we explain below.

institution has the authority, the “right,” to make the decision. Legitimate institutions are those recognized as appropriate decision-making bodies *even when* one disagrees with the outputs of the institution; their decisions are respected, enforced, and implemented even in the face of dissent. To be effective, courts need legitimacy—the leeway to go against public opinion (as, for instance, in protecting unpopular political minorities).

Gibson and Caldeira (2009) have proposed a theory of “positivity bias” that goes some distance toward accounting for how institutional legitimacy arises and changes over time. Figure 1 diagrams how this process unfolds. According to Positivity Theory, exposure to legitimizing judicial symbols (robes, decorum, deference by the mass media, etc.) begins a process of recognizing courts as a different sort of political institution from a bureaucracy or a legislature. These symbols signal to people that courts are worthy of respect, deference, and obedience—in short, that they are legitimate. Prolonged exposure to these symbols over the course of one’s life produces a positivity bias in the sense that even when the initial stimulus for paying attention to courts is negative (e.g., the court makes a disagreeable decision), judicial symbols enhance judicial legitimacy, which shields the institution from attack based on disagreement with its decision (Gibson, Lodge, and Woodson 2014).

[PLACE FIGURE 1 ABOUT HERE]

Together, legitimacy and positivity theories suggest that institutional legitimacy both insulates courts from harmful consequences of making unpopular decisions and increases the chances that judicial decisions—especially unpopular ones—are accepted, implemented, and enforced. Hence, institutional legitimacy helps a court’s decisions move from paper into practice while simultaneously reducing the institution’s reliance on pleasing others with its rulings in

order for those rulings to have teeth. As a result, institutional legitimacy contributes to judicial independence and, perhaps, to decisions grounded in the rule of law.<sup>4</sup>

## **THE ETIOLOGY OF LEGITIMACY: ACQUIRING VIEWS ABOUT THE LEGITIMACY OF INSTITUTIONS**

Both Legitimacy Theory and Positivity Theory emphasize the importance of legitimacy. The theories that courts draw upon legitimacy as political capital when the need to issue a displeasing decision arises. Given the importance of a deep reservoir of support for the long-term health and efficacy of a political institution, a crucial question emerges: how is this reservoir filled in the first place? Put differently, what is the etiology of attitudes toward political institutions?

Although not a great deal of original research has been conducted in the past few decades (but see Fagan and Tyler 2005; Trinkner and Cohn 2014), conventional wisdom holds that children learn about political authorities and institutions at a surprisingly young age (Easton and Dennis 1969; Caldeira 1977). As Trinkner and Cohn (2014, 604) observe, “adult law-related attitudes and behaviors have their origins in childhood and adolescence.” Moreover, much of what they learn is charged with positive affect.<sup>5</sup> As Fagan and Tyler (2005, 218) summarize: “early orientations toward law and government were found to be affective in nature, and

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<sup>4</sup> Judicial independence simply means that judges are free to decide cases as they see fit, without fear of reprisal. Those favoring judicial independence typically make the implicit assumption that judges prefer to decide cases in accordance with the rule of law. Of course, independence might also mean that judges are free to decide cases in accordance with their own ideological preferences or other factors, irrespective of the rule of law.

<sup>5</sup> Easton and Dennis (1969, Chapter 13) report that by the junior high school years, children attribute a variety of positive attributes to the Supreme Court, and do so more frequently than they do with other political institutions.



characterized by idealized and overly benevolent views about authority. These early views shaped the later views of adolescents, views that were both more cognitive and less idealized in form.” This “hot cognition” means that socialization generally contributes to the inculcation of the values and beliefs of the existing regime.<sup>6</sup> Particularly relevant is the development of positive orientations toward political institutions, such as legitimacy attitudes.

Childhood lessons are not the only source of attitudes toward legal institutions and authorities: adolescent and adulthood experiences also shape citizens’ views. For example, Trinkner and Cohn (2014) find “that legal socialization is not solely influenced by the development of increasingly sophisticated reasoning processes, as has been argued by the cognitive developmental approach (Tapp and Levine, 1977). Instead, they show that the development of positive orientations toward authorities and the internalization of law-related norms are also driven by one’s social environment” (615). For many, the positive orientations established during childhood are substantially eroded by experience and social learning as an adult.<sup>7</sup>

Moreover, it is not just one’s own experiences that matter: vicarious learning about the legal system is as commonplace as it is influential.<sup>8</sup> It is not just how one is treated by legal

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<sup>6</sup> Trinkner and Cohn (and many others) repeatedly write about “positive orientations toward legal authority” (e.g., 2014, 604) as a key element of legal socialization.

<sup>7</sup> Fagan and Tyler (2005, 229) show that perceptions of legitimacy erode with the age of adolescents, with legitimacy declining “sharply and monotonically from age 10 through age 14 before stabilizing in middle adolescence.”

<sup>8</sup> “A vicarious experience is one that is indirect and internalized by the actor, including (1) observations of how the police treat others either in public settings, (2) media reporting of incidents involving police officers (e.g., Rodney King, Abner Louima, Sean Bell), and (3) communications from others about their personal experiences.” (Brunson and Weitzer 2011, 428-429)

authorities that matters, but also how one's friends, children, and associates are treated.

“Accordingly, legal socialization is likely to be an integrative process that internalizes information derived from children's own experiences, their exposure to affective messages from others in response to their own experiences, and the cognitive frames that are prevalent within their neighborhood and peer group. That is, legal socialization is a process that is embedded in a set of interlocking social contexts and repeated social interactions over time in each of those settings” (Fagan and Tyler 2005, 222).

Several recent studies have investigated the role of interactions with legal authorities in shaping attitudes toward legal institutions. Among the best of such studies is that of Epp, Maynard-Moody, and Haider-Markel (2014), who investigate how contacts with police shape legal orientations. They conclude that “the benefits of investigatory stops are modest and greatly exaggerated, yet their costs are substantial and unrecognized” (Epp, Maynard-Moody, and Haider-Markel 153). Indeed, “after a generation of investigatory stops, neighborhood residents in east Kansas City so distrust the police that they will not cooperate with investigations even when the crime is a gang-land shooting at a church funeral” (Epp, Maynard-Moody, and Haider-Markel 2014, 153).

Tyler, Fagan, and Geller (2014) also test the hypothesis that personal experiences with the cops structure one's willingness to attribute legitimacy to the police, and, generally, they find considerable support for their presumed linkage. This finding is particularly important in light of the stunningly high levels of contact young men have with the police (756). Their study amply documents the conclusion that the deleterious effects of contact with police on legitimacy come not from simply having interactions with police, but rather have to do with the perceived fairness

of the contact. Moreover, vicarious experiences are also extremely important: the experiences of 18 year old males get amplified many times over through the stories their mothers report to others at church and the accounts their fathers provide others at the barbershop. As Tyler, Fagan, and Geller (2014, 754) assert: “Legitimacy is not a given power, but accumulates through dense social interactions with authorities, where accounts and evaluations of experiences with the police are shared through efficient information markets and social networks.” Thus, these studies underscore the deleterious effects of both direct and indirect contact with law enforcement officials on legitimacy.

Two crucial unanswered questions emerge from this literature. First, it is uncertain how orientations toward legal institutions get generalized. For instance, do encounters with police affect attitudes toward courts? Does experience with local courts affect attitudes toward courts at the pinnacle of the legal system? Because the literatures on police and lower courts intersect so little with research on national legal institutions, it is simply unclear how differentiated and interconnected legal orientations are. For example, Tyler, Fagan, and Geller do not consider attitudes beyond local authorities. We do not know, for instance, whether experiences with everyday legal authority influence attitudes toward courts, toward high courts, and/or toward the legal system in general. One might hypothesize that attitudes grounded in personal experiences generalize broadly to legal authorities,<sup>9</sup> but no extant empirical investigation of that hypothesis has been reported.

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<sup>9</sup> Gastil et al. (2012) investigated the consequences of jury service for a constellation of legal attitudes. Interestingly, the impact of various service indicators on confidence in the U.S. Supreme Court was nil, even though some effects on attitudes toward local courts and judges

A second important question has to do with group differences in attitudes toward legal institutions. It seems that the legal socialization of majority and minority children differs significantly, with minority children being far less likely to acquire positive affect toward law and legal authorities. While majority children tend to view the police as benign, minority children tend to learn a different lesson.

The source of these attitudes is in many instances the inter-generational transmission of the learned experiences of adults in their dealings with the police. In the wake of Ferguson, Staten Island, etc., discussions in the mass media about the lessons black parents teach their child about dealing with the police have become commonplace, with even President Obama chiming in on the subject. For example: “much as all parents broach sensitive topics like AIDS and sexuality or drug use, black and Hispanic parents say they talk to their children about dealing with the police. It is just a matter of time, they tell them, before they encounter a police officer who sees dark skin as synonymous with crime. They coach them on how to behave: don’t hang out in crowds, be polite, don’t make any sudden moves, carry identification, ask to make a phone call, refuse to answering incriminating questions” (Lee 1997, no pagination). Thus, there is good reason to believe that black children come of political age with decidedly less positive orientations toward legal institutions than their white counterparts.

It turns out that a substantial body of academic research exists investigating the socialization of minority children in the U.S., with an important focus on preparing minority children for experiences of discrimination (e.g., Hughes 2003; Hughes and Chen 1997; Hughes

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were discerned. This is evidence, albeit indirect, that attitudes toward legal institutions do not always generalize across levels of the judiciary.

and Johnson 2001)—a process sometimes referred to as “armoring” young black people. Indeed, as noted by Brunson and Weitzer (2011, 426, 448), this teaching process has even been formalized by groups through instructional videos, brochures, and wallet cards (ACLU 2004, NAACP, n.d.; [www.flexyourrights.org](http://www.flexyourrights.org), in “Ten Rules for Dealing with the Police”).<sup>10</sup> Some of this research focuses specifically on the police. For example, Brunson and Weitzer (2011) conclude from their research that “The present data clearly show, first, that many adult respondents do not trust the police and, second, that such distrust may be instilled in the youths in a way that is intended to armor them. In other words, some adults act in ways that generate or reinforce black youths’ general lack of confidence in the police” (Brunson and Weitzer 2011, 439). Thus, this line of research suggests that potential racial differences in diffuse support for legal institutions may be attributable to very different processes of socialization experienced by black and white American children.

But do these group-level differences in diffuse support for the American judiciary exist? Some research exists specifically focusing on the views of African Americans toward the U.S. Supreme Court, although owing in part to the difficulty of putting together representative samples of African Americans,<sup>11</sup> not a great deal is known about the willingness of blacks to

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<sup>10</sup> “The organization Flex Your Rights has dramatized this guidance in a video, *Ten Rules for Dealing with the Police*, which, according to the group’s website ([www.flexyourrights.org](http://www.flexyourrights.org)), has been viewed by 8 million people on YouTube. The *Ten Rules* video contains vignettes in which actors portray citizens and police officers during vehicle stops, illustrating what can happen if one does not follow rules such as “Always be calm and cool,” “Don’t run,” “Never touch a cop,” “Determine if you are free to go,” and “Don’t do anything illegal” during the stop. (Brunson and Weitzer 2011, 448)

<sup>11</sup> Note that, unless specifically designed to be representative of black Americans, most national samples generate small numbers of blacks who almost by definition cannot be assumed to be representative of black people in general.

extend legitimacy to the U.S. Supreme Court. Gibson and Caldeira (1992) found strong generational cohort differences on Court attitudes, which they ascribe to the effects of the Warren Court era. Blacks seemed to view the Supreme Court as an institution friendly to their interests, and, as a consequence, institutional loyalty developed. However, loyalty has its limits; as the Supreme Court turned more conservative on racial issues, blacks, especially young blacks, started to withdraw their allegiance toward the institution.<sup>12</sup>

Clawson and Waltenburg (2009) report one of the most comprehensive studies of black attitudes toward the system. Using a variety of different data sets, they generally conclude that Court legitimacy is high among blacks and that institutional legitimacy contributes to the willingness of African Americans to accept Supreme Court decisions even when they disagree with them (2004, 154). However, if the attitudes of black Americans are being continuously reshaped as the Supreme Court moves even further away from their preferences, the data from the data sets on which they rely may be significantly dated.

Some state-level studies of black attitudes exist. For instance, Overby et al. (2004) found that blacks in Mississippi tended to judge the Mississippi judicial system as significantly less fair than whites in Mississippi (2005, 454, 456). Experience with the judicial system had some effect on fairness judgments, with greater experience being associated with greater perceptions of fairness, although the effects of experience were not consistent across various dependent variables. Even the presence of descriptive representation (having more black judges on the Mississippi benches) did not to raise support for the local legal system.

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<sup>12</sup> For some thoughts about whether universal legitimacy for the legal system is possible see Scherer (2011).

So do citizens draw conclusions about higher level legal institutions from their interactions with lower level legal authorities? According to Tyler, Fagan, and Geller (2014, 755), “For many youths, during pivotal developmental stages when adolescents form lasting views of the legitimacy of legal norms and legal actors, the police are the primary face of the state and the first that they are likely to encounter growing up.” So it may be reasonable to hypothesize that attitudes generalize across a variety of legal institutions. Certainly, this is a research question upon which much more empirical research is necessary.

### **THE RELATIONSHIP BETWEEN DIFFUSE AND SPECIFIC SUPPORT**

Aside from the longer-term influences of identity and socialization, shorter-term influences may also affect support for the legal system. A particularly important recent debate in the literature concerns the extent to which both individual-level and aggregate-level evaluations of the U.S. Supreme Court’s legitimacy change as a function of performance satisfaction. Specifically, scholars have become concerned with the extent to which the U.S. Supreme Court’s legitimacy is vulnerable in the face of decisions that are displeasing to the American people. The normative stakes of this debate could not be higher; if the Court believes it will become illegitimate as a result of a series of displeasing decisions, it may abandon its role as a countermajoritarian institution charged, in part, with the protection of minority rights.

Classic legitimacy theory suggests that institutional legitimacy is relatively inflexible, even in the face of short-term performance dissatisfaction. To put the conventional wisdom in the language of the theory, diffuse support should be relatively disconnected from specific support. Caldeira and Gibson (1992) sum up this conventional wisdom: “[s]pecific support is

primarily distinguishable from diffuse support by its durability. Satisfaction may wax and wane depending on the outputs of the institution, but diffuse support changes only very slowly” (1125-

6). Caldeira and Gibson (1992) go on to explain the nature of the relationship:

Theoretically and conceptually, the two forms of support should *not* bear a close relationship to one another. To conceive of the former as a simple function of the latter would undermine much of the utility of distinguishing institutional commitments from satisfaction with outputs. The stability of political institutions would then simply turn on their performance in the short run. In a theoretical sense, then, diffuse support *must* be disconnected from specific support to at least some degree (1126).

Indeed, Easton (1975, 442, footnote 21) goes so far as to claim that a strong relationship between diffuse and specific support is an indication of measurement error in the operationalization of the concepts.

Among research that uses valid and reliable measures of diffuse support, the relationship has been relatively clear. Gibson and Caldeira (1992) demonstrated that the relationship between diffuse and specific support for the United States Supreme Court is a relatively weak one, and Gibson, Caldeira, and Baird (1998) reported that, for the 20 countries in their analysis, the average relationship between diffuse support and specific support for high courts worldwide is .33 (352, Table 7).<sup>13</sup>

The relationship has also held at the aggregate level, where study after study has shown that the U.S. Supreme Court’s legitimacy has stayed at a relatively high level for years despite volatility in aggregate-level specific support for the Court (e.g., Gibson 2007). Such stability, especially in the face of controversial decisions like *Bush v. Gore*, has lent strong credence to the

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<sup>13</sup> Though Murphy and Tanenhaus’s (1968) research reported correlations between diffuse support and ideology that rose above .45, their measure of diffuse support is one that has been widely criticized.



view that the Court's legitimacy will remain undisturbed even as it decides cases in ways that displease a majority of Americans (Gibson, Caldeira, and Spence 2003b; Kritzer 2001; Nicholson and Howard 2003; Yates and Whitford 2002; Price and Romantan 2004). In short, the conventional wisdom has received widespread support at both the aggregate and individual levels of analysis.

Recently, however, this prevailing belief has received renewed scrutiny, with scholars suggesting that the relationship between specific and diffuse support is greater than previously realized. This research has focused in particular on one component of specific support: dissatisfaction with specific Supreme Court decisions. Relying on a distinction between objective ideological disagreement (an individual's actual level of disagreement with the Court) and subjective ideological disagreement (an individual's believed level of disagreement with the Court), Bartels and Johnston (2013) demonstrate that increased levels of subjective ideological disagreement are associated with lower levels of support for the U.S. Supreme Court. Bartels and Johnston go a step further, drawing upon a survey experiment to present evidence that even a single displeasing decision can markedly lower individual-level evaluations of institutional legitimacy.

Similarly, Christenson and Glick (2015) use a nonrandom opt-in sample of Americans before and after the U.S. Supreme Court's decision in *National Federation of Independent Businesses v. Sebelius* (in which the U.S. Supreme Court held the Affordable Care Act constitutional) to determine whether a highly salient case could move individual-level judgments of legitimacy. Christenson and Glick reach conclusions that echo those of Bartels and Johnston, namely that individual-level disagreement with the Court's decision is associated with a decrease

in evaluations of legitimacy. Thus, just as Bartels and Johnston showed in an experimental context, Christenson and Glick demonstrate with a real-world intervention that even a single case may put the Court's legitimacy at risk.

These challenges to the conventional wisdom have not gone unanswered. Gibson and Nelson (2015a) critique the measures used by Bartels and Johnston, suggesting that the indicator of ideological disagreement used in that study likely contains a substantial amount of measurement error. Relying on a nationally-representative survey and a measure of subjective ideological disagreement that remedies these concerns about measurement error, Gibson and Nelson find that the relationship between ideological disagreement and diffuse support may be statistically significant, but it is not substantively significant. Indeed, the bivariate correlation between the two concepts is only  $-.03$ , and, in a multivariate model of diffuse support, a movement across the interquartile range of ideological disagreement is associated with only a 3% decrease in legitimacy. Thus, the case against the conventional wisdom is far from compelling.

Of course, the broader conceptual question concerns the relationship between specific support and diffuse support. While scholars have jumped at the opportunity to assess the effects of ideological disagreement on support for the Court, the extent to which the effects of other elements of specific support have been subjected to scholarly scrutiny varies widely. Here, we review several other possible components of specific support and outline potential avenues for further research.

First, regardless of the outcomes of the cases the Court chooses to decide, individuals may be frustrated by the Court's overall performance as an institution. Today, the Court decides

about half as many cases per term as it did in the early 1980s; the Court's agenda setting prerogative, combined with the justices' relative reluctance to use it, enables the Court to duck cases on issues of importance to individuals across the ideological spectrum (Liptak 2009). Moreover, the justices personally profit from their relatively light caseload, enjoying a lengthy recess that provides them with ample time to write memoirs and popular press books and to travel to and lecture at foreign law schools. As a result, the public may be dissatisfied with the Court's light workload, and, by extension, its reluctance to weigh in on issues of national importance.

Second, the public may be frustrated by the relative secrecy in which the Court operates. Indeed, Grimmelikhuijsen and Kijn (2015) demonstrate that increased judicial transparency has a positive effect on trust in the judiciary. The Court refuses to tell the public when it will release decisions, denies the public the opportunity to see oral arguments (unless they are one of the lucky few with the time and resources to wait in line on opinion day), and, until recently, fails to provide the public with even basic information on cases before the Court on its website. In a day and age in which transparency is a key talking point for politicians and activists of both parties, the Court's opacity stands in stark contrast to even the actions of many lower courts on this dimension. As a result, it seems likely that at least some Americans—though, admittedly, Americans who are intensely politically aware—may be frustrated by the Court's covert operating procedures.

Indeed, beyond its direct relationship with specific support, transparency is important to judicial institutions because it feeds perceptions of procedural justice. Prominent jurists and reform groups have long argued that transparent practices—and even transparency in the

language used in judicial opinions—can increase support for judicial institutions by enabling the public to understand the work that courts do (Vickery et al. 2012). The limited research on this topic supports this contention. Ramirez (2008) finds that the college students are more likely to accept decisions when they are framed as reached through fair processes, and Hansford and Coe (2014) show that more readable opinions are associated with increased acceptance of judicial decisions.

Third, when the public does hear about the Court’s operations, media accounts of individual justices may give some Americans pause about individual justices and their working relationships. Evidence sporadically surfaces suggesting that the relationships among the justices are not always cordial. As one example, reports surfaced that Justice Scalia was privately furious with Chief Justice Roberts’s vote to uphold the constitutionality of the Affordable Care Act, though Scalia publicly claimed that he harbored no ill will toward the Chief Justice (Toobin 2012).<sup>14</sup> Moreover, beyond anonymous reports of discord among justices, the justices sometimes air their dissatisfaction publicly. Indeed, the relative frequency of garrulous language—in which individual justices may directly attack their colleagues—might undermine the Court’s support (Grieve 2015, Tribe 2015, Viebeck 2015). For example, in *King v. Burwell*, a case in which the Court upheld the constitutionality of the Affordable Care Act, Scalia suggested that the Court “should start calling [the Affordable Care Act] SCOTUScare,” further stating: “The Court holds that when the Patient Protection and Affordable Care Act says ‘Exchange established by the

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<sup>14</sup> To be fair, the justices go to great pains in their public appearances to emphasize the good working relationships among the members of the Court. For example, Justice Scalia and Justice Ginsburg often discuss operas they have attended together, and Justice Kagan has spoken about a trip she took with Justice Scalia in which he taught her how to shoot a gun (Franke-Ruta 2013).

State’ it means ‘Exchange established by the State or the Federal Government.’ *That is of course quite absurd, and the Court’s 21 pages of explanation make it no less so*” (emphasis added).

Moreover, Scalia’s dissent accused his colleagues of engaging in “interpretive jiggery-pokery” and “somersaults of statutory interpretation,” resulting in a decision that is “pure applesauce.”

While the acrimonious relationships among members of Congress are often cited as a component of that institution’s low support, to our knowledge, no systematic research has assessed the extent to which such intemperate language or perceptions of poor working relationships among the justices affects either global assessments of diffuse support or acceptance of individual decisions.

Additionally, the public may be concerned about the justices for other reasons. Indeed, the high median age of the Court routinely raises public concerns about the ability of individual justices to do their jobs (Taylor 2005; LaFrance 2013). In a prominent recent example, Justice Ginsburg admitted that she was “not 100% sober” and fell asleep on national television during President Obama’s 2015 State of the Union address (Wolf 2015).

Likewise, the public actions of the justices have also raised questions about their impartiality; such concerns about impartiality represent another component of specific support. The job of Justice Thomas’s spouse, a conservative political activist, has raised prominent concerns about potential conflicts of interest in cases involving prominent conservative causes (Hennessey 2010). Similarly, Justice Scalia’s duck hunting exploits with then-Vice President Cheney raised similar concerns when the Court heard a challenge to the Vice President’s energy task force. Common Cause filed a petition with the Department of Justice in 2011 asking for the recusal of both Justice Scalia and Justice Thomas after they spoke at a retreat hosted by a

prominent conservative activist (Lichtblau 2011). The justices did not recuse themselves (Lichtblau 2011). These challenges to the individual impartiality of Supreme Court judges may directly harm the legitimacy of the overall institution; as research by Gibson and Caldeira (2012) has shown, even recusal is not a complete remedy for the decrease in public support that comes from a conflict of interest.

The research agenda in this area is both obvious and difficult. The most pressing concern is the development of a set of guidelines about the best way to measure subjective ideological disagreement. As the debate between these various research teams demonstrates, the measurement of these concepts may have substantively important ramifications for the conclusions that scholars draw from their analyses (see also Gibson and Nelson 2015b). Thus, just as Gibson, Caldeira, and Spence's (2003a) guidelines for the measurement of diffuse support have been widely adopted, we are in need of similar best practices for the measurement of subjective ideological disagreement.

Second, we need to know more about the longer-term dynamics of legitimacy. Both Bartels and Johnston and Christenson and Glick present evidence that a single judicial decision can move public support for the decision; yet, we do not know how long those effects last (but see Mondak and Smithey 1997). Do they wear off after a week? A month? A year? Never? We simply do not know, and understanding the extent to which judgements of legitimacy "bounce back" is essential to understanding the normative implications of the Bartels and Johnston and Christenson and Glick findings.

Finally, scholars must broaden their understanding of specific support beyond a single-minded focus on ideological disagreement toward a more holistic understanding of the concept.

Only by assessing the effects of the many different aspects of performance satisfaction will scholars achieve a full understanding of the importance that specific support judgements play as individuals form their diffuse support evaluations.

### **The Role of Politicization**

Another component of specific support left unmentioned so far is the degree to which individuals view decisions of courts as “political” or the institution’s actions as “politicized.” By “political” decisionmaking, we simply refer to what scholars of judicial behavior would call attitudinal decisionmaking: the notion that judges base their decisions on their preferences rather than solely upon the law. In other words, a belief that the Court engages in “political” decisionmaking is simply a belief in legal realism. By “politicization,” we refer to the degree to which individuals view a Court or its judges acting like ordinary politicians, most prominently by believing that they engage in strategic or self-interested behavior. Hence, individuals may believe that a court is political and/or politicized (or neither). One burgeoning area of scholarly interest concerns effects of political and politicized decisionmaking on diffuse support for the Court.

Perhaps the hallmark of political decisionmaking at the Supreme Court is the split decision along ideological lines. Scholars argue that such decisions give the impression that they are based upon politics rather than law, and one common theory is that the relatively high degree of salient 5-4 decisions reinforces public perceptions that the Court’s decision-making process is political, and, by extension, harms the Court’s legitimacy. The justices themselves have expressed a concern that split decisions can harm the Court’s legitimacy, with Justice Breyer writing in *Bush v. Gore* (2000): "in this highly politicized matter, the appearance of a split

decision runs the risk of undermining the public's confidence in the Court itself ... [W]e do risk a self-inflicted wound—a wound that may harm not just the Court, but the Nation.” Thus, scholars and the justices alike appear to believe that the Court’s support is based, at least in part, on the perception that its decisions are based upon law rather than personal preferences.

Evidence to support this theory has been mixed. Zink, Spriggs, and Scott (2009) present experimental evidence that some college students are more likely to accept a decision when it is unanimous. However, Gibson, Caldeira, and Spence (2005), drawing upon a representative national sample, find no evidence that individuals are more likely to accept or acquiesce to a unanimous decision than one characterized by sharp partisan divisions. Others have reached similar conclusions: macro-level studies (Marshall 1989) also fail to find a unanimity effect, and Salamone (2014) presents evidence that the presence of a dissent may, in some cases, actually *enhance* acceptance. As such, we cannot conclude that unanimity can inoculate the Court’s support to any significant degree, perhaps because 5-4 decisions are not understood by the American people as evidence of judicial politicization.

More direct attempts to test the effects of perceptions of political decisionmaking on support for the Court measure views of the process by which justices arrive at their decisions. Scholars have long posited that the Court’s legitimacy rests, in part, on a “myth of legality”; that is, that the Court’s support depends on the American public’s widespread belief that it makes decisions based on law rather than politics or ideology (Scheb and Lyons 2000). Gibson (2012) presents a bevy of evidence that the American people hold wildly differing expectations about their Courts, with some expecting legalistic decisionmaking and others expecting attitudinal decisionmaking. Moreover, Gibson and Caldeira (2011) provide evidence that directly



undermines the hypothesis that judicial legitimacy requires belief in the myth of legalistic decisionmaking. Thus, the premise of the “myth of legality” appears to be unsupported: a substantial proportion of the public does not subscribe to a legalistic view of Supreme Court decisionmaking, yet the Court’s high levels of legitimacy persist.

Aside from individual-level expectations about a court’s decisionmaking process, an array of research has considered the effects of the Supreme Court’s decisionmaking process on public support. Baird and Gangl (2006) present experimental evidence that some college students react more positively to legally-motivated decisions than to politically-motivated decisions. Other research has suggested that the decisionmaking-support connection is more complicated. Simon and Scurich (2011) demonstrate that the relationship is conditional: when the public approves of the outcomes, the principles underlying that decision have no effect on support. However, when the objection precondition is satisfied, the public penalizes the Court for politicized decisionmaking. This evidence is consistent with Gibson’s claim that “legitimacy is for losers” (Gibson 2015): winners accept outcomes with little questioning of the processes by which their victory was produced, but losers care about the process by which they lost.

Other research draws a distinction between political and politicized behavior. Gibson and Caldeira (2011) find that damage to the Court’s legitimacy comes not from sincere attitudinal decisionmaking but rather from strategic, politicized decisionmaking. In other words, when the public believes that a decision is reached through a principled decisionmaking process—be it legalistic or attitudinal—that decision does not harm the Court; however, when the decision is a strategic one, then the public is likely to penalize the Court, most likely because they view that behavior as politicized and akin to the behavior of ordinary politicians.

This reasoning fits well with other findings about public perceptions of politicized behavior and support for judicial institutions. Gibson (2012) presents a multitude of evidence that the legitimacy of state judges is harmed when citizens equate them with “ordinary” politicians. In other words, when judges are perceived as engaging in strategic behavior, then perhaps public support for the Court is harmed.

In what may be the most prominent recent example of high-profile strategic behavior at the Supreme Court, CBS News reported that Justice Roberts changed his vote in the Court’s first ruling on the constitutionality of Obamacare, changing his position from one in which the law was unconstitutional to a position that allowed him to uphold the law (Crawford 2012). Likewise, recent prominent commentary over the appropriateness of strategic retirement, particularly as it relates to Justices Ginsburg and Breyer at the end of the Obama presidency, has provided high-profile public discussion about the appropriateness of nonpolicy-related strategic behavior (Lithwick 2014; Kennedy 2011; Oliphant 2013).

Indeed, research supports the view that politicized behavior is harmful to the Court’s legitimacy. Christenson and Glick (2015), examining the consequences of exposure to information about Roberts’s vote switch in the Obamacare case on changes in diffuse support for the Court, find that survey respondents who read a news article alerting them to Robert’s strategic behavior decreased their support for the Court more after the Obamacare decision than those who were not randomly assigned to learn about Roberts’s vote switch.

Other evidence about the effect of politicization on the Supreme Court comes from Gibson and Caldeira’s (2009) study of attitudes toward the Court during the Alito confirmation. The politicization of the nomination campaigns—for and against Alito’s confirmation—affected

the legitimacy of the Court itself. It seems that the American people hold fairly realistic understandings of how their Supreme Court operates, but that there is a line between ideology and politicization that, when crossed, threatens the basic legitimacy of the institution.

Thus, taken together, the literature suggests that the real danger to the Court's legitimacy comes not from political decisionmaking, but rather from politicized decisionmaking. Gibson and Nelson (2015b) tested this proposition directly, attempting to untangle the effects of three components of specific support: subjective ideological disagreement, legal realism, and perceptions of judicial politicization (see also Woodson 2015). They find support for this hypothesis, namely that the effects of perceived judicial politicization trump the magnitude of the effects of both subjective ideological disagreement and legal realism. Moreover, Gibson and Nelson uncover an interactive effect among the three components of specific support: ideological disagreement only has an effect on diffuse support for those individuals who are both legal realists and do not believe the Court to be politicized. This finding fits well with the connection uncovered by Hibbing and Theiss-Morse (1995), who find that increased perceptions of congressional politicization have translated into the low levels of public support currently enjoyed by Congress.

The longer-term consequences of these findings are unclear but testable. We know almost nothing about how beliefs in judicial politicization have changed over time. We suspect that the American people believe that the Court is more politicized now than they have in the past, and that these increased perceptions of politicization are associated with the decline in public confidence so prominently noted by Gallup over the past few years. Yet, though confidence in the Court has declined in recent years, the Court's legitimacy remains high,

suggesting the possibility that, just as some individuals expect political decisionmaking from the Court, others are comfortable with politicized decisionmaking (Gibson and Nelson 2015b; Gibson 2007). However, more systematic research is necessary to embrace this conclusion with any sort of certitude.

### **THE ROLE OF THE SYMBOLS OF JUDICIAL AUTHORITY**

Legal scholars have long suspected that the symbols of legal authority—the judge’s robe, cathedral-like courthouses, statues of Lady Justice—play some role in at least reinforcing legal legitimacy, if not inculcating it. Until recently, however, no rigorous evidence of such effects has been adduced by scholars.

Gibson, Lodge, and Woodson (2014) were the first to show that the symbols of judicial authority influence the willingness of citizens to accept Supreme Court decisions with which they disagree. However, the effect of the symbols on acquiescence was not direct. Instead, the presence of judicial symbols led more readily to the activation of pre-existing attitudes toward courts, moving legitimacy considerations into working memory, rendering them relevant to the decision to accept an unwanted Court decision. One of the more startling findings of their research is that being exposed to judicial symbols resulted in people who rarely pay attention to the Supreme Court making judgments about decisions in a fashion equivalent to that of those who pay a great deal of attention to the Court. This, it seems, is a powerful role for symbols to play.

Gibson and Nelson (2015c) provide additional evidence on the influence of symbols on legitimacy. They posit that many citizens are disappointed in Supreme Court decisions of which

they disapprove (although some are not because they routinely expect the Court to make “wrong” decisions). This disappointment can undermine judicial legitimacy.

However, when the disappointment is paired with exposure to judicial symbols, its effect on legitimacy is completely neutralized. Gibson and Nelson suggest that the symbols activate considerations that in essence make up for unwanted public policy, perhaps by suggesting that the decision-making process was fair and appropriate. They argue that symbols exposure does not change legitimacy attitudes; instead, it simply blocks efforts to undermine legitimacy. Much is uncertain about the micro-level mechanisms underlying these studies, but their findings are sufficiently intriguing that they strongly suggest the utility of additional research on the symbols of judicial authority.<sup>15</sup>

The research of Gibson and his colleagues is based on a nationally representative sample, and, consequently, it is a sample that is overwhelmingly comprised of white people.<sup>16</sup> The authors are quite aware that the symbols of law most likely do not have universal meaning across various cultures and sub-cultures (e.g., Tyler 2000). Citing the work of Gibson and Caldeira (1996) on the legal cultures of Europe:

Various people may well perceive the role of law in society in quite different lights. For some, law is no doubt thought of as a rather neutral force, perhaps embodying consensually held social values. Those who view law in this way are likely to value it as a liberating force, either because it creates or reinforces a desirable social order or because it serves other interests of the entire citizenry. This view of law as consensual and neutral is common within a variety of types of legal scholarship (e.g., “neutral principles” for constitutional interpretation, “jural

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<sup>15</sup> Indeed, the theory underlying this research (which, generally, can be associated with Kahneman (2012) and Lodge and Taber (2013)) is much better developed than is the empirical research on micro-level mechanisms. As we note, there seems to be great opportunity here for future research.

<sup>16</sup> Furthermore, the sample was restricted to native-born Americans.

postulates,” etc.). Others, however, may perceive law as an external, repressive, and coercive force. Instead of embodying a broad social consensus to which nearly all citizens subscribe, law may be seen as an instrument of social control, as a means by which others advance their contrary political interests. By this view, law is not neutral in the sense that it represents the values of the entire society, but instead it is seen as representing the specific values of hegemonic groups and interests. This view of law as an instrument of political struggle, of political conflict, stands in sharp contrast to the perception that law represents the consensual interests of society. (Gibson and Caldeira 1996, 60-61).

Gibson and Caldeira found substantial cross-national variability in these attitudes (which they refer to as "legal alienation"), ranging (within the European Union, as of 1993) from the highly alienated Greeks to the Danes, who strongly embrace positive conceptions of law. “Law” apparently does not carry the same connotations for all Europeans.

It also seems likely that substantial sub-cultural differences exist in the U.S. in how the symbols of legal authority are interpreted. Gibson and his colleagues use as one of their symbols a picture of a judge’s gavel, under the assumption that the gavel implies something about authoritativeness. But the gavel may also be understood as representing social control—the gavel, for example, is sometimes paired with a picture of handcuffs.<sup>17</sup> Because symbols activate considerations already in the heads of people, it seems quite likely that the effects of symbols may differ across subgroups who have had different prior experiences with legal authorities.

Symbols other than those suggesting solemnity and justice are also important in the legal process. In the early days of the Ferguson, Missouri, conflagration, the authorities rolled out military-style equipment in an effort to intimidate and control the demonstrators. Indeed, one of

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<sup>17</sup> Some New Jersey Transit trains post a warning poster about messing with Transit officials. The poster includes a picture of a gavel that is nearly identical to that used in the Gibson et al. research. However, the poster pairs the gavel with a picture of handcuffs. Presumably, its message is that, if you do not follow the instructions of Transit officials, a judge will throw you in jail. Clearly, this is a social-control message.

the lasting images of the Ferguson struggle was pictures of military-style police vehicle patrolling the streets of the city and police officers dressed-to-kill in riot gear. Complaints against the escalation of the conflict by the authorities through the use of military equipment were widespread, and the city quickly reverted to civilian-style equipment (see Figure 2). The U.S. Department of Justice concluded: “The use of military weapons and sniper deployment atop military vehicles was inappropriate, inflamed tensions, and created fear among demonstrators” (Institute for Intergovernmental Research 2015, xvi). The images of social control coming out of Ferguson evoked widespread condemnation and most likely had some impact on how the controversy evolved.

[PLACE FIGURE 2 ABOUT HERE]

Thus, it seems that the long-standing intuition that symbols matter in legal processes (as they matter in religious and other processes) is in fact borne out by scientific research. But the effects of symbols are complex. Most importantly, symbols may not create anything; they simply stimulate the moving of material in long-term memory into working memory, thereby affecting cognitive (System 2) information processing. If so, then symbols merely unlock the residue of pre-existing experiences. Because those experiences differ across subgroups (as we documented early in this chapter), the effects of symbols are far from uniform. A great deal more research at the micro-level is required to clarify these complex processes.

### **The Way Forward**

Understanding how various institutions in the legal system—and that system as a whole—acquire, use, and lose public support is essential to our understanding of how the judiciary (and

its component parts) functions as efficacious elements of the American political system. Indeed, the abundance (or lack of) public support given to the legal system is a major topic of conversation in American political discourse today, helping to explain—in the last twelve months alone—why black Americans have taken to the street to protest the failure of grand juries to indict police officers who killed young men and women, why the U.S. Supreme Court’s edict that every state in the country must allow same-sex couples to wed (and to recognize marriages and divorces performed in other states) was implemented quickly and with little backlash, and why a book based on an internet meme of Ruth Bader Ginsburg skyrocketed to the *New York Times* bestseller list. Legitimacy has become a topic with broad scholarly and public implications.

Moreover, it is an area of research where there is so much more to be done. In this chapter, we have raised far more questions than we have provided answers, and our hope is that others will join this line of inquiry. For years, the study of judicial legitimacy has been the study of the legitimacy of the U.S. Supreme Court; recent events (and trends in the study of judicial politics) have demonstrated that we need to broaden the research agenda to include lower courts, other actors in the legal system (especially the police), and the extent to which individual-level judgements of the legitimacy of one part of the legal system color evaluations of the legitimacy of the rest of the legal system. Irrespective of whether one wants the legal system to have more legitimacy or wants it to have less, understanding the dynamics of legitimacy is a crucial task.



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**Figure 1. The Consequences of Positivity Bias**

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**Exposure to Courts**



**Exposure to Legitimizing Symbols**



**Courts are Not Ordinary Political Institutions**



**Enhanced Institutional Esteem & Loyalty**



**Legitimacy**

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**Figure 2. Images of Ferguson Protest**



**Police officers try to disperse a crowd Monday in Ferguson, Missouri.**

Source: Szoldra 2014.