

**Supreme Court Nominations, Legitimacy Theory, and the American Public:  
A Dynamic Test of the Theory of Positivity Bias\***

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## Abstract

Social scientists have taught us much about the legitimacy of the U.S. Supreme Court. Unfortunately, however, most research fails to consider how the public's views of political institutions like the Court change over time. But opinions *can* change, with at least two types of “exogenous” sources — controversial decisions and politicized confirmation hearings — providing engines for attitude change. Based on a three-wave national survey, we attempt to understand the influence of the Alito nomination/confirmation process on loyalty toward the Supreme Court. Our most important finding is that exposure to advertisements by interest groups for and against Alito's confirmation contributes to the erosion of support for the Court. These advertisements seem to encourage the belief that the Supreme Court is “just another political institution,” which is not an accolade. Politicized confirmation processes therefore seem to have considerable capacity to undermine the legitimacy of the Supreme Court itself.

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Social scientists are now generally in agreement that few forms of political capital are as useful to political institutions as legitimacy and that no institution depends more upon legitimacy than the judiciary. The conventional view is that courts have neither the power of the purse nor of the sword and therefore depend upon the voluntary compliance that typically springs from legitimacy. In truth, however, no matter how useful legitimacy may be to courts, no political institution could be effective without some mechanism for inducing citizens to believe that accepting their policy outputs, even disagreeable ones, is the right thing to do (Tyler 1990, 2006). Indeed, it is perhaps not hyperbole to claim that the concept legitimacy has become one of the most important building blocks of contemporary theories of institutional stability and efficacy.

From the initial empirical studies of legitimacy came the view that citizens' beliefs about institutions develop early in the life-cycle, perhaps even in adolescence, and change little over time (hence the great interest in research on political socialization — e.g., Caldeira 1977). The view that public attitudes toward institutional legitimacy<sup>1</sup> are obdurate, however, is no longer tenable. Although beliefs and values acquired early in life may shape perceptions and evaluations of institutional outputs to some degree, legitimacy is nonetheless not immune to forces of change. We know, for instance, that the views of African-Americans toward the U.S. Supreme Court evolved over time from strong support to considerable suspicion (Gibson and Caldeira 1992). We also know that attitudes are to some degree responsive to policy outputs, whether through highly salient decisions (e.g., Grosskopf and Mondak 1998; Gibson, Caldeira, and Spence 2003a) or through decisions with particular local relevance (e.g., Hoekstra 2003). Indeed, the original theory upon which so many studies of legitimacy rely (Easton's theory of diffuse support) acknowledges that *sustained* disappointment with the outputs of an institution

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<sup>1</sup>We equate several terms in this analysis: institutional legitimacy, diffuse support, and institutional loyalty. This is the same concept Caldeira and Gibson (1992) refer to as “institutional support.” For a full explication of the conceptual and theoretical meaning of this construct see Caldeira and Gibson (1992, 636-642). For a recent review, see Gibson 2006.

can empty the “reservoir of goodwill.” As with interpersonal trust and loyalty, a single incident may not destroy a relationship, but repeated violations of expectations over time can deplete the store of loyalty. Few social scientists today believe that support for political institutions is impervious to influences from institutional performance or exogenous shocks and events.

What we do *not* know, however, is whether, why, how, and under what conditions change takes place. Did, for instance, the controversies over the Bork and Thomas nominations to the Supreme Court have a lasting effect on public perceptions of the institution? Moreover, it is even unclear from the literature whether sizeable short-term reactions to individual judicial decisions have enduring influences. And the consequences of highly controversial decisions are not always what scholars expect: From available evidence, it seems that the U.S. Supreme Court may actually have *enhanced* its institutional legitimacy by its ruling in *Bush v. Gore* (e.g., Gibson, Caldeira, and Spence 2003a; Gibson 2007). When it comes to the question of how legitimacy is created, maintained, and destroyed, social scientists have some theories and conjectures, but precious few data, and little understanding of processes of opinion updating and change.

There are many good reasons why we know so little about the dynamics of change, but perhaps the most exculpatory is the scarcity of longitudinal data sets. Consider the data most widely used to understand changing attitudes toward the U.S. Supreme Court: Apart from one-shot surveys, scholars rely on aggregate time-series data from the General Social Survey (measuring confidence in the leaders of the Supreme Court – e.g., Caldeira 1986, 1987; Durr, Martin, and Wolbrecht 2000), some small collections of individual surveys conducted over time (e.g., the Gibson/Caldeira data from 1987, 1995, 2001, and 2005), a handful of before-and-after media polls (e.g., Grosskopf and Mondak 1998) and short-term time series (e.g., Kritzer 2001), simulations and mathematical models (e.g., Mondak and Smithey 1997), and a tiny number of studies (outside the laboratory/campus, that is) that directly assess individual-level change (e.g., Tanenhaus and Murphy 1981; Hoekstra 2003). Of course, the major

impediment to panel studies of individual-level stability and change lies in the unwillingness of most scholars (and funding agencies) to mount surveys *prior to* important events taking place. Change can best be assessed when baseline data are available, which means that measurements must be taken well in advance of highly salient controversies. Unlike the periodicity of elections, the events that shape institutional legitimacy occur irregularly and are often difficult to predict. Hence, the data and knowledge deficits are enormous when it comes to understanding how legitimacy waxes and wanes.

The purpose of this paper is specifically to test hypotheses about the causes of change in attitudes toward the U.S. Supreme Court. Based on a three-wave, nationally representative panel survey, this research is centered around the controversy over the nomination of Judge Samuel Alito to the Supreme Court. Confirmation fights are valuable for theory testing because they provide a fecund opportunity for understanding how citizens revise and update their attitudes toward the Supreme Court and its institutional legitimacy. Our contention is that these confirmation processes “wake up” dormant attitudes toward law and courts by providing a salient window into the operation of the Court. To take just a simple example, the theory of mechanical jurisprudence — according to which judges make decisions not on the basis of their ideologies but rather strictly according to the syllogisms of *stare decisis* — is strained during confirmation hearings since nearly all actors focus (to at least some degree) on the nominee’s ideology. Debates are certainly clouded by confused discussions over “judicial activism and restraintism,” but few close observers of the process doubt that ideologies are important. Thus, the central legitimizing symbols upon which the Court relies — its impartiality and its strict adherence to the law — are potentially compromised during politicized confirmation processes. Consequently, although confirmation battles have been relatively rare in recent times, when they occur, they provide a telling opportunity for understanding how citizens’ attitudes toward courts are formed, shaped, and revised.

Typically, of course, courts are relatively low in salience, and people’s attitudes toward them heavily reflect their basic values (e.g., support for democratic institutions and processes; see Caldeira and

Gibson 1995). When a flood of new information becomes available — as is true of controversial confirmation hearings (e.g., Gimpel and Wolpert 1996) — citizens must somehow incorporate the new information into existing belief systems. The purpose of this paper is thus to determine how citizens “update” their views of the Supreme Court on the basis of exposure to highly salient and often partisan confirmation disputes. Fortunately, some theory is available that can assist us in this endeavor.

This analysis relies heavily on the theory of positivity bias, as developed by Gibson and Caldeira. That theory asserts that anything that causes people to pay attention to the Supreme Court — even highly controversial events — enhances institutional legitimacy because citizens are simultaneously exposed to legal symbols that portray the judiciary as a unique institution and that therefore impart and reinforce judicial legitimacy. Thus, the overriding hypothesis of this research states that confirmation fights — even politicized ones — may not undermine the legitimacy of the U.S. Supreme Court. Since that theory is so central to our analysis, we begin by explicating it in some detail.

## **THE THEORY OF POSITIVITY BIAS**

Positivity theory offers an explanation of how citizens update their attitudes toward political institutions. The theory becomes relevant when exogenous events cause ordinary people to pay attention to the U.S. Supreme Court. Confirmation hearings and highly controversial court rulings are examples of such events. Such episodes “wake up” existing institutional attitudes, providing an opportunity for those attitudes to change; thus, attitudes come out of hibernation.

In the contemporary U.S., the attitudes that are roused by salient judicial events tend strongly to favor the Supreme Court as an institution, which is little more than to point out that it attracts the esteem of a considerable proportion of the American people (e.g., Gibson, Caldeira, and Baird 1998; Gibson 2007). The residue of earlier salient events — what some refer to as a “running tally” (e.g., Taber, Glather, and Lodge 2001), a sort of summary score of earlier positive and negative evaluations of the Court —

becomes susceptible to updating when events cause citizens to pay attention to the Supreme Court.

Many fear that partisan and ideological confirmation processes will detract from the legitimacy of the Supreme Court. During confirmation fights, citizens are offered the opportunity to get a view of how the Supreme Court actually operates. Since many actors are focusing on the ideology of the nominee, considerable potential exists for the myth of legality (“mechanical jurisprudence”)<sup>2</sup> to be placed under strain during confirmation hearings. Thus, the central legitimizing symbols upon which the Court relies — its impartiality and its strict adherence to the law — are potentially compromised during politicized confirmation processes.

As it turns out, some research indicates that even highly controversial events need not diminish the legitimacy of the Supreme Court and, indeed, may actually augment it. For instance, Gibson, Caldeira, and Spence (2003a) show that the Court’s decision in *Bush v. Gore* – a controversy holding enormous potential to threaten its legitimacy – did not wound the Supreme Court. The Court’s decision to award the presidential election to George Bush obviously pleased Republicans. But the evidence of the analysis of Gibson, Caldeira, and Spence is that Democrats – and even African Americans – did *not* alter their loyalty toward the institution as a result of this decision. Attitudes toward the institution seemed to be highly resistant to potentially corrosive influences.

How can this be so? Gibson, Caldeira, and Spence argue that attention to the Court under nearly all circumstances enhances the institution’s prospects for legitimacy. In their theory, the process goes something like the following. People become attentive to the Supreme Court in the context of policy controversies (e.g., *Bush v. Gore*) or events like confirmation hearings. In such circumstances, judicial symbols proliferate — in part because elites and interest groups realize the power of such symbols and

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<sup>2</sup>In referring to this as a “myth” we are only deferring to the term of art that has emerged in the literature (e.g., Baird and Gangl 2006). We suspect that most political scientists view legalistic depictions of Supreme Court decision making as empirically inaccurate, but we are not required in this analysis to accept or reject any particular view about how the Court actually makes its decisions.



attempt to manipulate them — so it is impossible for attentive citizens to avoid exposure to them. These symbols – judicial robes, the use of “your honor,” even the temple-like Supreme Court building – teach a particular lesson: The Court is different. The theory posits that exposure to legitimizing judicial symbols reinforces the process of distinguishing courts from other political institutions. Citizens do not naturally differentiate between the judiciary and the other branches of government; that courts are special and different must be learned. The message taught by these powerful judicial symbols is that “courts are different,” and owing to these differences, the judiciary deserves more respect, deference, and obedience—in short, legitimacy. Because courts use “non-political,” principled processes of decision making (and since the American people seem not to approve of the decision-making procedures commonplace in political institutions — see Hibbing and Theiss-Morse 1995), and since judicial institutions associate themselves with symbols of impartiality and insulation from ordinary political pressures, those more exposed to courts come to accept the “myth of legality.” This process of social learning explains why citizens who are more aware of and knowledgeable about courts tend to adopt less realistic views of how these institutions actually operate and make decisions (e.g., Scheb and Lyons 2000).<sup>3</sup> What is crucial for our purposes here, however, is that salient judicial events reinforce support for the institution through the exposure to legitimizing symbols. In this fashion, even controversial episodes profit the Court by enhancing its legitimacy.

Unfortunately for the theory, however, the data marshaled by Gibson, Caldeira, and Spence and

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<sup>3</sup>Long ago, Casey (1974) demonstrated that the more one knows about the Supreme Court, the *less* realistic are perceptions of judicial decision (i.e., the more one is likely to believe in the theory of mechanical jurisprudence). Something about being exposed to information about courts contributes to people embracing this traditional mythology of judicial decision making (see also Scheb and Lyons 2000, and Brisbin 1996). Similarly, Hibbing and Theiss-Morse (1995) have shown that greater awareness of the Court leads to *more* support for it, whereas greater awareness of Congress is associated with *less* support for that institution. Kritzer and Voelker (1998) make a similar argument. Caldeira and Gibson (1992, 1995) have found in several contexts that greater awareness of judicial institutions is related to a greater willingness to extend legitimacy to courts. Gibson, Caldeira, and Baird (1998) have confirmed this finding in research in roughly 20 countries. Something about being exposed to the institution increases support for it, and there is apparently something trenchant about exposure to judicial institutions.

others are far from incontrovertible since they document change only at the aggregate or macro-level. To test the theory of positivity bias, individual-level data on attitude change are essential. Fortunately, that is the design of this research. Also needed is a clearer specification of how events shape attitudes toward political institutions such as the Supreme Court.

### **Updating Processes: Theories of Individual-Level Change**

A theory of change must include two components. First, it should provide an understanding of cross-sectional differences: an explanation of why citizens differ in their attitudes at any given point in time. For instance, Caldeira and Gibson (1995) have shown that the tendency to extend legitimacy to courts is in part a function of support for democratic values more generally. That theory has proven to be quite valuable in understanding and predicting individual difference in attitudes toward courts.

Second, a theory of *change* must also be grafted onto the cross-sectional theory. For instance, it is unlikely that changes in levels of legitimacy are due to variation in support for democratic values inasmuch as the latter is usually thought to be formed early in life and is therefore fairly resistant to change (e.g., Gibson 1995). Thus, the cross-sectional theory must identify causal factors themselves subject to exogenous influences.

Bendor, Diermeier, and Ting (2003) have proposed a simple but powerful theory that can be modified and made useful for understanding change in levels of legitimacy. The model posits that citizens are “adaptively rational,” by which they mean that people are susceptible to basic processes of “reinforcement learning.” They then add “aspirations” to their model. Aspirations are essentially expectations against which experiences are measured; the relationship between expectations and experiences defines encounters as either successful and unsuccessful. Over time, aspirations adjust to experience. In short, “adaptation combines reinforcement learning and endogenous aspirations” (Bendor, Diermeier, and Ting 2003, 263).

Learning about the Supreme Court is a dynamic process involving the interaction of experiences and aspirations. Citizens hold expectations of judges and judicial institutions that interact with exposure to messages from the confirmation process. To the extent that perceptions satisfy expectations, attitudes toward the institution are unlikely to change. Disappointment, however, can be a powerful engine for change, especially if the disappointment emerges from recognition of a politicized confirmation frame. To the extent that people come to view nominees to the High Bench as “politicians in robes,” the distinctive, non-political character of the Supreme Court can be undermined, opening the door for reconsideration of loyalties toward the institution itself. Because challenges to Supreme Court nominees so often focus on ideology, partisanship, and highly realistic views about how the justices go about the business of making the law, these events have great potential to reshape attitudes toward the Court. The processes are without doubt complicated, involving interactions between pre-existing attitudes and perceptual frames, the availability of highly salient alternative views of the operation of the judiciary, and poorly understood “tipping” processes when the presumption of judiciousness<sup>4</sup> begins to melt quickly away. Unraveling these complex processes is a difficult task indeed. Unfortunately, few earlier studies have had the luxury of panel data for their inquiries into the effects on nominations on attitudes toward the Supreme Court.

### **Extant Research on Change in Attitudes toward the Supreme Court**

To address the impact of nomination processes on the legitimacy of law and courts requires a pre- / post-research design centered on a highly salient confirmation event. Unfortunately, resignations and deaths of

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<sup>4</sup>During the confirmation hearings for Judge Alito, Professor Anthony Kronman (former Dean of the Yale Law School) provided a useful understanding of “judiciousness” (DCH e-Media 2006): “The temperament of the judge, as I see it, is marked by modesty, by caution, by deference to others, in different roles with different responsibilities, by an acute appreciation of the limitations of his own office, and by a deep and abiding respect for the past. There is a name that we give to all of these qualities taken together. We call them judiciousness.”

Supreme Court justices typically occur without much advance notice, and, consequently, we know little about how citizens view confirmation fights, and even less about how attitudes toward the Court affect and are affected by the process. Since practical issues of timing make it extremely difficult to design and implement a rigorous research design, scholars have been forced to rely upon data collected for other purposes, and in particular on extremely weak measures of the concept “legitimacy.” For instance, although their research is clever, Gimpel and Wolpert (1996) face two substantial limitations in their analysis of mass opinion on the Rehnquist, Bork, Souter, and Thomas nominations: (1) the data sources available include only cross-sectional (“snapshot”) polls, and (2) the questions asked in the surveys are limited to simple opinion-holding and approval of the nominees (see also Caldeira and Smith 1996). No valid measures of the perceived legitimacy of the Court itself are included in any of the earlier analyses of confirmation fights.<sup>5</sup> Consequently, little if any research has considered how perceptions of confirmation controversies affect pre-existing commitments to the Supreme Court, even if speculation about the effects of such events is commonplace.

## **RESEARCH DESIGN**

The central purpose of this project is to assess the impact of confirmation processes on the legitimacy of the Supreme Court in the eyes of the American people. Thus, the most useful research design is a multi-wave panel survey. The value of a panel design is that it allows the assessment of individual change over time (something not possible with repeated cross-sections<sup>6</sup>), and the crucial dependent variable, the perceived legitimacy of the Supreme Court, is measured outside the nomination season and thus is not

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<sup>5</sup>Gibson, Caldeira, and Spence (2003b) have shown that the commonly used “confidence in the leaders of the Supreme Court” indicator is far from being a valid and reliable indicator of the concept of institutional legitimacy.

<sup>6</sup>Gibson and Howard (2007) illustrates this point in the context of analysis of both cross-sectional and panel data on anti-Semitism in Russia.

contaminated with variance properly assigned to the independent variables – the confirmation stimuli. Since the central hypotheses of this research concern the effects of the nomination process on individual citizens, no other research design would produce probative data.

We have therefore based our research on a nationally representative sample interviewed three times in 2005 and 2006. In the initial interviews, conducted face-to-face from mid-May until mid-July, 2005, a total of 1,001 interviews was completed, with a response rate of 40.03 % (AAPOR Response Rate #3). No respondent substitution was allowed; up to six call-backs were executed. The average length of interview was 83.8 minutes (with a standard deviation of 23.9 minutes). The data were subjected to some minor “post-stratification,” with the proviso that the weighted numbers of cases correspond to the actual number of completed interviews. Interviews were offered in both English and Spanish (with the Spanish version of the questionnaire prepared through conventional translation/back-translation procedures). This sample has a margin of error of approximately  $\pm 3.08$  %.

During the course of Alito’s confirmation process, we sought to re-interview the respondents from the 2005 survey. Telephone interviews were used; the fieldwork began on January 19, 2006, and was completed on February 13, 2006. A total of 335 individuals from the 2005 survey was re-interviewed. If we were to treat this as an entirely new survey, not a re-interview, and apply the AAPOR criteria to calculate the widely used Modified Response Rate #3, the rate would be 53.2 %.<sup>7</sup>

The  $t_3$  interviews were conducted from May 24 through June 22, 2006, with a total of 259 telephone interviews completed. Only those interviewed at  $t_2$  were considered eligible for re-interviewing at  $t_3$ . Were this treated as a completely new survey, the AAPOR response rate would be 82 %.

Additional details about the panel survey are available in Appendix A.

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<sup>7</sup>Since  $t_2$  interviews were completed with only one-third of the original respondents, questions about the representativeness of the sub-sample naturally arise. We have considered this issue in some detail, with a statistical investigation reported in Appendix A. The analysis supports two general conclusions. First, the  $t_2$  sub-sample is reasonably representative on its face, and second, with minor post-stratification, the 2006 sub-sample closely mirrors the 2005 population from which it was drawn.

## MEASURING CHANGE IN ATTITUDES TOWARD THE SUPREME COURT

Legitimacy Theory is a crucial component of contemporary thinking about the role of courts in American society, ranging from macro-level theories about the ability of courts to bring about social change (e.g., Rosenberg 1991) to micro-level theories about the willingness of citizens to comply with law (e.g., Tyler 1990, 2001), and broader issues of judicial independence and accountability (e.g., Kramer 2004; see also Friedman 2004). Especially in a ideologically divided society like the U.S., courts to be effective must be able to persuade people to accept outcomes with which they strongly disagree, and most scholars acknowledge that legitimacy is a crucial component of that process.<sup>8</sup>

Across all three waves of the survey, we included four core indicators of institutional loyalty:<sup>9</sup>

*If the U.S. Supreme Court started making a lot of decisions that most people disagree with, it might be better to do away with the Supreme Court altogether.*

*The right of the Supreme Court to decide certain types of controversial issues should be reduced.*

*The Supreme Court can usually be trusted to make decisions that are right for the country as a whole.*

*The U.S. Supreme Court gets too mixed up in politics.*

Both the  $t_2$  and  $t_3$  interviews included two additional measures:

*Judges on the U.S. Supreme Court who consistently make decisions at odds with what a majority of the people want should be removed from their position as judge.*

*The U.S. Supreme Court has become too independent and should be seriously reined in.*

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<sup>8</sup>For research investigating the relationship between perceptions of institutional legitimacy and willingness to accept unfavorable court decisions in several contexts see Gibson 2004, 1991; Gibson, Caldeira, and Spence 2005; and Gibson and Caldeira 2003, 1995.

<sup>9</sup>Gibson and Caldeira have written extensively on how to measure the legitimacy of courts (see especially Gibson, Caldeira, and Spence 2003b). In that article, they discuss alternative measures of attitudes toward courts and present what they consider to be a useful measure of loyalty toward (or institutional support for) high courts. This current research follows those recommendations.

Finally, one additional statement was used only in the  $t_3$  survey.

*The U.S. Supreme Court ought to be made less independent so that it listens a lot more to what the people want.*

As reported in Table 1, at the aggregate level, these four items seem to indicate a) reasonably high levels of support for the Court<sup>10</sup>, and b) a great deal of stability in responses across the waves of the panel.

[PLACE TABLE 1 ABOUT HERE]

The four indicators available at  $t_1$  are reliable: Cronbach's alpha = .70.<sup>11</sup> The six-item pool at  $t_2$  has an alpha of .67, and the set of seven indicators at  $t_3$  produces a coefficient of .73. Thus, using all available measures at each of the interviews results in indices of institutional loyalty of roughly equal reliability (.70, .67, and .73). Because we wish to avoid the confounding influence of variables with different degrees of reliability at the three points in the panel survey, we have derived support indices from four items at  $t_1$ , six items at  $t_2$ , and seven items at  $t_3$ .

### **Change in Loyalty Toward the U.S. Supreme Court**

The correlations of the support indices are .46 for the  $t_1 - t_2$  pair and .68 for the  $t_2 - t_3$  scores. When the  $t_3$  index is regressed on the two earlier measures, nearly one-half of the variance can be accounted for ( $R^2 = .48$ ).<sup>12</sup> In terms of the simple number of supportive replies given to the four-item core set, 38.1 % of the respondents became more supportive of the Court, 25.8 % did not change in their level of support, and 36.1 % became less supportive from the  $t_1$  to the  $t_3$  interview.

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<sup>10</sup>Gibson, Caldeira, and Baird (1998) provide a cross-national perspective on the relative legitimacy of the Supreme Court. On support within the U.S. over time (1987-2005) see Gibson 2007.

<sup>11</sup>The  $t_1$  survey was not primarily focused on the legitimacy of the Supreme Court, and hence the number of support indicators available is limited.

<sup>12</sup>The part coefficients for both the  $t_2$  and  $t_1$  measures of support are statistically and substantively significant in the multivariate regression.

In the analysis that follows, we measure change in attitudes toward the Court by including the  $t_1$  index as an independent variable in the substantive equations.<sup>13</sup> Thus, all of the findings we report control for the original (pre-Alito) attitudes of the respondents. We do not also control for support at  $t_2$ , owing to the possibility that the  $t_2$  variance in Court support was contaminated by the interview being conducted at the time of the confirmation hearings.<sup>14</sup> We also report for illustrative purposes simple variables indicating change between  $t_1$  and  $t_3$ , as in change in the number of supportive replies to our queries, and, on occasion, the residuals resulting from regressing  $t_3$  support on  $t_1$  attitudes. We report these indicators for illustrative purposes only, and only after confirming relationships within the multivariate equations.

## **THE MODEL OF CHANGE IN INSTITUTIONAL SUPPORT**

Our objective in this research is to account for how attitudes toward the Supreme Court might have changed as a result of exposure to the Alito controversy. To do so requires a model incorporating both factors associated with cross-sectional variability in support and those expected to drive temporal change in attitudes. So, in general, we hypothesize that support for the Supreme Court is influenced by two types of variables: First, attributes of the individual that predate the confirmation hearings, such as support for democratic institutions and processes more generally (e.g., Caldeira and Gibson 1995), and general political and ideological predispositions of the individual (e.g., party identification). The hypotheses here

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<sup>13</sup>For a discussion of the disadvantages of using simple change scores in social science research see Cohen et al. 2003, 570-571. See also Hoekstra 2003, 162-164 (Appendix D).

<sup>14</sup>Since  $t_2$  loyalty toward the Supreme Court was measured directly within the context of the Alito confirmation process, controlling for  $t_2$  attitudes may in some sense over-control because the  $t_2$  measure represents in part attitude change that may have taken place as a result of that process (and, if so, this would account for the quite strong relationship we observe between attitudes at  $t_2$  and  $t_3$ ). Thus, we are cautious in our use of  $t_2$  attitudes as control variable. Controlling for pre-confirmation attitudes ( $t_1$ ) when analyzing post-confirmation attitudes ( $t_3$ ) is the purest analytical approach.



are well grounded in previous investigations of Court support.

Second, expectations, perceptions, and judgments of the Alito nominations may have influenced support for the Supreme Court. Since these influences have so rarely been considered in the political science literature, we pay careful attention to any connections between these variables and institutional support. We then proceed to a single integrated analysis that simultaneously controls for all known influences on institutional support. To reiterate, support for the Court is measured at  $t_3$ , with a control for Court attitudes at  $t_1$ . All of the variables associated with the Alito confirmation process were measured at  $t_2$ . Additional control variables were measured at various interviews in the panel survey (e.g., education at  $t_1$ ). When a control was measured at multiple points-in-time (e.g., party identification), we have typically used the indicator at  $t_3$  – i.e., contemporaneously with the  $t_3$  measure of institutional support.

We begin the analysis with further elaboration of the cross-sectional model.

## **The Origins of Attitudes Toward Political Institutions**

Earlier research on support for the Supreme Court has determined that those more strongly committed to democratic institutions and processes are more likely to support the Court (e.g., Caldeira and Gibson 1992; Gibson 2007). This body of research has also demonstrated that support for the Court is grounded in political knowledge. Gibson, Caldeira, and Spence (2003a) assert that this relationship is connected to exposure to the legitimizing symbols of the judiciary: To know more about courts is to extend more support to them because to know more about courts is to have been exposed to the highly symbolic trappings of the judiciary (e.g., robes, “your honor,” the “marble temple”). Furthermore, political knowledge is associated with greater support for democratic institutions and processes (Gibson 2007; Gibson and Caldeira 2007). Thus, knowledge is an important independent variable not so much because information underpins support, but rather because knowledge is indicative of processes of socialization to democratic values and exposure to legitimizing symbols. From the 2005 cross-sectional analysis, Gibson

(2007, 25-26, footnotes omitted) provides this understanding of the processes involved:

. . . the causal process involved here seems relatively clear. Citizens who are better educated learn more about the Supreme Court and the democratic theory in which the Court is embedded and sustained. I suspect that the primary content of the learning is to stress that “courts are different.” They are relatively non-political, and judges make decisions on the basis of principled criteria—impartiality, for instance—without regard to self interest (even the self interest of being reelected or reappointed). This knowledge predisposes people to accept the viewpoint that courts have a distinctive role in democracy and that role is not necessarily to mollify the preferences of the majority. The reason why democratic values and court support are so closely connected is that supporting a court — an institution that often tells the majority that it cannot do that which it very much wants to do — requires a relatively sophisticated understanding of democratic theory. As it turns out, a reasonable number of Americans understand this, and therefore support for the Court is quite.

Earlier research has also decidedly rejected the hypothesis that the legitimacy of the Supreme Court is shaped by partisan and ideological considerations. The Court draws its support nearly equally from liberals and conservatives, Democrats and Republicans.<sup>15</sup> Nonetheless, in the preliminary model, we include indicators of these political identities. Other variables for which we control include education, race, gender, age, and social class (home ownership). The equation also incorporates as a control variable the respondent’s expressed confidence in President Bush. These attributes are measured at  $t_3$ .

Our best measures of democratic values are found in the  $t_1$  survey (on measurement, see Appendix B). In addition, we use these pre-Alito indicators so as to minimize causal confusion. Since

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<sup>15</sup>In his analysis of 2005 data, Gibson (2007) also discovered that support for the Court is related to political efficacy and race, with blacks extending significantly less support to the institution.

these attitudes may have changed systematically over the short-term, perhaps even as a result of the Alito nomination itself, the most conservative strategy is to employ measures of commitment to democratic institutions and processes that predate the confirmation process. We draw the same conclusion about our indicator of political knowledge, and thus use the  $t_1$  index.

The cross-sectional model has been well-honed in previous research. Exposure to and evaluations of the Alito hearings provide the engine for possible change in our model. Since these variables have not been at all well-investigated in previous research, we consider this portion of the model in more detail.

### **Independent Variables – Evaluations of the Alito Confirmation Process**

Our primary hypotheses concern the impact of the Alito confirmation process on broader loyalty toward the Supreme Court. Can events such as confirmation hearings shape people's views of the Court as an institution? We begin consideration of this question by reviewing the advertising campaigns that mobilized in response to Judge Alito's nomination.

According to data collected by the Campaign Media Analysis Group (CMAG), 1,190 individual advertisements were aired during the course of the Alito confirmation dispute.<sup>16</sup> The ads ran from November 1, 2005, through January 27, 2006. Apparently, most interest groups saw little additional benefit in running advertisements in the week prior to the vote in the Senate.

According to the CMAG data, four organizations ran ads during the Alito confirmation fight. Against Alito's confirmation were IndependentCourt.org (a coalition of interest groups), MoveOn.org, and People for the American Way. Progress for America was the only group sponsoring ads in support of

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<sup>16</sup>CMAG captures and analyzes all advertisements concerning nominees to the Supreme Court from the public airwaves. Analysis of the ads, as well as copies of the "storyboards" (television images captured every few seconds, and the full text of the ad and the "paid for by" information) are available from the Brennan Center at NYU (and from the authors). Appendix C [available from the authors] reports a summary of the ads broadcast for and against the confirmation of Judge Alito.

the Judge Alito.<sup>17</sup> The opponents spent \$1,515,067 on seven ads, aired 987 times on cable tv and in Portland, Maine; Providence, Rhode Island; Washington, D.C.; Denver, Colorado; Little Rock, Arkansas; and Dayton, Ohio.<sup>18</sup> The proponents produced five advertisements and broadcast them 203 times, primarily on cable (N = 191) and in about a dozen individual markets, with a total expenditure of \$1,019,335. Thus, considerably more resources and effort were expended in trying to block Alito's confirmation. The pro-Alito campaign began on 11/1/2005 and lasted through 1/27/2006; the anti-Alito campaign started slightly later (11/7/2005) and terminated on 1/23/2006.

The ads run in support of and in opposition to Alito's confirmation pulled no punches. For instance, consider the following transcript of an IndependentCourt.org ad:

[Narrator]: Washington, the Right Wing has taken over the West Wing. George Bush gave extremists the veto over Supreme Court nominations. And they chose Samuel Alito. As a judge, Alito ruled to make it easier for corporations to discriminate, even voted to approve the strip-search of a 10 year old girl. As a government lawyer Alito wrote, "The Constitution does not protect a right to abortion." The Right Wing has already taken over the West Wing. Don't let them take over your Supreme Court. [PFB]

IndependentCourt.org.<sup>19</sup>

The most widely broadcast pro-confirmation ad said the following:

[Announcer]: Everyday, desperate liberals make up a steady drip of attacks against Judge

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<sup>17</sup>For details on the organizations, see <http://progressforamerica.org/> [accessed 5/18/2006] <http://independentcourt.org/> [accessed 5/18/2006] <http://moveon.com/> [accessed 5/18/2006] <http://www.pfaw.org/pfaw/general/> [accessed 5/18/2006] .

<sup>18</sup>Although no full account of other sorts of advertisements is available, IndependentCourt.org also prepared for broadcast at least three radio advertisements opposing the confirmation of Judge Alito.

<sup>19</sup>Creative Id: 4176684, Issue/IC Right Wing Takeover, IndependentCourt.org (B329). "PFB" means "Paid for by."

Samuel Alito. Want the truth? Respected Supreme Court analyst, Stuart Taylor of the non-partisan National Journal: Alito (quote) [sic] “is widely admired by liberals, moderates, and conservatives who know him well as fair-minded, committed to apolitical judging, and wedded to no ideological agenda other than restraint and the exercise of judicial power” (end quote) [sic]. Confirm Judge Samuel Alito. [PFB] Progress for America.<sup>20</sup>

Were the ads effective?<sup>21</sup> This is, of course, an extremely difficult question to answer, although we do have some data relevant to drawing a conclusion. First, a substantial portion of our respondents (62.5 %) reported seeing or hearing an advertisement (on TV, radio, in newspapers, or elsewhere) “concerning whether Judge Alito should be confirmed by the U.S. Senate.” The modal response to this question was “saw a few” ads (42.3 %), although 4.9 % reported seeing many such ads and 15.4 % saw some. That something close to two-thirds of the American people were exposed to advertisements expressing a view on whether Alito ought to be confirmed is striking and somewhat unexpected.

There is a moderate relationship between overall attentiveness to the confirmation process<sup>22</sup> and seeing advertisements. For instance, 59.5 % of those who did *not* follow the process reported seeing no ads, whereas only 25.0 % of those very closely paying attention did not see an ad. The most significant distinction is between those who claimed not to follow the process and everyone else — even among those who said they did not pay much attention to the Alito confirmation, 62.8 % nonetheless reported

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<sup>20</sup>Creative Id: 4242787, Issue/PFA Steady Drip, Progress for America Org (B329).

<sup>21</sup>In an earlier paper, we analyzed perceptions and evaluations of the Alito confirmation controversy. To recap: A majority of respondents (59.9 %) followed the Senate debate on Alito either “very” or “somewhat” closely, and a majority of respondents (65.7 %) favored Alito’s confirmation.

<sup>22</sup>The question asked is: “As you may know, President Bush has nominated Judge Samuel Alito to serve on the U.S. Supreme Court. The U.S. Senate has just been debating whether Judge Alito ought to be confirmed to the Supreme Court. How closely would you say you have been following news about the appointment of Samuel Alito to the U.S. Supreme Court: very closely, somewhat closely, not very closely, or not at all closely?”

seeing an ad about the nomination. Thus, it seems that advertising was sufficiently prolific that people with fairly low thresholds of political interest and attentiveness were nonetheless exposed to information about the confirmation controversy.<sup>23</sup>

Is ad exposure simply a function of one's own position on whether Judge Alito should be confirmed to the Supreme Court? With one exception, generally not. Of those definitely against Alito's confirmation, 34.6 % saw no ads, compared to 33.3 % of those definitely supporting his confirmation. Ad exposure is somewhat related to intensity of opinion among the opponents, but not among the supporters. The big (and unsurprising) difference is among those unable to form an opinion about whether to confirm Alito, with 60.9 % of these respondents reporting seeing no ads.

The 60 + % of the respondents who were exposed to Alito advertisements were asked a series of questions about their judgments of the ads they saw or heard. Among those seeing an ad, nearly a majority (49.0 %) reported that all the ads favored Alito's confirmation. Some said that nearly all of the ads did so (14.8 %), while others said most but not all favored the confirmation (34.3 %). This stands in contrast to the 14.0 % who claimed to have seen ads nearly all of which opposed the confirmation, and 22.6 % who said most of the ads they saw opposed confirmation. Another 6.2 % saw a balanced mix of ads. Only 8.1 % of those exposed to an advertisement could not recall whether the ad favored the confirmation or not. As we have noted above, 987 ads were shown in opposition to the nomination and 203 in support of confirming Alito. In terms of just nationwide cable ads, however, 133 anti-Alito spots were aired, in contrast to 191 pro-Alito spots. Although we have no conclusive data on the point, it seems likely that our respondents were reporting exposure primarily to the national cable ads, where the ad content was to some degree evenly balanced.

We also asked the respondents about their judgments of three characteristics of the ads they saw:

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<sup>23</sup>We also note that the difference in ad exposure between those who followed the confirmation events "very" and "somewhat" closely is slight indeed, a finding that suggests that the reply "somewhat closely" is a meaningful and valid reply, and is not simply a socially acceptable cover for inattentiveness.

negativity, partisanship, and overall fairness.<sup>24</sup> Substantial majorities viewed the advertisements as at least somewhat negative (61.8 %) and at least somewhat partisan (77.4 %). But, perhaps surprisingly, the respondents also viewed the ads as fair. A substantial majority (59.1 %) judged the ads they saw as somewhat fair, and another 8.3 % rated them as extremely fair. When we regress perceived ad fairness on the other perceptions and preferences, we find that the most important component of unfairness is perceived partisanship ( $\beta = -.26$ ); those who judge the ads to be more partisan rate the ads in general as less fair. The other three variables (including the respondent's own preference for whether Alito ought to be confirmed) have trivial (and statistically insignificant) influences upon perceived fairness.<sup>25</sup> For these respondents, the dominant meaning of unfair procedures is partisanship, even if many respondents saw the process as a both partisan and fair.

In the analysis that follows, we test several specific conjectures about the consequences of the confirmation process for attitudes toward the Court:

- Since attentiveness to judicial events is typically associated with exposure to legitimizing legal symbols, those who paid more attention to the Alito confirmation controversy should experience an increase in support for the Supreme Court.

- Those satisfied with the confirmation process are expected to become more supportive of the Court. Satisfaction is indexed both by outcome (preference that Alito be confirmed) and by process satisfaction (perceptions that the confirmation process was fair).

- As we have noted, the ad campaigns of opposition interest groups strongly emphasized Alito's ideology, not his judiciousness. We therefore hypothesize that those exposed to more advertisements became less supportive of the Court.

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<sup>24</sup>A great deal of attention has been paid to the effects of the use of negative ads — see for example Brooks 2006, 2007, and Geer 2006.

<sup>25</sup>The correlation between perceived partisanship and perceived negativity is only .11, so these results are completely unaffected by multicollinearity.

## FINDINGS

Table 2 reports two equations. Model I does not include a control for institutional attitudes at  $t_1$  and therefore should be considered as an account of variation from low to high support for the Court. Model II adds the  $t_1$  control, and therefore is an analysis of change in attitudes toward the Supreme Court.

[PLACE TABLE 2 ABOUT HERE]

We begin our analysis with consideration of the variables that have no consequences whatsoever for institutional loyalty. The first variable in this category is the indicator of preferences on Alito's confirmation. The bivariate correlation<sup>26</sup> between preferences (measured at  $t_2$ ) and support (measured at  $t_3$ ) is a mere .04.<sup>27</sup> All of the multivariate coefficients are trivial. Thus, simply being on the winning or losing side of this confirmation fight did not seem to undermine respect for the Court as an institution.<sup>28</sup>

We also find no relationship between party identification (measured at  $t_3$ ) and court support: the correlation is only -.03 (indicating only the slightest tendency for Democrats to express less support for the Supreme Court). And the bivariate correlation between institutional support and confidence in President Bush is only -.02. Furthermore, although political knowledge has a healthy bivariate correlation with Court support, the independent effect of knowledge is reduced to insignificance in the multivariate equation, owing largely to the correlation between knowledge and democratic values. Finally, although ideological self-identification has a weak bivariate relationship with Court support (with, perhaps

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<sup>26</sup>For ease of presentation, when we refer to bivariate relationships we consider both the bivariate correlation between the independent variable and support at  $t_3$  and the multivariate relationship between the independent variable and  $t_3$  support, controlling for  $t_1$  support. If the findings are not consistent we always make explicit reference to that fact.

<sup>27</sup>Even when we substitute preferences (remembered at  $t_3$ ), the correlation is only .08.

<sup>28</sup>We also find no relationship between the perceived ideological distance from the respondent to Judge Alito (a strong predictor at  $t_2$  of Alito confirmation preferences — see DELETED FOR IDENTIFICATION). We do not enter this variable into the multivariate equation because that variable has higher than average missing data (since it is a compound variable expressing the difference between the respondent's own ideological position and her or his perception of Alito's ideological location).



ironically, liberals expressing slightly more support for the Court than conservatives), this relationship disappears in the multivariate context. We therefore exclude confirmation preferences, party and ideological identification, and confidence in President Bush from further consideration. Attitudes toward the Court do not seem to reflect the partisan divisions that shape so many other political attitudes in the contemporary U.S. (see also Gibson 2007). It appears from this analysis that the effects of the confirmation battle cannot be understood in terms of the simple calculus of winning and losing.

Nor do perceptions of the fairness of the confirmation process have anything to do with attitudes toward the Supreme Court.<sup>29</sup> Thus, neither satisfaction with the outcome nor with the process caused much change in loyalty toward the Supreme Court.

The Model I equation does a reasonable job of predicting support for the Court, accounting for nearly one-third of the variance. Among the best predictors of support for the Court are general political efficacy and *lack of* exposure to ads during the Alito dispute. Effects are also seen of democratic values (support for a multiparty system and political tolerance<sup>30</sup>), and level of education. Perhaps surprisingly, Hispanics are somewhat less supportive of the Court than non-Hispanics.<sup>31</sup>

Of the various indicators of perceptions of the Alito hearings, only exposure to advertisements has any independent influence on support for the Court. Paying attention to the Alito hearings is positively associated with Court support in the bivariate case, but the coefficient becomes marginal in the

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<sup>29</sup>The respondents were asked: “How would you rate the overall fairness of the process? Would you say it has been extremely fair, somewhat fair, not very fair, or not at all fair?”

<sup>30</sup>Caution must be taken in understanding the role of any particular democratic value since there is considerable multicollinearity among the four values. This does not concern us, however, since our goal here is to investigate the effect of the Alito confirmation process on change in Court support within the context of a fully specified equation.

<sup>31</sup>In light of the relatively small number of Hispanics in the sample it is perhaps unwise to place a great deal of confidence in this finding, just as it unwise to draw firm conclusions about African Americans and those of Asian origin.

multivariate equation (we will have more to say about this relationship below).<sup>32</sup>

The findings change little in Model II, which includes the control for pre-Alito attitudes toward the Court. The variables of marginal statistical significance in Model I generally reduce to insignificance in Model II. Three variables predict change in attitudes toward the Supreme Court: supporters of a multiparty system, the politically efficacious, and those without exposure to advertisements during the Alito battle increased support for the Supreme Court. Of course, Court attitudes at  $t_1$  are strong predictors of attitudes  $t_3$ , as they should be.<sup>33</sup>

It is worth reiterating that we do not contend that support for a multiparty system *per se* generates allegiance to the Supreme Court. Instead, those who support such a party system — especially in this strongly anti-party age — likely possess a more sophisticated understanding of the nature of the American political system. To accept parties is associated with accepting the distinctive role of the judiciary in the American scheme. In short, those who are sophisticated enough to realize that “democracy without parties is unthinkable” are also sophisticated enough to recognize a unique role for the Supreme Court.

From the point-of-view of the theory being investigated in this paper, the most interesting finding of this analysis is that being exposed to advertisements during the Alito battle seems to undermine support for the Court. This is true in both the bivariate and multivariate equations. At the same time, however, attentiveness to the nomination process does *not* erode support. The more people paid attention to the confirmation battle, the more supportive they were of the Court, although attentiveness has only a marginal and insignificant effect on increases in Court support. These relationships are depicted in Figure

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<sup>32</sup>The correlation between attention to the confirmation debate and exposure to ads is only .32.

<sup>33</sup>Because a number of predictors in Table 2 have little consequences for institutional attitudes, we have re-estimated a trimmed equation. This analysis does not require that any of our substantive conclusions be revised; change in Court support is a function of a relatively small number of reasonably strong predictors. Table 3, reporting this analysis, is available from the authors upon request.

1, using the  $t_3 - t_1$  support residuals as the dependent variable. For exposure to the ads, the bivariate correlation between degree of exposure and change in support is -.22, with those having more exposure declining in support for the Court. The correlation with attentiveness is much weaker, and not statistically significant, although positive: As attentiveness increases, so too does Court support. Puzzles in these relationships require further investigation.

[PLACE FIGURE 1 ABOUT HERE]

Perhaps the most interesting relationship — or lack thereof — has to do with ad exposure and overall assessments of the fairness of the confirmation process. Given the corrosive effect of ad exposure on institutional support, one might hypothesize that the ads caused people to view the process as unfair. This is not at all the case.<sup>34</sup> Yet, as attentiveness to the confirmation hearings increases, so too do judgments of process fairness. Apparently, then, most Americans were able to distinguish between the confirmation process itself and the ads broadcast in conjunction with that process. The ads themselves had an independent effect on how people see the Supreme Court, an effect that is distinctive from and even contrary to that of observations of the confirmation debate in the Senate.<sup>35</sup>

Since the influences of ad exposure and process attentiveness are contrary to each other, hypothesizing an interactive effect becomes reasonable. That is, the influence of attentiveness might be mitigated as the citizen is exposed to more advertisements. Similarly, the effect of these advertisements may be diminished to the extent that the respondent paid attention to the confirmation process in the Senate. We can easily test these hypotheses with the data at hand.

Across the four levels of attentiveness, the impact of exposure to ads on Court support changes little. The regression coefficients representing the effect of exposure from low to high attentiveness (in

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<sup>34</sup>We do find that those who reported seeing “many” ads judged the process as somewhat less fair. However, too few people saw many ads, so their effect on the overall measure of association is minimal.

<sup>35</sup>The correlation between ad exposure and perceptions of fair process is a mere -.04.

an equation controlling for attitudes at  $t_1$ ) are: -.23, -.07, -.25, and -.29, respectively.<sup>36</sup> The coefficient for the “not very closely” group (-.07) is anomalous, but generally these data provide no support for the expectation that the impact of exposure on support declines with increasing attentiveness to the confirmation process.

The alternative way of looking at this relationship is to examine the impact of attentiveness across the levels of ad exposure. Because so few respondents saw “many” ads, we have collapsed those people with those seeing “some” ads for the purposes of this analysis. The regression coefficients in an equation including attitudes at  $t_1$ , varying from low ad exposure to some ad exposure, are: .25, .16, and -.05, respectively. That is, among respondents who viewed practically no ads, greater attention to the process is associated with increasing support for the Supreme Court ( $\beta = .25$ ). However, among those who saw some or many ads, attentiveness has no impact on Court support ( $\beta = -.05$ ).<sup>37</sup> Thus, we see the power of exposure to these ads. Even high attentiveness to the confirmation process does not mitigate the derogatory effect of the ads; at the same time, high ad exposure completely neutralized any salutary efforts of paying attention to the confirmation process in the Senate. This analysis makes it all the more important to try to isolate specifically what characteristics of these ads and exposure to them are responsible for undermining the legitimacy of the Supreme Court.

## **Ad Content**

Since exposure to these ads is associated with a decline in institutional support, something about the ads

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<sup>36</sup>These results are from a simple equation without the controls included in Table 2 (above). When we add all of the control variables to the basic equation, the four standardized regression coefficients are: -.27, +.10, -.18, and -.18, respectively. Thus, our substantive conclusion about the hypothesis remains unchanged.

<sup>37</sup>In the fully specified equation with all control variables shown in Table 2 (above), the three regression coefficients are: .13, .13, and -.06. Thus, we draw the same conclusion from that analysis.

themselves must have been unsettling to many respondents. The ads either taught lessons incompatible with the legitimacy of courts or perhaps violated expectations about the nature of the confirmation process. Perhaps that lesson was that “courts are *not* different.” The ads suggest that courts are the same as any other political institution; because courts are political, they are not worthy of the special esteem judicial institutions normally attract. If this is what citizens learned, then the confirmation process may be quite damaging to the Supreme Court. Thus, the consequences and correlates of being exposed to these ads must be considered further.

To assess the impact of perceptions of the attributes of the advertisements on institutional support, we created a set of dummy variables characterizing perceptions of the ads and entered them into equations both with and without the control for Court attitudes at  $t_1$ . The excluded category represents those who reported seeing no ads, and therefore the significance tests evaluate the hypothesis that those who saw particular kinds of ads differ in their support from those who saw none. We first consider the impact of overall ad fairness.

Only two of the dummy variables achieved statistical significance in the regressions. Those who judged the ads they saw as somewhat fair or extremely fair tended to be *less* supportive of the Court and to have *declined* in their support from the  $t_1$  to the  $t_3$  interview. This finding is *not* consistent with our hypothesis; indeed, the data suggest that we may have the causal structure reversed, with ad perceptions being endogenous rather than exogenous. We will consider this possibility further below.

The perceived partisanship of the ads has little systematic impact on Court support. Those who saw the ads as “somewhat” partisan tend to have lower support for the Court, but did not become less supportive over time. Moreover, those who judged the ads as “extremely” partisan were neither less supportive nor did their support decline. In terms of perceptions of the negativity of the ads, those judging the ads as *not* negative tended to have lower support for the Court, and for those respondents, support declined. Moreover, those who judged the ads as in any degree negative differ insignificantly

from those who saw no ads. Thus, these tests also fail to support the hypotheses positing negative effects of perceived partisanship and negativity in the ads broadcast during the confirmation process.

These findings suggest that perceptions of the ads may be endogenous in the sense that they are strongly influenced by expectations. Variation in judgments of the ads most likely reflects the influence of two factors: perceptions of the ads and expectations about them. Individuals may differ in their assessments of what is “too partisan,” “too negative,” or “unfair.” Consider, for instance, one who believes strongly in the apolitical nature of the judiciary. That person is likely to judge any mention of ideology or party as inappropriate. The endogeneity of ad perceptions is all the more strongly suggested by the nature of the attitudes we are investigating here, having to do, for example, with whether the Supreme Court is different from other political institutions and thereby worthy of respect and esteem. Thus, whether an ad is considered to be fair depends upon the interaction between one’s standards of fairness and perceptions of the content of the ad. If so, then evaluations of the ads are endogenous to our model, not exogenous.

We have no direct indicator of the sorts of ads the respondents view as appropriate and legitimate. But, following our earlier analysis of the process by which opinions on Alito’s confirmation are based — where we argued that prior institutional loyalty gave rise to a strong weight being attached to the criterion of judiciousness in evaluating Alito’s candidacy — we suspect that those with strong loyalty toward the Supreme Court would subscribe to the view that confirmation advertisements should be civil and relatively non-political. Institutional legitimacy provides a frame through which ads are judged. Thus, under this process, one might expect support for the Court at  $t_1$  to lead to the respondents forming harsh judgments of the ads they viewed.

That is precisely what the data indicate. Support at  $t_1$  is correlated with judging the ads to be unfair ( $r = -.08$ ), negative ( $r = .19$ ), and partisan ( $r = .11$ ). The modest size of these relationships is most likely a function of the imperfect relationship between expectations and institutional support. And all of

these relationships are stronger among opponents of the confirmation than among supporters of the confirmation. The most compelling difference is on the perceived fairness of the ads. Among Alito's opponents, institutional loyalty ( $t_1$ ) is strongly connected to perceptions ( $t_2$ ) of unfairness ( $r = -.44$ ), whereas the relationship is trivial among those supporting the confirmation ( $r = .01$ ).

Perhaps the central consideration here is whether the ads violated the expectations of citizens, thereby causing them to re-evaluate how they feel about the Supreme Court. Consider a citizen who is also a typical political scientist specializing in judicial process. He or she likely believes the following. (1) The Supreme Court makes public policy. (2) Supreme Court justices have a great deal of discretion in casting their votes in cases. (3) Within limits, the president has the right to name whom he wants to the Supreme Court. (4) Those limits are defined by a) technical competence, b) broad ideological agreement, and c) extremism. Liberal (conservative) presidents have the right to name liberal (conservative) judges, so long as they are not too liberal (conservative). (5) Therefore, ideological and political considerations are an appropriate part of the confirmation process. A citizen subscribing to this set of beliefs is unlikely to become disoriented by a moderately politicized confirmation process in which the ideology of the nominee is widely discussed.

Others, however, may view the Supreme Court as being "above" politics and therefore ads focusing on the ideology of the candidate are inappropriate. For these citizens, the ad campaigns presented by both supporters and opponents of Alito's confirmation most likely seemed offensive. Thus, expectations may play a key role in this process.

### **The Judiciousness Sub-Model**

Judiciousness is an alternative to ideology as a criterion for preference formation and is based on the

qualities the respondent views as important for being a good judge.<sup>38</sup> In the interviews, we began consideration of the respondents' expectations with the following text: "Now I would like you to focus on thinking about the characteristics of a good Supreme Court judge, that is, what a good judge ought to be like. First, how important would you say it is for a good Supreme Court judge to [INSERT ITEM]?"

The characteristics about which we queried the respondents were:

*Strictly follow the law no matter what people in the country may want*

*Try to maintain the appearance of being fair and impartial no matter what the cost*

*Stay entirely independent of the president and the government*

*Respect existing Supreme Court decisions by changing the law as little as possible*

*Uphold the values of those who wrote our constitution two hundred years ago*

The data clearly reveal that Americans expect their Supreme Court justices to maintain the appearance of fairness and impartiality (75.5 %, as well as, no doubt, to *act* in a fair and impartial way), and to uphold long-standing constitutional values (67.4 %). Given the ballyhoo from elites about precedent and "super-precedents" during the Senate hearings, perhaps the most surprising finding in these data is the relatively light weight Americans accord to respecting existing Supreme Court decisions (only 37.3 % rate it as very important). Across the set of items, the average number of characteristics judged to be extremely important is 3.0 (with a median of 3, on a scale ranging from 0 to 5); nearly all respondents found something on our list to rate as very important.

The interactive hypothesis is that as citizens place greater emphasis on legalistic expectations of judges, the corrosive effects of the ads on institutional support will be stronger. Using a simple measure of the number of these expectations rated as "extremely important," we first examine the bivariate

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<sup>38</sup>These questions are based on role theory, which specifies that actors in particular positions are subject to expectations about how they ought to behave (and that such expectations are one factor influencing the actor's own beliefs about how he or she ought to behave—i.e., role orientations). Few governmental actors are subject to such all-encompassing and stringent expectations as judges. On role theory see Gibson 1981. Also, recall the definition of "judiciousness" we offered in footnote 7, above.



correlations of ad exposure and institutional support.<sup>39</sup> Across the levels of legalistic expectations, the correlations are: +.18, -.04, -.19, -.23, and -.51, from low to high legalistic expectations. Thus, the greater the emphasis on legalistic criteria, the more corrosive the effect of ad exposure on institutional support. The same conclusion emerges from multivariate analysis. In an equation controlling for attitudes at  $t_1$ , the coefficient for the interaction between expectations and ad exposure is statistically and substantively significant ( $\beta = -.39$ ;  $-.49$  without the  $t_1$  control), and that coefficient remains significant in the fully controlled model ( $\beta = -.34$ ).<sup>40</sup> Those who expect judges to adhere to strict standards of legality were more likely to have been affected by the ads they viewed. As a result, their support for the Court declined.

## **DISCUSSION AND CONCLUDING COMMENTS**

Despite a fairly complex and ambitious research design, the principal findings of this research are simple: Politicized nomination processes do in fact detract from the legitimacy of the Supreme Court. The corrosive effect seems not to be associated with the proceedings in the Senate — after all, Senate hearings on nominees tend to be civil to a considerable degree, especially when the nominee is a sitting judge (and therefore is addressed as such). Instead, the damage to institutional support arises from the advertisements produced by interest groups. At least in the case of Judge Alito, these ads were framed in terms of politics. Indeed, one who saw the ads might well have assumed that they were referring to a political nominee to the executive branch. That the effect of attentiveness to the Senate process is opposite that of ad exposure adds to our confidence that the specific content of the ads was the culprit in eroding support for the Court.

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<sup>39</sup>Because so few respondents rated none of these as extremely important, we have collapsed the two lowest categories.

<sup>40</sup>The relevant part of the equation is:  $\hat{Y} = .24 + (.02 * \text{expectations}) + (.03 * \text{advertisements}) - (.02 * \text{expectations} \times \text{advertisements})$ .

We are also impressed that the impact of the confirmation events on attitudes toward the Court persists several months after Alito was confirmed. One often sees studies of short-term attitude change (e.g., experiments embedded within surveys) and wonders whether attitude change is lasting. For these citizens, it seems that the confirmation process made an enduring impression on their views of the Court.

The driving mechanism for change in institutional support has to do with whether the Supreme Court is seen as an ordinary political institution or whether it is judged to be distinctive. To the extent that people believe the Court is a relatively non-political institution, support for it is more easily generated. Anything that drags the Court into ordinary politics damages the esteem of the institution.

We have written extensively about positivity bias, the process through which exposure to the judicial process tends to enhance support. In this analysis, we uncover evidence of negativity. To the extent that citizens are exposed to the Supreme Court and its processes and procedures, we believe citizens learn the message that the Court is different and worthy of esteem. To the extent, however, that low politics is associated with the Court, that esteem is threatened. The content of the messages Americans receive when they start paying attention to the Supreme Court is crucially important.

Attitudes toward the Court depend in substantial part on the expectations citizens hold of judges. Support for the Court suffers most among those whose expectations are violated during politicized confirmation processes. These people expect legalism from judges; when the process is portrayed as political, they adjust their attitudes toward the Court itself. Of course, we do not know how long this effect persists, but unrequited expectations seem to undermine the legitimacy of the Supreme Court.

Much more about these processes must be understood. But this initial inquiry into how confirmation processes affect attitudes toward the Supreme Court demonstrates that the legitimacy of the institution is malleable. Future research would profit, therefore, from far more dynamic research designs than have characterized prior investigations of public attitudes toward the Court. Change is important and needs to be much better understood.

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## **APPENDIX A: SURVEY DESIGN, THE 2005 – 2006 PANEL SURVEY**

This research is based on a nationally representative sample interviewed face-to-face during the summer of 2005. The field work took place from mid-May until mid-July, 2005. A total of 1,001 interviews was completed, with a response rate of 40.03 % (AAPOR Response Rate #3). No respondent substitution was allowed; up to six call-backs were executed. The average length of interview was 83.8 minutes (with a standard deviation of 23.9 minutes). The data were subjected to some minor “post-stratification,” with the proviso that the weighted numbers of cases must correspond to the actual number of completed interviews. Interviews were offered in both English and Spanish (with the Spanish version of the questionnaire prepared through conventional translation/back-translation procedures). This sample has a margin of error of approximately  $\pm 3.08$  %.

During the course of the Alito confirmation process, we attempted to re-interview the respondents from the 2005 survey.<sup>41</sup> The fieldwork began on January 19, 2006, and was completed on February 13, 2006. A total of 335 individuals from the 2005 survey was re-interviewed. If we were to treat this as an entirely new survey, not a re-interview, and apply the AAPOR criteria to calculate the widely used Modified Response Rate #3, the rate would be 53.2 %.

Since  $t_2$  interviews were completed with only one-third of the original respondents, questions about the representativeness of the sub-sample naturally arise. We have considered this issue in some detail (see Gibson and Caldeira 2006, Appendix A, for the details of the statistical analysis). We draw two general conclusions from that analysis. First, the  $t_2$  sub-sample is reasonably representative on its face, and second, with minor post-stratification, the 2006 sub-sample closely mirrors the 2005 population from which it was drawn. We therefore believe inferences can confidently be drawn from our analysis,

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<sup>41</sup>We decided to exclude two categories of individuals from the second-wave project: (1) those for whom the initial interview was in Spanish, and (2) those living in areas decimated by Hurricane Katrina. This resulted in 969 individuals being eligible for re-interviewing.



even if the confidence intervals of this relatively small sub-sample are larger than we might prefer.

The  $t_3$  survey was in the field from May 24 through June 22, 2006, and resulted in 259 completed interviews. Only respondents interviewed at  $t_2$  were eligible for inclusion in the  $t_3$  re-interview survey (334 respondents), resulting in a 77.6 % raw response rate, and a rate of 82 % according to AAPOR's Response Rate #3 formula.

The question of how to weight the panel data is somewhat complicated. The  $t_1$  survey was subjected to some slight post-stratification so as to improve its representativeness. We then developed weights for the  $t_2$  and  $t_3$  surveys to improve the representativeness of these subsamples. The target for the  $t_2$  and  $t_3$  weighting was the characteristics of the  $t_1$  survey. As a consequence, when we analyze the panel data, we use the  $t_3$  weight, but when we consider only the  $t_1$  data, we use the original weight variable.

A second issue has to do with the shifting N for the panel data. Instead of using the full  $t_2$  sample when considering questions asked at  $t_2$ , we focus our analysis on those respondents interviewed in all three surveys. Even when we consider  $t_2$  data alone, we use the  $t_3$  weights because we are focusing on the restricted  $t_1$  through  $t_3$  sample. To do otherwise would base our analysis of change on different sets of respondents, thereby providing an alternative explanation of any change we observe. The exception is when we compare the  $t_1$  data to earlier surveys; for this sort of analysis, we take advantage of all of the people interviewed in 2005.

## **APPENDIX B: MEASURING SUPPORT FOR DEMOCRATIC INSTITUTIONS AND PROCESSES**

We have measured support for democratic institutions and process as a multi-dimensional meta-concept composed of four distinct subdimensions: (1) political tolerance, (2) the relative value attached to social order versus individual liberty, (3) support for the rule of law, and (4) support for a multiparty system.

Table B.1 reports the factor structure resulting from a Common Factor Analysis with oblique (biquartimin) rotation.

[PLACE TABLE B.1 ABOUT HERE]

As hypothesized, a four-dimensional solution emerged from the factor analysis. With only two minor exceptions, each item strongly loaded on the factor on which it was expected to load. In the two exceptions (a rule-of-law item and a newly created measure of support for individual liberty), the highest loading of the variable is on the hypothesized factor, even if the loading is less than .30. We have not excluded these items from the factor scores, but, given their factor loadings, their contribution to the measurement of the construct is small.

The factors are themselves intercorrelated, as they should be. The average correlation within the set is .31, and Cronbach's alpha is .64. The rule of law factor score is the most poorly interrelated of the four subdimensions.

**Table B.1 Support for Democratic Institutions and Processes**

Item	Factors			
	1. Political Tolerance	2. Multi-party System	3. Order v. Liberty	4. Rule of Law
Tolerance <sub>1</sub>	.87			
Tolerance <sub>2</sub>	.85			
Tolerance <sub>3</sub>	.82			
Tolerance <sub>4</sub>	.82			
Tolerance <sub>5</sub>	.54			
Tolerance <sub>6</sub>	.51			
Party <sub>1</sub>		.77		
Party <sub>2</sub>		.60		
Party <sub>3</sub>		.56		
Order <sub>1</sub>			.66	
Order <sub>2</sub>			.57	
Order <sub>3</sub>			.50	
Order <sub>4</sub>			.39	
Order <sub>5</sub>			[.29]	
Rule of Law <sub>1</sub>				.67
Rule of Law <sub>2</sub>				.61
Rule of Law <sub>3</sub>				.41
Rule of Law <sub>4</sub>				[.22]

Note: Entries shown are factor loadings from the pattern matrix. All loadings greater than or equal to .30 are shown. When the loading of a variable on its hypothesized factor is less than .30, the coefficient is reported in brackets.

The items are:

Tolerance<sub>1</sub>: Members of the [GROUP X] should be allowed to make a speech in our community.

Tolerance<sub>2</sub>: Members of the [GROUP X] should be allowed to hold public rallies and demonstrations in our community.

Tolerance<sub>3</sub>: Members of the [GROUP Y] should be allowed to make a speech in our community.

Tolerance<sub>4</sub>: Members of the [GROUP Y] should be allowed to hold public rallies and demonstrations in our community.

Tolerance<sub>5</sub>: Members of the [GROUP X] should be banned from running for public office.

Tolerance<sub>6</sub>: Members of the [GROUP Y] should be banned from running for public office.

Party<sub>1</sub>: What our country needs is one political party which will rule the country.

Party<sub>2</sub>: The party that gets the support of the majority ought not to have to share political power with the political minority.

Party<sub>3</sub>: Our country would be better off if we just outlaw all political parties.

Order<sub>1</sub>: It is better to live in an orderly society than to allow people so much freedom that they can become disruptive.

Order<sub>2</sub>: Society shouldn't have to put up with those who have political ideas that are extremely different from the majority.

Order<sub>3</sub>: When America is at war, people should not criticize the government.

Order<sub>4</sub>: Free speech is just not worth it if it means that we have to put up with the danger to society of extremist political views.

Order<sub>5</sub>: We are all better off if everyone is free to speak their mind in politics, even if some of the things people say are obnoxious and offensive.

Rule of Law<sub>1</sub>: It is not necessary to obey a law you consider unjust.

Rule of Law<sub>2</sub>: Sometimes it might be better to ignore the law and solve problems immediately rather than wait for a legal solution.

Rule of Law<sub>3</sub>: It is not necessary to obey the laws of a government that I did not vote for.

Rule of Law<sub>4</sub>: The government should have some ability to bend the law in order to solve pressing social and political problems.

**Table 1. Loyalty Toward the Supreme Court, 2005 – 2006**

Item	Year	Level of Diffuse Support for the Supreme Court					
		Percentage			Mean	Std. Dev.	N
		Not Supportive	Undecided	Supportive			
<b>Do away with the Court</b>							
	t <sub>1</sub>	17.1	9.1	73.8	3.7	1.0	251
	t <sub>2</sub>	15.5	6.2	78.3	3.8	1.0	251
	t <sub>3</sub>	11.0	7.7	81.4	3.9	0.9	251
<b>Limit the Court's jurisdiction</b>							
	t <sub>1</sub>	32.4	15.3	52.3	3.2	1.1	251
	t <sub>2</sub>	38.6	11.2	50.2	3.2	1.1	249
	t <sub>3</sub>	36.1	9.3	54.6	3.2	1.2	251
<b>Court can be trusted</b>							
	t <sub>1</sub>	17.9	13.0	69.1	3.6	0.9	251
	t <sub>2</sub>	16.9	7.8	75.3	3.7	0.9	251
	t <sub>3</sub>	20.1	9.1	70.8	3.6	1.0	251
<b>Court gets too mixed up in politics</b>							
	t <sub>1</sub>	45.0	16.1	38.9	2.9	1.0	251
	t <sub>2</sub>	50.1	10.6	39.3	2.9	1.3	251
	t <sub>3</sub>	48.3	12.0	39.8	2.9	1.2	250
<b>Number of items endorse</b>							
	t <sub>1</sub>				2.3	1.3	251

t <sub>2</sub>	2.4	1.2	251
t <sub>3</sub>	2.5	1.1	251
Index Average			
t <sub>1</sub>	3.4	0.7	251
t <sub>2</sub>	3.4	0.7	251
t <sub>3</sub>	3.4	0.7	251

Note: The percentages are based on collapsing the five-point Likert response set (e.g., “agree strongly” and “agree” responses are combined). The means and standard deviations are calculated on the uncollapsed distributions. Higher mean scores indicate more institutional loyalty.

The propositions are:

Do away with the Court:

If the US Supreme Court started making a lot of decisions that most people disagree with, it might be better to do away with the Supreme Court altogether.

Limit the Court’s jurisdiction:

The right of the Supreme Court to decide certain types of controversial issues should be reduced.

Court can be trusted:

The Supreme Court can usually be trusted to make decisions that are right for the country as a whole.

Court gets too mixed up in politics:

The U.S. Supreme Court gets too mixed up in politics.

**Table 2. The Impact of the Alito Confirmation Process On Support for the U.S. Supreme Court**

Predictor	r	Model I			Model II		
		b	s.e.	$\beta$	b	s.e.	$\beta$
Support for Multiparty System	.34	.04	.02	.18*	.05	.02	.22**
Political Tolerance	.33	.03	.01	.16*	.02	.01	.11
Support for Rule of Law	.16	.01	.02	.05	-.01	.02	-.03
Liberty versus Order	.32	.00	.02	.01	-.01	.02	-.06
Political Knowledge	.26	-.00	.01	-.01	-.01	.01	-.05
Level of Education	.36	.02	.01	.16*	.01	.01	.10
Political Efficacy	.35	.27	.08	.24***	.27	.08	.24***
Whether Black	-.09	-.02	.04	-.03	.02	.04	.03
Whether Hispanic	-.05	-.09	.04	-.16*	-.06	.04	-.11
Whether Asian	.07	.06	.07	.07	.08	.06	.08
Number of Advertisements Seen	-.19	-.04	.02	-.17**	-.04	.01	-.19**
Attention to the Confirmation Process	.17	.02	.01	.10	.02	.01	.09
Assessment of Process Fairness	.02	-.00	.02	-.02	-.02	.02	-.10
Alito Confirmation Preference	.04	-.00	.01	-.00	.01	.01	.05
Confidence in President Bush	-.02	.00	.01	.02	-.01	.01	-.08
Party Identification	-.03	.00	.01	.04	-.01	.01	-.02
Ideological Identification	-.12	.00	.01	.00	-.00	.01	-.03
Support for the Supreme Court $t_1$	.38	—	—	—	.34	.07	.33***
Intercept		.37	.08		.27	.08	
Standard Deviation — Dependent Variable		.19			.19		
Standard Error of Estimate		.16			.15		
R <sup>2</sup>				.32***			.39***
N		240			240		

\*\*\*  $p < .001$     \*\*  $p < .01$     \*  $p < .05$

**Figure 1. The Impact of the Alito Events on Change in Support for the Supreme Court**

