

**THE LEGITIMACY OF THE UNITED STATES SUPREME COURT
IN A POLARIZED POLITY***

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ABSTRACT

Conventional political science wisdom holds that contemporary American politics is characterized by deep and profound partisan and ideological divisions. Unanswered is the question of whether those divisions have spilled over into threats to the legitimacy of American political institutions, such as the United States Supreme Court. Since the Court is often intimately involved in making policy in many issue areas that divide Americans—including the contested 2000 presidential election—it is reasonable to hypothesize that loyalty toward the institution depends upon policy and/or ideological agreement and partisanship. Using data stretching from 1987 through 2005, the analysis reveals that Court support among the American people has not declined. Nor is it connected to partisan and ideological identifications. Instead, support is embedded within a larger set of relatively stable democratic values. Institutional legitimacy may not be obdurate, but it does not seem to be caught up in the divisiveness that characterizes so much of American politics — at least not at present.

I. INTRODUCTION

The period of the early 21st century in the United States is judged by many to be an era of rather intense partisan and ideological polarization. From abortion rights to the war in Iraq, Democrats disagree with Republicans, just as liberals joust with conservatives. The primary colors of contemporary America seem to be red and blue. On a variety of important political issues, partisan and ideological differences are substantial and profound.¹

Implicated in many of the issues dividing the Americans is the United States Supreme Court. For a variety of reasons, the Court often finds itself at the center of intense political disputes: be it the right to abortion, the right to burn an American flag in protest, the degree to which church and state must be separated, and conflicts between rights of privacy and national security. These issues clearly divide Americans of different ideological and partisan persuasions, and much of the contemporary debate focuses on what the Supreme Court has, or has not, ruled.

What is less obvious, however, is whether this same sort of polarization exists with regard to the basic institutional legitimacy of the Supreme Court. Have divisions over public policy been exacerbated to the point that they have undermined the very legitimacy of the institutional author of such policy: the U. S. Supreme Court? If so, then the divisiveness of the current era may have more profound and lasting consequences than even the most pessimistic analysts currently imagine.

There are indeed signs that threats to the institutional integrity of the Supreme Court abound.

¹The literature on how divided the Americans are is itself somewhat divided. Fiorina (2006) does not believe such differences to be profound, but many (if not most) draw different conclusions from the available data (e.g., Abramowitz and Saunders 2005; McCarty, Poole, and Rosenthal 2006; Sinclair 2006). Others suggest that even areas such as foreign policy — once thought to be the last bastion of non-partisanship — have become highly disputatious (e.g., Shapiro and Bloch-Elkon 2006).

Certainly, the justices of the Court have complained about this matter, often couching their arguments in terms of the preservation of one of the most distinctive, essential, and cherished attributes of courts: judicial independence. In 2006, former Justice Sandra Day O'Connor delivered a series of speeches decrying those who would limit the independence of the American judiciary.² There can be no doubt that certain members of Congress have attacked the U. S. Supreme Court, and no shortage exists of legislation designed to “curb” the Court’s decision-making authority: ranging from the “Safeguarding Our Religious Liberties Act,” H.R. 4379, introduced by Ron Paul (TX-14) with the purpose of eliminating federal court jurisdiction over state and local policies regarding the free exercise or establishment of religion, any privacy claim related to issues of sexual practices, orientation, or reproduction, and any equal protection claim based on the right to marry without regard to sex or sexual orientation, to the “Congressional Accountability for Judicial Activism Act of 2004,” introduced in the House of Representatives by Representative Ron Lewis (KY-2) and 26 co-sponsors, and which would empower Congress to reverse by a two-thirds vote any judgment of the U. S. Supreme Court that concerns the constitutionality of an Act of Congress (H.R. 3920).³ Specific, high-stakes Court decisions have drawn vicious and legitimacy-challenging criticism — as in the direct attack by various law professors on the Court’s legitimacy after its ruling in *Bush v. Gore*⁴— and there is no shortage of threats to the judiciary from the religious right,

²For an unofficial transcript of one of these speeches, see <http://www.law.ufl.edu/dedication/speechtext.shtml> [accessed June 8, 2006]. In his 2005 report on the federal judiciary, Chief Justice Roberts asserted what has become another familiar refrain: “A more direct threat to judicial independence is the failure to raise judges' pay.” See <http://www.uscourts.gov/ttb/jan06ttb/yearend/index.html> [accessed May 26, 2006].

³For a discussion of earlier court-curbing efforts in the American case, see Friedman 2005, 314-315. For European examples, see Schwartz 2000.

⁴On 13 January, 2001, 585 law professors placed an advertisement in the *New York Times* condemning

right-wing terrorists and murderers, and kooks.⁵ Serious proposals to change the structure of the judiciary have been floated (e.g., various plans to convert the life tenure of Supreme Court judges to a fixed term).⁶ While not all dissatisfaction with judges in the U. S. is focused on the Supreme Court, there can be little doubt that the justices of the Court are correct to worry about the implications of the current political climate in the country for the legitimacy of law and courts in general and their court in particular. Finally, some longitudinal studies of trust in the United States Supreme Court argue that partisan polarization in Court attitudes has risen significantly in recent times (e.g., Mate and Wright 2006).⁷

Nonetheless, earlier research on the legitimacy of the Supreme Court has generally found that the institution enjoys a fairly substantial “reservoir of goodwill” among the American people (e.g., Caldeira and Gibson 1992, Gibson, Caldeira, and Baird 1998). However, that research is dated, and certainly predates the emergence of strong ideological and partisan cleavages in the U.S., especially as the dust (and unity) of the 9/11 attack has worn away. Thus, it seems quite reasonable and interesting to revisit the question of how much legitimacy the Supreme Court has today. More specifically, have divisions

the Court’s decision in *Bush v. Gore* as illegitimate. The advertisement, as well as much additional material and criticism, can be found at: <http://www.the-rule-of-law.com> [accessed 12/7/2001].

⁵See for example: <http://www.judgesgonewild.com/> [accessed 5/26/2006].

⁶Farnsworth (2004,2, footnotes omitted) asserts: “In recent years at least ten distinguished scholars (as well as two distinguished judges and a distinguished journalist) have proposed abolishing life tenure for Supreme Court Justices and replacing it with fixed terms of years in office.” That paper provides full citations to support this claim. See also Eskridge and Levinson 1998; Levinson 2006.

⁷On the other hand, Kritzer (2005, 173) analyzes multiple opinion surveys and concludes: “What is perhaps most striking about the analysis presented above is that one is likely to draw different conclusions about trends in support for the Supreme Court depending upon which survey series one looks at.”

over policy issues spilled over to undermine the Court's legitimacy? In addition to answering that important factual question, however, we need to reexamine the sources of the institution's legitimacy. Has support for the Court become dependent upon partisanship and ideology, and even policy agreement with the institution? To what degree has the etiology of institutional support changed over time? To the extent that the bases of legitimacy have become more fragile, Legitimacy Theory itself may require rethinking and reconsidering. Based on a nationally representative face-to-face survey conducted in 2005, I attempt in this article to answer these questions in a rigorous and comprehensive fashion.

II. THEORIES OF INSTITUTIONAL LEGITIMACY

Considerable agreement exists among political scientists on most of the major contours of Legitimacy Theory.⁸ For instance, most agree that legitimacy is a normative concept, having something to do with the right (moral and legal) to make decisions. "Authority" is sometimes used as a synonym for legitimacy. Institutions perceived to be legitimate are those with a widely accepted mandate to render judgments for a political community; those without legitimacy find their authority contested. "Basically, when people say that laws are 'legitimate,' they mean that there is something rightful about the way the laws came about . . . the legitimacy of law rests on the way it comes to be: if that is legitimate, then so are the results, at least most of the time" (Friedman 1998, 256).

Legitimacy becomes especially relevant when people disagree about public policy. When a court, for instance, makes a decision pleasing to all, discussions of legitimacy are rarely relevant or necessary and do not emerge. When there is conflict over policy, then some may ask whether the institution has the

⁸For a most useful recent review of Legitimacy Theory see Tyler 2006. For a superb collection of essays on legitimacy, mostly from psychologists, among whom the theory has recently received great currency, see Jost and Major 2001.

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. Thus, legitimacy takes on its primary relevance in the presence of an *objection precondition*. As Friedman (1977, 141) 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.”⁹ Policy disagreements — even very strong ones — may have few lasting systemic consequences if the basic legitimacy of the key political institutions remains in tact.

But what exactly are the indicia of institutional legitimacy? Empirically oriented scholars have been unhappy with the amorphous nature of the concept of legitimacy. Under the influence of David Easton (1965, 1975), researchers have instead been attracted to the notion of institutional¹⁰ “support,” with a distinction often being made between “diffuse” and “specific” support. Although a few important scholars doubt that the two types of support can be differentiated empirically (e.g., Mishler and Rose 1994), most recognize a difference, at least at the theoretical level, between approval of policy outputs in the short-term and a more fundamental loyalty to an institution over the long-term.

Diffuse support therefore refers to “a reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed or the effects of which they see as

⁹Moreover, the literature on distributive and procedural justice (e.g., Lind and Tyler 1988; Tyler 1990) teaches us that those who lose on distributive issues often find losing palatable if the procedures leading to the decision are perceived to be fair (e.g., Baird 2001). However, controversy exists in the literature on the causal relationships among perceived fairness, legitimacy, and compliance (see Gibson 1989, Tyler and Rasinski 1991, and Gibson 1991; see also Mondak 1993 and Scherer and Curry 2006).

¹⁰Research on legitimacy sometimes addresses the legitimacy of regimes and states but at other times focuses on the legitimacy of specific institutions. This article addresses the latter. For a useful discussion of the objects of support see Norris 1999.

damaging to their wants” (Easton 1965, 273). Diffuse support is institutional *loyalty*; it is support that is *not* contingent upon satisfaction with the immediate outputs of the institution. Easton’s apt phrase – a “reservoir of goodwill” – captures the idea that people have confidence in institutions to make, in the long-run, desirable public policy. Speaking of parliaments, Loewenberg and Patterson (1979, 285) claim:

Although public attitudes toward legislatures vary depending on short-term public satisfaction with their performance, some part of the public attitude toward the institution is unrelated to its performance but reflects long-term influences. . . . This more enduring attitude, based on cumulative experience with the institution or with political authority over a lifetime, has been called diffuse support, to indicate that it is general, that is, unrelated to specific experiences. This part of the attitude toward legislatures is theoretically of great significance, since it can be a source of public commitment to the institution through good times and bad and a basis for public compliance with the enactments of the legislature whether they are liked or not.

Institutions without this reservoir of goodwill may be emasculated and therefore limited in their ability to go against the preferences of determined majorities.¹¹

Although there are many ways to conceptualize the orientations ordinary citizens hold toward institutions like the Supreme Court, I contend that the most politically significant attitudes are best thought of as a form of institutional loyalty. “Loyalty” represents the idea that failure to make policy that is pleasing in the short-term does not necessarily undermine basic commitments to support the institution.

¹¹Consequently, Legitimacy Theory is closely tied to — and often debated within — more general democratic theories concerning majorities and minorities. For a recent useful overview of this body of literature, see Fallon 2005. Moreover, Comparativists (e.g., Tsebelis 2000; Alivizatos 1995) have focused on courts as “veto players” and have acknowledged that legitimacy is a necessary resource if courts are to play this role. See also Gibson and Caldeira 2003 and Walker 2006.

Institutions such as courts need the leeway to be able to go against public opinion (as for instance in protecting unpopular political minorities). Thus, a crucial aspect of the political capital of institutions is the degree to which they enjoy the loyalty, not just approval, of their constituents.¹²

A. The Consequences of Institutional Legitimacy

At this point in the theory, an important disagreement over definitions exists. Some scholars *equate* legitimacy with compliance; others treat legitimacy as one of many possible causes of compliance.¹³ I take the latter tack, theorizing that the decision to obey or not obey a law is *conceptually* independent of whether an institution is judged to have the authority to make a decision. To do otherwise makes tautological the relationship between perceived legitimacy and compliance, and precludes consideration of determinants of compliance that are not grounded in legitimacy.¹⁴

¹²Within the context of a formal model of relations between legislatures and constitutional courts, Vanberg (2001) places great emphasis on the degree of support enjoyed by constitutional courts. The logic goes as follows: Courts enjoying high support also enjoy a presumption that their decisions ought to be complied with by the legislature. To the extent that the legislature seeks to evade compliance with a court decision, a backlash will likely result. “The fear of such a backlash can be a powerful inducement for legislative majorities to respect judicial decisions as well as the institutional integrity of a court” (Vanberg 2001, 347).

¹³For instance, Yoo (2001, 225) uses the following definition: “We can think of institutional ‘legitimacy’ as the belief in the binding nature of an institution’s decisions, even when one disagrees with them.” By “binding,” he means an obligation to obey. I contend that people obey laws for many reasons, not just due to legitimacy, and that the degree to which legitimacy and compliance are related must be treated as an empirical question (as it is, for example, in Gibson, Caldeira, and Spence 2005).

¹⁴For example, Tyler (1990, 4) makes this distinction: “Normative commitment through personal morality

Indeed, one of the most interesting unresolved questions in this literature has to do with the “legitimacy conferring” powers of courts. First clearly articulated by Dahl (1957), this theory asserts that a court ruling can induce people to accept the decision of other political institutions because the court has ratified and sanctified the decision. Since courts rarely challenge the ruling coalition in the United States (Dahl 1957), the American judiciary essentially places its imprimatur on policies, thereby encouraging citizens to accept outcomes with which they disagree (see Clawson, Kegler, and Waltenburg 2001). Mondak and others (e.g., Choper 1980) refer to this as the “political capital” of courts, and note that institutions must husband this capital and spend it wisely if they are to be effective. As Mondak (1992, 461) notes: “. . . sponsoring a policy is a type of gamble; the possibility of negative reaction endangers the institution’s lifeblood, institutional legitimacy.” Exactly this theory was cited when scholars asserted that the Court “wounded” itself by its decision in *Bush v Gore*.¹⁵ To the extent that courts are perceived as legitimate, citizens tend to acquiesce to unpopular judicial rulings, even ones with which they strongly disagree. Thus, to lose this legitimacy-conferring capacity—especially in the context of deep political divisions in American politics — would deal a serious blow to the function of the Supreme Court in the American political system and to the ability of the Court to contain and manage political conflict.

means obeying a law because one feels the law is just; normative commitment through legitimacy means obeying a law because one feels that the authority enforcing the law has the right to dictate behavior.”

¹⁵It is easy to see the relevance of this theory to the 2000 U.S. presidential election. The Supreme Court decision in *Bush v Gore*, even though badly divided, effectively ended the election dispute. The Court ruling eroded Gore’s support, making it difficult if not impossible to continue his challenge to the election outcome. On its face, the election controversy seems to provide compelling evidence in support of legitimacy theory. For an empirical analysis of the effect of this decision on the Court’s legitimacy see Gibson, Caldeira, and Spence 2003a. See also Yates and Whitford 2002, Kritzer 2001, Gillman 2001, and Kritzer 2005.

B. Extant Research on the Legitimacy of the United States Supreme Court

Much of what we know about recent public attitudes toward the United States Supreme Court comes from the nationally representative surveys conducted by Gibson and his colleagues in 1987, 1995, and 2001. Relying on the widely accepted conceptualization of diffuse support provided by Easton (1965, 1975)¹⁶, their research documents several important findings. First, the United States Supreme Court is in general regarded as a quite legitimate institution (e.g., Gibson, Caldeira, and Baird 1998). Second, the legitimacy of the Court has waxed and waned little over time, although the number of available surveys of institutional legitimacy is small. Even controversial decisions like that in *Bush v. Gore* seem not to have undermined the Court's legitimacy (Gibson, Caldeira, and Spence 2003a). Among some groups, however, legitimacy has in fact declined, as in the rather distinct (but not necessarily abrupt) "about-

¹⁶A considerable body of research has evolved based on national surveys asking a question about confidence in the leaders of the United States Supreme Court. However, it is unclear to me what exactly this question is measuring: For instance, is "confidence" the same as predictability, or is it instead equivalent to confidence that the leaders will do what is right, and if the latter, right for the country, me, my group, or my ideological preferences? And who are the leaders of the United States Supreme Court? Does the question refer to the Chief Justice, the most senior member of the Court, or whom? It seems easy to imagine the following sort of citizen: one who is liberal, is completely confident that the right-wing leadership of the Court will make right-wing decisions, of which the citizen strongly disapproves, but who nonetheless does not seek to emasculate the Court since either a) liberals may one day again control the Court, and/or b) whatever the Court may be doing at the moment, the institution plays a vital role in American politics and therefore must be respected, protected, and obeyed. I am certain there is at least one such citizen in the United States, and strongly suspect that there are more. Gibson, Caldeira, and Spence (2003b) provide more rigorous evidence that this survey item measuring confidence is not a very useful measure of institutional loyalty.

face” of African-American attitudes toward the Court (e.g., Gibson and Caldeira 1992). Finally, support for the Court has important implications for willingness to accept even disagreeable judicial decisions (Gibson, Caldeira, and Spence 2005). I should reiterate, however, that all of these conclusions are drawn from a period in American history that predates the current era of strong partisan and ideological divisions.

Earlier research has also provided reasonable explanations of the variability in attitudes toward the Supreme Court, with extant research identifying four important sources of support: (1) ideology, partisanship, and policy agreement, (2) knowledge of the institution and its role in American politics, (3) support for democratic institutions and processes, and (4) race. I will briefly consider each.

Although clouded by causal ambiguity, a relationship between approval of performance and policy outputs (specific support) and institutional loyalty is typically found in research on public attitudes (e.g., Caldeira and Gibson 1992). The relationship varies over time (as different segments of the population are pleased or displeased with Court outputs), and the relationship often implicates partisanship and ideology since they help structure evaluations of Court decisions. To the extent, however, that these relationships are very strong, they undermine the validity of measures of diffuse support. Whether this is a causal relationship remains unclear (and indeed, perhaps diffuse support creates specific support via processes of framing — see Gibson and Caldeira 2006, and Baird and Gangl 2006).

Race may be a surrogate for policy disagreement with the Court. Several studies have documented that African Americans exhibit less support for the Supreme Court than whites (e.g., Gibson and Caldeira 1992). This research is also important because it reveals something about the processes by which legitimacy deteriorates. As a “reservoir of goodwill,” legitimacy is not easily shaken in the short-term by policy disagreements. But over the long haul, the repeated failure of an institution to meet policy expectations can weaken and even destroy that institution’s legitimacy in the eyes of disaffected groups.

This seems to be exactly what happened with African Americans: as the Court changed its policy orientation, so too did blacks' opinions of the Court change.

Although early socialization processes are thought by many to be influential in creating support for the judiciary, perhaps more important are the basic political values to which people subscribe. Those with commitments to individual freedom and other democratic values (perhaps grounded in individualism) are more likely to support minoritarian institutions like courts (Caldeira and Gibson 1992, 1995). This finding is important because it implies that support for the Supreme Court will change only slowly over time (since values themselves change only slowly). Perhaps the most important contribution of this body of work on the etiology of Court support is the evidence that the Supreme Court gets much of its legitimacy from its role in the American democratic process, and, apparently, Americans' understanding of that role.

Extant research has also consistently shown that those who know more about courts are more likely to support them (e.g., Gibson, Caldeira, and Baird 1998). Gibson and his colleagues have explicated this finding within the context of the theory of positivity bias. As Gibson, Caldeira, and Spence (2003a) explain it, positivity bias is a frame through which contemporary political conflicts are judged. In their theory, the process goes something like the following. People become attentive to courts in the context of policy controversies (e.g., *Bush v. Gore* — see Gibson, Caldeira, and Spence 2003) or events like confirmation hearings (e.g., on the Alito confirmation, see Gibson and Caldeira 2006). In such circumstances, judicial symbols proliferate — in part because elites and groups realize the power of such symbols and attempt to manipulate them — so it is impossible for attentive citizens to avoid exposure to them. Exposure to legitimizing judicial symbols reinforces the process of distinguishing courts from other political institutions. The message of these powerful symbols is that “courts are different,” and owing to these differences, courts are worthy of more respect, deference, and obedience — in short, legitimacy. This process of social learning explains why citizens who are more aware of and

knowledgeable about courts tend to extend more legitimacy to the judiciary.¹⁷

Thus, a tension exists in the literature on support for the Supreme Court. On the one hand, support is to some degree related to approval or disapproval of the performance of the institution. Why did support for the Supreme Court decline precipitously within the black community in the U.S.? The simple answer is that the Court reversed policy courses, with the result that the long-standing support African Americans extended to the Supreme Court withered. From this perspective, Court support can change fairly quickly over time; from this perspective, the deep disagreements existing in the United States today may have a strongly corrosive impact on institutional support.

Support may instead reflect processes of political socialization, the creation of political values, and the reinforcement of such values through highly potent judicial symbols. Loyalty to institutions like the Supreme Court is therefore a natural extension of broader support for democratic institutions and processes. If this latter process is dominant, then one would not expect much change in the short term, since values change slowly, and since legitimizing symbols are so widely available to reinforce support. Under this process, it is unlikely that the current divisions over public policy will spill over and affect the legitimacy of the Supreme Court. It is these alternative possibilities that this paper investigates.

¹⁷Hibbing and Theiss-Morse (1995) have shown that greater awareness of the Supreme Court leads to *more* support for it, whereas greater awareness of the Congress is associated with *less* support for that institution. Kritzer and Voelker (1998) make a similar argument. Caldeira and Gibson (1992, 1995) have shown 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 unique about exposure to judicial institutions.

III. RESEARCH DESIGN

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). Samples such as this have a margin of error of approximately ± 3.08 %.

IV. MEASURING INSTITUTIONAL LEGITIMACY

My thinking about operationalizing institutional loyalty follows a considerable body of research on theorizing about and measuring mass perceptions of high courts (see Caldeira and Gibson 1992, Gibson, Caldeira, and Baird 1998, Caldeira and Gibson 1995, and Gibson and Caldeira 1995, 1998, 2003).¹⁸ That research conceptualizes loyalty as opposition to making fundamental structural and functional changes in the institution (see Boynton and Loewenberg 1973), and is grounded in the history of attacks by politicians against courts in the U.S. (see Caldeira 1987) and elsewhere (e.g., manipulation of their jurisdiction — see Schwartz 2000). As Caldeira and Gibson describe it (1992, 638), those who have no loyalty toward the U.S. Supreme Court are willing “to accept, make, or countenance major changes in the

¹⁸For a full explication of the conceptual and theoretical meaning of this concept see the discussion in Caldeira and Gibson (1992, 636-642). Here, I provide only an overview of the conceptualization since this is well-trodden territory.

fundamental attributes of how the high bench functions or fits into the U.S. constitutional system” (see also Loewenberg 1971). Loyalty is also characterized by a generalized trust that the institution will perform acceptably in the future. To the extent that people support fundamental structural changes in an institution, and distrust it, they are extending little legitimacy to that institution.¹⁹ Conceptually, loyalty thus ranges from complete unwillingness to support the continued structure and function of the institution to staunch institutional fealty.

Consequently, my measure of the legitimacy of the Supreme Court is derived from that used by Gibson, Caldeira, and Spence (2003a). In the 2005 survey, four statements were put to the respondents, with the request that they indicate their degree of agreement or disagreement with the statement. Table 1 reports the 2005 findings, along with the findings from the 2001 national survey by Gibson, Caldeira, and Spence. Since similar questions were asked in national surveys in the U.S. in 1987 and 1995, those results are reported as well. The table is structured so that the third data column (labeled “Supportive of the Institution”) reports the percentage of respondents giving a favorable answer to the statement, irrespective of whether the answer is “agree” or “disagree.” For instance, in 2005, 68.9 % of the Americans disagreed with the statement “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.” I deem a disagree response to represent loyalty toward the institution, and therefore the level of support for the Court is 68.9 %.

[PLACE TABLE 1 ABOUT HERE]

The first conclusion to be drawn from Table 1 is that, in 2005, the Supreme Court seemed to have a fairly broad base of support within the American mass public. At one extreme, only a very small proportion (18.2 %) favor doing away with the Court, even if a plurality (44.4 %) believes that the Court gets too mixed up in politics. A substantial majority (65.5 %) believes the Court can generally be trusted,

¹⁹For a useful analysis of legitimacy and FDR’s attack on the Supreme Court see Caldeira 1987.

and a slim majority does not want the jurisdiction of the institution altered. Counting across all four statements, the average number of supportive replies is 2.2, with only 12.8 % of the respondents expressing no support at all for the Court, and 20.3 % issuing supportive replies to all four statements.

The data in Table 1 also allow some conclusions about change in attitudes toward the Supreme Court. Interestingly enough, the apogee of support for the Court was reached right in the midst of the struggle over the 2000 presidential election and the Court's highly controversial decision in *Bush v. Gore*. Consider the results on the "Court can be trusted" statement. In 1995, 65.3 % of the respondents agreed. This figure rose significantly in 2001 to nearly 78 %, before declining in 2005 to almost exactly the same level as was observed a decade earlier. Roughly similar patterns characterize the jurisdiction item and even the measure of institutional commitment. From these data, it seems obvious that the effect of the presidential dispute in 2000 was to *elevate* the perceived legitimacy of the Court (see Gibson, Caldeira, and Spence 2003a), even if only temporarily.

More important, we see in these data *no evidence that the current political climate has tainted the legitimacy of the Supreme Court*. Support for the Court has declined in the last few years, but its decline seems to be a retreat from the unusually high levels of loyalty it enjoyed around the time of the 2000 presidential election dispute, and a return to a level predating that dispute. Although at this point in my analysis the data are not dispositive — partisan and ideological divisions may explain the decline since 2001 — the most reasonable tentative conclusion is that 2001 was somewhat unusual, not 2005.

One other basis of comparison is available. Based on the data reported by Gibson, Caldeira, and Baird (1998), supplemented with research conducted since then in Canada (Fletcher and Howe 2000) and South Africa (Gibson forthcoming), it is possible to compare the legitimacy of the United States Supreme Court with that of other high courts throughout the world. Figure 1 reports data on the summary indicator of support for the high courts in about twenty countries. The item used refers to "doing away with" the court if it continually makes decisions with which many people disagree. This summary of institutional

loyalty provides a useful basis for cross-national comparison.

[PLACE FIGURE 1 ABOUT HERE]

These data support several conclusions (including the conclusion that enormous variability exists in the legitimacy of these constitutional courts). Most important, in comparison to other national high courts, the United States Supreme Court enjoys an extraordinarily wide and deep “reservoir of goodwill” — only a handful of institutions has support percentages approaching those of the American court. Thus, in comparison to the past and to other national high courts, the Supreme Court today enjoys widespread institutional legitimacy.

In order to assess more rigorously the hypotheses concerning the etiology of Court support, I require a summary index of loyalty toward the institution. My analysis reveals that these 2005 measures of legitimacy are reasonably reliable, with a Cronbach’s alpha of .64. The average inter-item correlation is .31, which is moderately strong given categorical data that only approximate an interval-level scale, and given some degree of degenerate variance in some of the items. In terms of validity, the item set is clearly unidimensional, with Common Factor Analysis extracting a single dominant factor (eigenvalue₁ = 1.94; the eigenvalue of the second extracted factor is .85). The two most valid indicators of institutional loyalty are the statement about the Court’s jurisdiction (factor loading = .78), and the statement about doing away with the Court (loading = .63). The assertion that the Court gets too mixed up in politics has an acceptable loading (.48), although the general statement about trusting the Court has a relatively low correlation with the latent factor (.35).²⁰ The factor score (from the first unrotated factor) and a simple summated index of the responses to the four items are correlated at .96. For purposes of analyzing inter-individual variability in support for the Court, I therefore use the summated index as the indicator of

²⁰Cronbach’s alpha does not improve with the deletion of this item from the set of measures, and the correlation between the four-item and three-item indices is .95. Consequently, I use the four-item index in the remainder of this analysis.

institutional loyalty.

A. Summary

The data produced to this point strongly suggest that the legitimacy of the Supreme Court has not been undermined within this most recent period of strong partisanship and deep ideological divisions. Indeed, the Court seems as widely trusted today as it was a decade ago. Large majorities of the American people express loyalty toward the institution. However much Americans may dislike those of opposing ideologies and partisan attachments, they seem to be reasonably united in their commitment to the Supreme Court.

V. ACCOUNTING FOR INDIVIDUAL-LEVEL VARIABILITY IN INSTITUTIONAL LOYALTY

However, data on the univariate frequency distributions of these items are obviously not definitive on the issue of whether loyalty toward the Court is grounded in ideology and partisanship. To answer that question more rigorously requires that the origins of institutional support be more thoroughly investigated.

A. Partisanship and Ideology

The first hypothesis requiring consideration is relatively simple and straightforward. I hypothesize that citizens in ideological and/or partisan disagreement with Supreme Court will express less support for the institution. I therefore hypothesize that Democrats support the Court less than Republicans, just as liberals are expected to extend less legitimacy to the institution than conservatives.

The data reveal that attitudes toward the Supreme Court are *not* strongly influenced by the ideological predispositions of the respondents. For instance, the correlation between loyalty and the respondent's self identification on a liberalism – conservatism scale does not even achieve statistical

significance (with nearly 1,000 cases). A slightly stronger relationship exists between simple affect toward conservatives and institutional loyalty ($r = .10$), but there is also a similar relationship between feeling *positively* toward liberals and loyalty toward the court ($r = .09$). The relationship between relative affect toward liberals and conservatives and loyalty is absolutely trivial. Finally, there is only the slightest tendency for individual ideological polarization (here defined as the square of the difference between affect toward liberals and affect toward conservatives) and support for the Court, with those adopting more polarized views expressing *more* support for the Court. Thus, the most appropriate conclusion from this portion of the analysis is that *loyalty toward the Supreme Court has very little to do with the ideological orientations of citizens.*

The relationship between attitudes toward the Court and party identification is similarly tepid. There is little tendency for Republicans or Democrats to express more support for the Court, although there is some tendency for those adopting a strong party attachment (Republican *or* Democratic) to be *more* supportive. If we take the conventional tack of collapsing strong partisans, weak partisans, and those claiming to lean toward a party, we find that 49.2 % of the Republicans express relatively high support for the Court (support the Court on at least three of the four propositions), while 42.6 % of the Democrats are similarly opinionated. Those without a party attachment (independent independents) are slightly less likely to support the Court (39.8 %), in part because this category (as usual) includes the most poorly informed citizens. As I have noted, Republicans are slightly more supportive of the Court than Democrats, but the differences are so small that one would be hard pressed to term these differences “partisan polarization.”

By way of comparison, we can consider the relationship between ideology and partisanship and policy preferences on a variety of legally relevant issues. I focus on four areas of public policy: (1) the right of a woman to choose whether to have an abortion, (2) Affirmative Action, (3) the rights of gay people, and (4) invasions of citizen privacy by the government. According to Gibson and Caldeira

(2006), these four issues represent the most important policy concern for roughly 75 % of the American people. Table 2 reports the bivariate relations between ideology and partisanship and each issue variable, as well as the amount of variance jointly explained by these factors. For comparison, I also include in that table comparable analysis of institutional loyalty.

[PLACE TABLE 2 ABOUT HERE]

With one exception, all of the policy preferences represented by these variables are moderately to strongly predicted by the respondent's partisan and ideological identification. Liberals and Democrats tend to favor extending the right to chose whether to have an abortion to women, Affirmative Action, and gay rights. In general, the relationships are stronger with ideology than they are with partisanship. Consider abortion attitudes: The percentages of respondents who would grant considerable rights of choice to women when it comes to abortions range from 35.0 % to 71.7 % across the seven categories of party identification, and for the eleven categories of ideological self identification, abortion permissiveness ranges from 37.0 % to 81.8 %. These are obviously reasonably strong relationships. The single exception has to do with the civil liberties measure, on which liberals and Democratic tend to favor individual liberty over security, but only slightly so.²¹

The most important contrast in this table is of course with the failure of ideological and partisan identification to predict loyalty toward the Supreme Court. Americans may be divided, even sharply so, on many of the policy issues on which the Supreme Court chimes in, but on the institution itself, similar divisions are not manifest. Indeed, when institutional loyalty is regressed on the measures of ideological and partisan self-identification, the resultant variance explained is a mere 0.6 %.

These data do not indicate that support for the Court suffers from partisan polarization, as so many other aspects of American politics seem to. This is not to say that partisanship and ideology do not

²¹This lack of relationship may be due to the fact that only one-third of the respondents were willing to give up some of their civil liberties in order to fight against terrorism.

shape reactions to individual court decisions or to the issues that underlay them.²² But attitudes toward the institution itself are not at all determined by partisanship or ideology. We must look elsewhere for an explanation of the variability in institutional support.

B. Knowledge of the Court and Support for It

In general, an important sub-text of the findings to this point is that lack of support for the Court is concentrated among people with so little political information that they have difficulty placing themselves on a scale of ideology or partisanship. It is therefore worth considering more completely the relationship between information levels and attitudes toward the Supreme Court.

To what degree does loyalty toward the Supreme Court reflect knowledge of the institution? Fortunately, this important question can be answered since a three-item set of knowledge items was included on the survey. The respondents were asked:

- Some judges in the U.S. are elected; others are appointed to the bench. Do you happen to know if the justices of the U.S. Supreme Court are elected or appointed to the bench?
(65.4 % correct)
- Some judges in the U.S. serve for a set number of years; others serve a life term. Do you happen to know whether the justices of the U.S. Supreme Court serve for a set number of years or whether they serve a life term? (60.5 % correct)

²²Caldeira and Gibson (1992) found that individual policy agreement and disagreement exerted little independent influence on support for the Supreme Court. The same is true in the 2005 data, at least insofar as these four areas of policy attitudes are concerned. Regressing institutional loyalty on the policy measures shown in Table 2 results in an R^2 of .013, with none of the indicators being significantly related to Court loyalty. For example, the bivariate correlation between attitudes on how much abortion policy should restrict the choices of women and attitudes toward the Court is a trivial .03.

- Do you happen to know who has the last say when there is a conflict over the meaning of the Constitution – the U.S. Supreme Court, the U.S. Congress, or the President? (57.2 % correct)

The hypothesis is that those who are more knowledgeable about the Court will be more supportive of it.²³

Figure 2 reports the mean level of support for the Supreme Court (here indicated, to simplify interpretation, by the number of supportive replies, out of four questions) by levels of knowledge about the institution.²⁴ The data clearly demonstrate that as knowledge of the Supreme Court increases, so too does loyalty toward the institution. The relationship is at least moderate ($r = .27$). To know more about the Court is indeed to be more favorably predisposed toward the institution.

[PLACE FIGURE 2 ABOUT HERE]

This finding confirms a considerable body of earlier research on the legitimacy of courts throughout the world (e.g., Gibson, Caldeira, and Baird 1998). We presume that the relationship is based on the following causal chain: Attentiveness to the institution is associated with knowledge of its structure and function, but also with exposure to the legitimizing symbols of the judiciary. Consequently, as citizens are learning about the institution, they are also learning about its special, non-political methods of policy making. In short, they are learning to accept the legitimacy of the institution.²⁵

²³This set of indicators is quite reliable, with a Cronbach's alpha of .75.

²⁴The level of knowledge we discovered in this survey is quite high. For a complete analysis of knowledge of the Court and other political institutions see Gibson and Caldeira 2007. Note that the level of knowledge we find here is similar to that found by Gibson, Caldeira, and Spence in their 2001 survey. For a review of the literature on knowledge of the judiciary see Caldeira and McGuire 2005.

²⁵I have considered the possibility of an interaction between ideology and levels of information about the court, under the hypothesis that support for the court is more closely connected to ideology among the most informed Americans. In fact, there is some slight evidence of such an effect, with the addition of the

C. Democratic Values and Court Support

Caldeira and Gibson found in earlier research (1992) that support for the Supreme Court is fairly strongly grounded in more general commitments to democratic institutions and processes. Those committed to democracy tend to express stronger support for the Supreme Court. We test that hypothesis here, with a more extensive (and perhaps more valid) set of measures of support for democratic institutions and processes (see Appendix A). Table 3 reports the results.

[PLACE TABLE 3 ABOUT HERE]

We observe a fairly strong relationship between support for democratic institutions and processes and loyalty toward the Supreme Court. The equation with the four predictors is able to explain 16 % of the variance in loyalty toward the Court. The single best predictor (as indicated by the multivariate

ideology interaction producing a statistically significant increase in the explained variance in Court support. (No meaningful interaction exists between partisan identification and knowledge of the Court.) The standardized regression coefficients indicating the connection between ideology and support are: -.09, -.02, -.01, and .14, ranging from the lowest level of knowledge to the highest. Thus, among all respondents who scored less than the highest score on the knowledge index (3), support for the court varies independently of one's ideology (the three negative coefficients are not distinguishable from zero). Among the most informed Americans, those who are more *liberal* tend slightly to support the Court more. Since it is doubtful that liberals are supporting the current Supreme Court out of satisfaction with the Court's policy outputs, I interpret this relationship as reflecting the commitment of liberals to institutions generally associated with advancing individual rights, and therefore more akin to diffuse support than specific support. Since no relationship exists between ideology and Court support for most Americans, and since the weak tendency of liberals to support the Court more runs counter to the polarization hypothesis, I will not consider this interactive relationship any further in this analysis.

regression coefficient) is support for the rule of law, although the high multicollinearity between tolerance and individual liberty dilutes the regression coefficient of each.²⁶ Thus, like the evidence from an earlier, less divisive era, these data demonstrate that attitudes toward the Supreme Court are closely connected to more general orientations toward democratic institutions and processes.

Why do those who support democratic institutions and processes support the Supreme Court more? It seems likely that there are two driving forces in this relationship. First is the rule of law. The Court is obviously a preeminent rule of law institution; indeed, the Court is in some sense the principal guardian of the rule of law. Those who love law tend to love the Court. Second, the democratic values we measure have much to do with individualism and individual liberty (e.g., tolerance). The Supreme Court is the quintessential minoritarian institution in the American system of government; indeed, it is the primary institution designed and empowered to protect minorities against abuse by the majority. Thus, it is not surprising that loyalty toward the Court is so firmly embedded within the democratic values belief system.

D. Multivariate Analysis

To this point we have established several possible causes of variability in loyalty toward the Supreme Court. It remains to consider these variables within the context of an overall multivariate equation. I considered including in that equation a variety of additional control variables, following primarily the earlier work of Caldeira and Gibson (1992). However, trivial bivariate correlations were found between court attitudes and gender and age, so these variables were excluded from further consideration. In addition, from the analysis above, the following variables have no connection whatsoever with support for the Court, and therefore have been dropped from the equation: party identification, ideological self-

²⁶For purposes of this analysis, whether one democratic value or the other is the most influential is of little substantive consequence.

identification, and attitudes toward a woman's right to choose on the issue of abortion.²⁷ On the other hand, also following Caldeira and Gibson (1992), I added a measure of the respondent's political efficacy²⁸, as well as dummy variables for the three racial minorities included in our sample. Table 4 reports the results.

[PLACE TABLE 4 ABOUT HERE]

First, we note that a considerable amount of variance in institutional loyalty is explained by this simple equation: $R^2 = .20$. Second, despite significant bivariate relationships, three predictors are entirely insignificant in the full equation: knowledge of the judiciary, the respondent's level of education, and the relative value the respondent attaches to liberty and order. The latter is largely a function of multicollinearity (with political tolerance and support for a multiparty system). In addition, the direct impact of knowledge in the multivariate equation vanishes owing to its strong relationships with support for democratic institutions and processes, and via its moderate bivariate relationship with level of education.²⁹ Third, the most powerful predictors of court attitudes are two of the measures of democratic values: support for the rule of law and support for a multiparty system. Loyalty toward the Supreme Court is very much a function of broader support for democratic institutions and processes. Finally, like earlier analyses, I find that African Americans are significantly less supportive of the Court. To a lesser

²⁷Although this decision has no consequence whatsoever for the statistical results, I have excluded these variables in order not to mis-specify the equation. Mis-specification is typically understood as the failure to include relevant predictors, but the concept also refers to the inclusion of irrelevant variables. But as I note, the statistical results are virtually identical when these variables are added to the equation.

²⁸The measure is a simple index of efficacy derived from responses to four conventional indicators of internal and external political efficacy.

²⁹When knowledge is regressed on the four measures of democratic attitudes, 20 % of its variance can be accounted for. The addition of education to that equation adds another 6 % to R^2 .

degree, Asian Americans are as well. The coefficient for Hispanics, while negative, does not achieve statistical significance. Care must be taken with these conclusions regarding race and loyalty, however, since relatively small numbers of blacks, Hispanics, and Asians are included in the sample.³⁰

If I am allowed to take some liberties in moving away slightly from the data, 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.³¹ As it turns out, a reasonable number of Americans understand this, and therefore support for the Court is quite high.³²

³⁰Note that Caldeira and Gibson (1992) had a bona fide oversample of African Americans and therefore could give this group much more substantive attentive than is possible with the 2005 sample.

³¹I suspect that the strong correlation between attitudes toward the party system and court support actually has little to do with political parties per se. Those who support a multiparty system are rejecting the sort of knee-jerk anti-party reaction that is common in American society. To support parties in the current context in the U.S. requires at least the implicit understanding that “modern democracy is unthinkable save in terms of political parties,” even if the respondents have never heard of Schattschneider (1942, 1).

³²In an earlier analysis of data from 1987, Caldeira and Gibson (1992) discovered significant differences

VI. DISCUSSION

An important finding of this research is that the United States Supreme Court is widely supported by the American people, and that support has little to do with ideology or partisanship. Instead, loyalty toward the institution is grounded in broader commitments to democratic institutions and processes, and more generally in knowledge of the role of the judiciary in the American democratic system. Perhaps one of the most unconventional findings of this research is that knowledge of the structure and function of the Supreme Court is fairly widespread within the mass public.

These findings thus reinforce rather than challenge existing research on public attitudes toward the Court. That this is so is the most important finding of this research, given strong reasons for expecting otherwise. Although the American people are severely divided on many important issues of public policy, when it comes to the institution itself, support for the Court has little if anything to do with ideology and partisanship. Liberals trust the Court at roughly the same level as conservatives; Democrats and Republicans hold the Supreme Court in similar regard. I do not argue that different people do not have different expectations and evaluations of Court-made policy: Liberals and conservatives

in how opinion leaders formed their attitudes toward the Supreme Court. In particular, their support for the Court seemed to be more highly conditional upon policy agreement. I have explored this issue in these data, but, with fewer than 75 respondents claiming to be opinion leaders, the analysis is not stable enough to warrant much attention. Nonetheless, in these limited data it appears that the views of opinion leaders are *not* more closely connected to policy views than they are among the mass public as a whole. Nor are partisan and ideological identifications in any way connected to loyalty toward the Court. If anything, the views of opinion leaders are more solidly grounded in their attitudes toward democratic institutions and processes. As I note, these results must be treated as highly tentative in light of the relatively small number of opinion leaders included in the sample.

unquestionably differ in their preferences for how the Supreme Court should decide important issues of public policy. But as yet, the legitimacy of the Court has not been threatened by the divisions over public policy. Even the most contentious of issues — such as those decided in *Bush v. Gore* or abortion rights — seem not to have undermined public confidence in the Supreme Court as an institution. It has been suggested elsewhere that this is a function of so-called positivity bias (e.g., Gibson, Caldeira, and Spence 2003a; Gibson and Caldeira 2006)—the tendency of any exposure to the Court and its symbols to produce and/or reinforce positive feelings toward the institution—but assessing that theory goes beyond the purpose of this article.

From the analysis presented here, it appears that the Supreme Court has sufficient institutional legitimacy to be able to continue to perform its assigned role within the American democratic scheme, even within the context of deep substantive divisions within the American mass public. Whether this will remain so is unclear, especially if the Supreme Court takes a dramatically rightward shift in its policy outputs (as many expect it will). As African Americans have shown us, even obdurate loyalty toward an institution can indeed wither away. But at present, for those who worry about the systemic consequences of sharp ideological divisions in American politics, the findings of this analysis will surely provide some solace.

REFERENCES

- Abramowitz, Alan, and Kyle Saunders. 2005. "Why Can't We All Just Get Along? The Reality of a Polarized American." *The Forum* 3 (#2), Article 1. <http://www.bepress.com/forum/vol3/iss2/art1/> [accessed 5/30/2006]
- Alivizatos, Nicos. 1995. "Judges as Veto Players." In *Parliaments and Majority Rule in Western Europe*. Edited by Herbert Doring. New York: St. Martin's Press. Pp. 566-591.
- Baird, Vanessa A. 2001. "Building Institutional Legitimacy: The Role of Procedural Justice." *Political Research Quarterly* 54 (#2, June): 333-354.
- Baird, Vanessa A., and Amy Gangl. 2006. "Shattering the Myth of Legality: The Impact of the Media's Framing of Supreme Court Procedures on Perceptions of Fairness." *Political Psychology* 27 (#4, August): 597-614.
- Boynton, G. R., and Gerhard Loewenberg. 1973. "The Development of Public Support for Parliament in Germany, 1951-1959." *British Journal of Political Science* 3 (#2, April): 169-189.
- Caldeira, Gregory A. 1987. "Public Opinion and The U.S. Supreme Court: FDR's Court-Packing Plan." *American Political Science Review* 81 (#4, November): 1139-53.
- Caldeira, Gregory A., and James L. Gibson. 1992. "The Etiology of Public Support for the Supreme Court." *American Journal of Political Science* 36 (#3, August): 635-664.
- Caldeira, Gregory A., and James L. Gibson. 1995. "The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support." *American Political Science Review* 89 (#2, June): 356-376.
- Caldeira, Gregory A., and Kevin T. McGuire. 2005. "What Americans Know About the Courts and Why It Matters." In *Institutions of American Democracy: The Judiciary*, edited by Kermit L. Hall and Kevin T. McGuire. New York: Oxford University Press. Pp. 262 – 279. [Chapter 10]
- Choper, Jesse H. 1980. *Judicial Review and the National Political Process*. Chicago: University of

- Chicago Press.
- Clawson, Rosalee A., Elizabeth R. Kegler, and Eric N. Waltenburg. 2001. "The Legitimacy-Confering Authority of the U.S. Supreme Court: An Experimental Design." *American Politics Research* 29 (#6, November): 566-591.
- Dahl, Robert A. 1957. "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker." *Journal of Public Law* 6 (1): 279-295.
- Easton, David. 1965. *A Systems Analysis of Political Life*. New York: John Wiley & Son, Inc.
- Easton, David. 1975. "A Re-Assessment of the Concept of Political Support." *British Journal of Political Science* 5 (#4, October):435-457.
- Eskridge, William N., and Sanford Levinson. 1998. *Constitutional Stupidities, Constitutional Tragedies*. New York: New York University Press.
- Fallon, Richard H., Jr. 2005. "Legitimacy and the Constitution." *Harvard Law Review* 118 (#6, April): 1789-1853
- Farnsworth, Ward. 2004. "The Regulation of Turnover on the Supreme Court." Boston University School of Law, Working Paper Series, Public Law & Legal Theory, Working Paper No. 04-18.
- Fiorina, Morris P., with Samuel J. Abrams and Jeremy C. Pope. 2006. *Culture Wars? The Myth of Polarized America*. Second Edition. New York: Pearson Longman.
- Fletcher, Joseph F., and Paul Howe. 2000. "Canadian Attitudes toward the Charter and the Courts in Comparative Perspective." *Choices* 6 (#3, May): 4-29. [Published by IRPP, Montreal, Québec, Canada.]
- Friedman, Barry. 2005. "The Politics of Judicial Review." *Texas Law Review* 84 (#2, December): 257-337.
- Friedman, Lawrence M. 1977. *Law and Society: An Introduction*. Englewood Cliffs, NJ: Prentice-Hall, Inc.

- Friedman, Lawrence M. 1998. *American Law: An Introduction*, Revised and Updated Edition. New York: W. W. Norton & Company.
- Gibson, James L. 1989. "Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance." *Law and Society Review* 23 (#3):469-496.
- Gibson, James L. 1991. "Institutional Legitimacy, Procedural Justice, and Compliance With Supreme Court Decisions: A Question of Causality." *Law and Society Review* 25 (#3, no month): 631-635.
- Gibson, James L. Forthcoming. "The Evolving Legitimacy of the South African Constitutional Court." In *Justice and Reconciliation in Post-Apartheid South Africa*. Edited by Antje du Bois-Pedain and Francois du Bois. Cambridge University Press. Forthcoming.
- Gibson, James L., and Gregory A. Caldeira. 1992. "Blacks and the United States Supreme Court: Models of Diffuse Support." *Journal of Politics* 54 (#4, November): 1120-1145.
- Gibson, James L., and Gregory A. Caldeira. 1995. "The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice." *American Journal of Political Science* 39 (#2, May): 459-489.
- Gibson, James L., and Gregory A. Caldeira. 1998. "Changes in the Legitimacy of the European Court of Justice: A Post-Maastricht Analysis." *British Journal of Political Science* 28 (#1, January): 63-91.
- Gibson, James L., and Gregory A. Caldeira. 2003. "Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court." *Journal of Politics* 65 (#1, February): 1-30.
- Gibson, James L., and Gregory A. Caldeira. 2006. "Politicized Confirmation Processes and the Legitimacy of the U.S. Supreme Court." Paper delivered at the 64th Annual National Conference of the Midwest Political Science Association, April 20–23, 2006, Palmer House Hilton, Chicago, Illinois.

- Gibson, James L., and Gregory A. Caldeira. 2007. "Knowing About Courts." Unpublished paper, Washington University in St. Louis.
- Gibson, James L., Gregory A. Caldeira, and Vanessa Baird. 1998. "On the Legitimacy of National High Courts." *American Political Science Review* 92 (#2, June): 343-358.
- Gibson, James L., Gregory A. Caldeira, and Lester Kenyatta Spence. 2003a. "Measuring Attitudes toward the United States Supreme Court." *American Journal of Political Science* 47 (#2, April): 354-367.
- Gibson, James L., Gregory A. Caldeira, and Lester Kenyatta Spence. 2003b. "The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?" *British Journal of Political Science* 33: (#4, October): 535-556.
- Gibson, James L., Gregory A. Caldeira, and Lester Kenyatta Spence. 2005. "Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment." *Political Research Quarterly* 58 (#2, June): 187-201.
- Gibson, James L., and Amanda Gouws. 2003. *Overcoming Intolerance in South Africa: Experiments in Democratic Persuasion*. New York: Cambridge University Press.
- Gillman, Howard. 2001. *The Votes That Counted: How the Court Decided the 2000 Presidential Election*. Chicago: The University of Chicago Press.
- Hibbing, John R., and Elizabeth Theiss-Morse. 1995. *Congress as Public Enemy: Public Attitudes Toward American Political Institutions*. Cambridge: Cambridge University Press.
- Jost, John T., and Brenda Major. 2001. *The Psychology of Legitimacy: Emerging Perspectives on Ideology, Justice, and Intergroup Relations*. New York: Cambridge University Press.
- Kritzer, Herbert M. 2001. "The Impact of *Bush v. Gore* on Public Perceptions and Knowledge of the Supreme Court." *Judicature* 85 (#1, July-August): 32-38.
- Kritzer, Herbert M. 2005. "The American Public's Assessment of the Rehnquist Court." *Judicature* 89

- (#3, November-December): 168-176.
- Kritzer, Herbert M., and John Voelker. 1998. "Familiarity Breeds Respect: How Wisconsin Citizens View Their Courts." *Judicature* 82 (September/October): 58-64.
- Levinson, Sanford. 2006. *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)*. New York: Oxford University Press.
- Lind, E. Allan, and Tom R. Tyler. 1988. *The Social Psychology of Procedural Justice*. New York: Plenum Press.
- Loewenberg, Gerhard. 1971. "The Influence of Parliamentary Behavior on Regime Stability." *Comparative Politics* 3 (#2, January): 177-200.
- Loewenberg, Gerhard and Samuel C. Patterson. 1979. *Comparing Legislatures*. Boston: Little, Brown.
- Mate, Manoj, and Matthew Wright. 2006. "Bush v. Gore and the Micro-foundations of Public Support for the Supreme Court." Paper presented at the 2006 Annual Meeting of the American Political Science Association, September 2, 2006, Philadelphia, Pennsylvania.
- McCarty, Nolan, Keith T. Poole, and Howard Rosenthal. 2006. *Polarized America: The Dance of Ideology and Unequal Riches*. Cambridge, MA: MIT Press.
- Mishler, William, and Richard Rose. 1994. "Support for Parliaments and Regimes in the Transition Toward Democracy in Eastern Europe." *Legislative Studies Quarterly* 19 (#1, February): 5-32.
- Mondak, Jeffery J. 1992. "Institutional Legitimacy, Policy Legitimacy, and the Supreme Court." *American Politics Quarterly* 20 (#4, October): 457-477.
- Mondak, Jeffery J. 1993. "Institutional Legitimacy and Procedural Justice: Reexamining the Question of Causality." *Law and Society Review* 27 (#3, no season): 599-608.
- Norris, Pippa. Ed. 1999. *Critical Citizens*. New York: Oxford University Press.
- Schattschneider, Elmer E. 1942. *Party Government*. New York: Farrar Rinehart.
- Scherer, Nancy, and Brett Curry. 2006. "What Impact Does Racial and Gender Diversity on the Federal

- Bench Have on Citizens' Support for the Judiciary?" Paper delivered at the 2006 Annual Meeting of the Midwest Political Science Association, Chicago, Illinois, April 2006.
- Schwartz, Herman. 2000. *The Struggle for Constitutional Justice in Post-Communist Europe*. Chicago: University of Chicago Press.
- Shapiro, Robert Y., and Yaeli Bloch-Elkon. 2006. "Political Polarization and the Rational Public." Paper presented at the Annual Conference of the American Association for Public Opinion Research, Montreal, Quebec, Canada, May 18-21, 2006.
- Sinclair, Barbara. 2006. *Party Wars: Polarization and the Politics of National Policy*. Norman, OK: University of Oklahoma Press.
- Tsebelis, George. 2000. "Veto Players and Institutional Analysis." *Governance* 13 (#4, October): 441-474.
- Tyler, Tom R. 1990. *Why People Follow the Law: Procedural Justice, Legitimacy, and Compliance*. New Haven: Yale University Press.
- Tyler, Tom R. 2006. "Psychological Perspectives on Legitimacy and Legitimation." *Annual Review of Psychology* 57: 375-400.
- Tyler, Tom, and Kenneth Rasinski. 1991. "Legitimacy and the Acceptance of Unpopular U. S. Supreme Court Decisions: A Reply to Gibson." *Law & Society Review* 25 (#3, no month): 621-630.
- Vanberg, Georg. 2001. "Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review." *American Journal of Political Science* 45 (#2, April): 346-361.
- Walker, Lee Demetrius. 2006. "Separation of Powers and Judicial Legitimacy in Latin America [sic] Presidential Democracies." Paper delivered at the 2006 Annual Meeting of the Midwest Political Science Association, Chicago, Illinois, April 2006.
- Yates, Jeffrey L., and Andrew B. Whitford. 2002. "The Presidency and the Supreme Court After *Bush v. Gore*: Implications for Legitimacy and Effectiveness." *Stanford Law and Policy Review* 13 (#1):

101-118.

Yoo, John C. 2001. "In Defense of the Court's Legitimacy." In *The Vote: Bush, Gore, and the Supreme Court*. Edited by Cass R. Sunstein and Richard A. Epstein. Chicago: University of Chicago Press. Pp. 223-240.

APPENDIX A: MEASURING SUPPORT FOR DEMOCRATIC INSTITUTIONS AND PROCESSES

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

As hypothesized, a four-dimensional solution emerged from the factor analysis. With only two somewhat 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. I have not excluded these items from the factor analysis, but, given their factor loadings, their contribution to the measurement of the construct is small.

The factors are themselves intercorrelated (as they should be). One consequence of this, however, is that multicollinearity exists. The correlation between political tolerance and support for individual liberty is .54; support for a multi-party system is correlated with individual liberty at .56. I have resisted the temptation to reduce this four-dimensional structure to a single measure of support for democratic institutions and processes since one of the most important subscales I wish to analyze is support for the rule of law, and this factor is only weakly correlated with political tolerance and support for individual liberty (although it is strongly correlated with support for a multiparty system). Therefore, in the analysis of this paper, I incorporate measures of each of these subdimensions of support for democratic institutions and processes within the equations predicting institutional loyalty.

Table A.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 ₁	.87			
Tolerance ₂	.85			
Tolerance ₃	.82			
Tolerance ₄	.82			
Tolerance ₅	.54			
Tolerance ₆	.51			
Party ₁		.77		
Party ₂		.60		
Party ₃		.56		
Order ₁			.66	
Order ₂			.57	
Order ₃			.50	
Order ₄			.39	
Order ₅			[.29]	
Rule of Law ₁				.67
Rule of Law ₂				.61
Rule of Law ₃				.41
Rule of Law ₄				[.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:

Tolerance₁: Members of the [GROUP X] should be allowed to make a speech in our community.

Tolerance₂: Members of the [GROUP X] should be allowed to hold public rallies and demonstrations in our community.

Tolerance₃: Members of the [GROUP Y] should be allowed to make a speech in our community.

Tolerance₄: Members of the [GROUP Y] should be allowed to hold public rallies and demonstrations in our community.

Tolerance₅: Members of the [GROUP X] should be banned from running for public office.

Tolerance₆: Members of the [GROUP Y] should be banned from running for public office.

Party₁: What our country needs is one political party which will rule the country.

Party₂: The party that gets the support of the majority ought not to have to share political power with the political minority.

Party₃: Our country would be better off if we just outlaw all political parties.

Order₁: It is better to live in an orderly society than to allow people so much freedom that they can become disruptive.

Order₂: Society shouldn't have to put up with those who have political ideas that are extremely different from the majority.

Order₃: When America is at war, people should not criticize the government.

Order₄: 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.

Order₅: 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 Law₁: It is not necessary to obey a law you consider unjust.

Rule of Law₂: Sometimes it might be better to ignore the law and solve problems immediately rather than wait for a legal solution.

Rule of Law₃: It is not necessary to obey the laws of a government that I did not vote for.

Rule of Law₄: The government should have some ability to bend the law in order to solve pressing social and political problems.

Table 1: Loyalty Toward the United States Supreme Court, 1987 – 2005

Item	Year	Level of Diffuse Support for the Supreme Court					
		Percentage			Mean	Std. Dev.	N
		Not Supportive	Undecided	Supportive			
<i>Do away with the Court</i>							
	1987	9.4	12.9	77.7	3.9	0.9	1218
	1995	16.8	7.2	76.0	3.8	1.0	803
	2001	12.9	4.4	82.7	4.2	1.2	1418
	2005	18.2	12.9	68.9	3.7	1.0	995
<i>Limit the Court's jurisdiction</i>							
	1987	28.4	24.4	47.2	3.3	1.0	1216
	1995	35.5	11.7	52.8	3.2	1.1	803
	2001	28.3	11.0	60.7	3.6	1.3	1418
	2005	32.4	16.2	51.4	3.2	1.1	996
<i>Court can be trusted</i>							
	1987	not asked	—	—	—	—	—
	1995	25.1	9.6	65.3	3.4	1.0	804
	2001	17.0	5.1	77.8	3.9	1.2	1418
	2005	18.7	15.8	65.5	3.5	0.9	996
<i>Court gets too mixed up in politics</i>							
	1987	not asked	—	—	—	—	—
	1995	not asked	—	—	—	—	—

2001	40.8	15.9	43.3	3.1	1.4	1418
2005	44.4	18.4	37.2	2.9	1.1	997

Source: 1995 – Gibson, Caldeira, and Baird 1998, 350-351, Table 4.

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

The propositions are:

Do away with the Court:

1987: If the Supreme Court continually makes decisions that the people disagree with, it might be better to do away with the Court altogether.

1995/2001/2005: 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:

1987: The right of the Supreme Court to decide certain types of controversial issues should be limited by the Congress.

1995/2001/2005: The right of the Supreme Court to decide certain types of controversial issues should be reduced.

Court can be trusted:

1995/2001/2005: 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:

2001/2005: The U.S. Supreme Court gets too mixed up in politics.

Table 2: Partisan and Ideological Divisions on Public Policy Issues

Policy	Bivariate Correlation		R
	Partisanship	Ideology	
Abortion	.20 ***	.29 ***	.30 ***
Affirmative Action ₁	.16 ***	.24 ***	.25 ***
Affirmative Action ₂	.16 ***	.29 ***	.29 ***
Gay Freedom	.15 ***	.33 ***	.33 ***
Gay Marriage	.22 ***	.38 ***	.39 ***
Civil Liberties	.09 **	.06 *	.10 **
Supreme Court Loyalty	-.05 *	.03	.08

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

Note: All policy variables are scored such that high values indicate liberal responses. For Supreme Court loyalty, high scores indicate greater loyalty.

Measures of policy preferences:

Which one of the opinions on this page best agrees with your view on the abortion issue? You can just tell me the number of the opinion you choose.

- 1 By law, abortion should never be permitted.
- 2 The law should permit abortion only in case of rape, incest, or when the woman's life is in danger.
- 3 The law should permit abortion for reasons other than rape, incest, or danger to the woman's life, but only after the need for the abortion has been clearly established.
- 4 By law, a woman should always be able to obtain an abortion as a matter of personal choice.

Equal opportunity for blacks and whites is very important but it's not really the government's job to guarantee it. (Likert response set)

Irish, Italian, Jewish and many other minorities overcame prejudice and worked their way up. Blacks should do the same without any special favors. (Likert response set)

Gay men and lesbians should be free to live their own lives as they wish. (Likert response set)

There has been much talk recently about whether gays and lesbians should have the legal right to marry someone of the same sex. Which of the following comes closest to your position on this issue? Do you support full marriage rights for gay and lesbian couples; do you support gay civil unions or partnerships, but not gay marriage; or, do you oppose any legal recognition for gay and lesbian couples?

- 1 Full Marriage Rights
- 2 Civil Unions/Partnerships but not full marriage rights
- 3 No Legal Recognition

In order to curb terrorism in this country, it will be necessary to give up some civil liberties OR We should preserve our freedoms above all, because otherwise the terrorists will win

- 1 First
- 2 More first than second
- 3 Can't say
- 4 More second than first
- 5 Second

Table 3: Democratic Values as Predictors of Loyalty to the Supreme Court

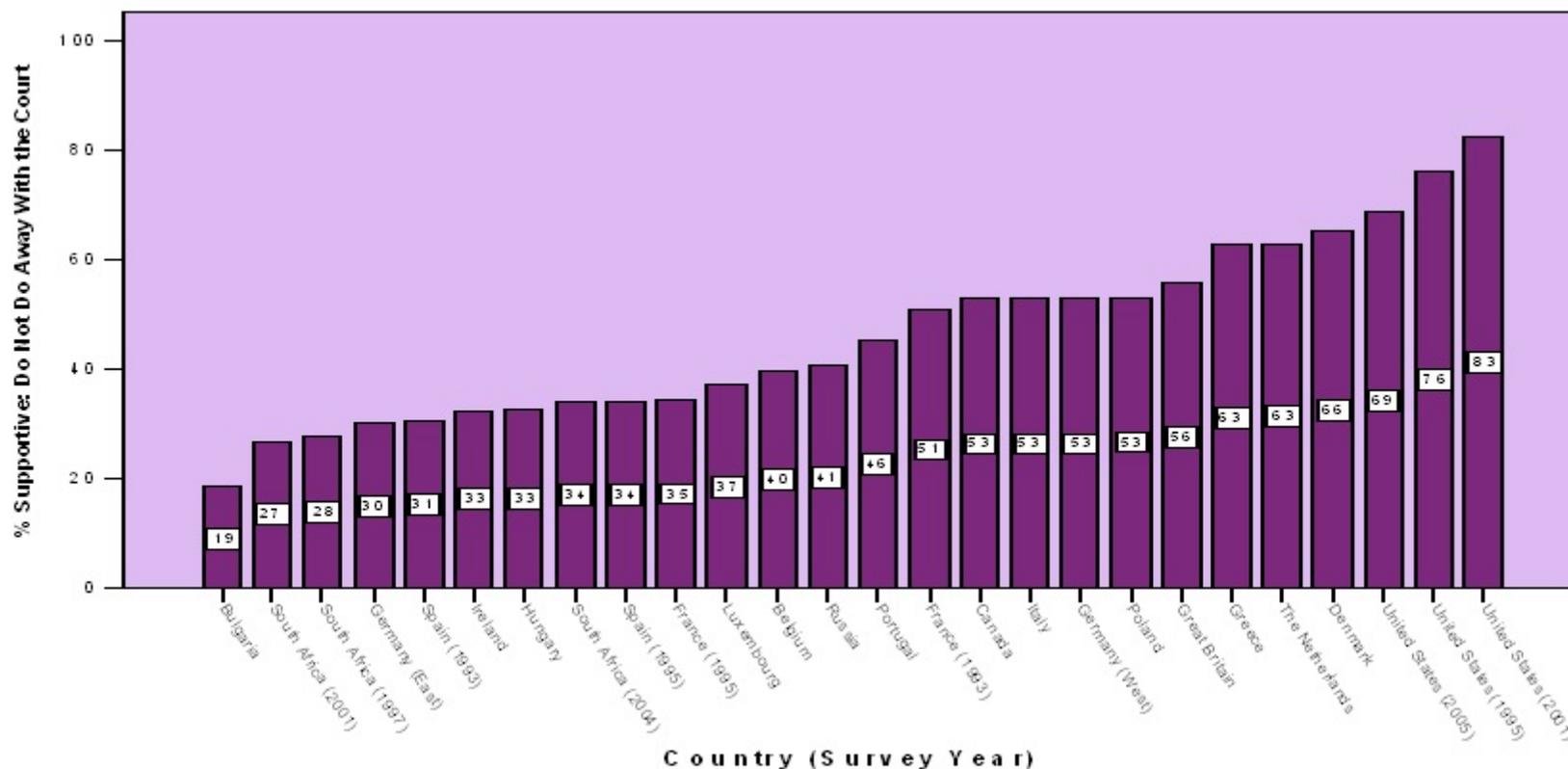
Predictor	r	b	s.e.	β
Support for the Rule of Law	.31	.21	.03	.24 ***
Support for a Multiparty System	.33	.14	.03	.17 ***
Political Tolerance	.18	.11	.03	.15 ***
Support for Liberty over Order	.23	.02	.04	.02
<i>Equation</i>				
Intercept		3.34	.02	
Standard Deviation – Dependent Variable		.70		
Standard Error of Estimate		.64		
R ²				.16 ***
N		922		
Note: Significance of standardized regression coefficients (β): *** $p < .001$ ** $p < .01$ * $p < .05$				

Table 4: Multiple Predictors of Loyalty to the Supreme Court

Predictor	r	b	s.e.	β
Support for the Rule of Law	.31	.18	.03	.21 ***
Support for a Multiparty System	.33	.12	.03	.15 ***
Political Tolerance	.18	.08	.03	.11 **
Support for Liberty over Order	.23	.00	.04	.01
Court Knowledge	.22	.02	.02	.03
Level of Education	.20	.03	.01	.07
Political Efficacy	.17	.14	.04	.12 ***
African American	-.14	-.22	.07	-.10 ***
Hispanic	-.09	-.11	.07	-.05
Asian	-.06	-.24	.11	-.07 *
<i>Equation</i>				
Intercept		2.94	.10	
Standard Deviation – Dependent Variable		.70		
Standard Error of Estimate		.63		
R ²				.20 ***
N		919		

Note: Significance of standardized regression coefficients (β): *** $p < .001$ ** $p < .01$ * $p < .05$

Figure 1: Cross-National Variability in Support for Constitutional Courts, Do Not Do Away with the Institution



Note: Most of these data are taken from Gibson, Caldeira, and Baird 1998, Table 4, p. 340. When not otherwise indicated, the data are taken from surveys conducted in the period 1993 – 1995. For a few countries, more than a single survey is available; for these, the year of the survey indicated in the country caption. The Canadian data are taken from Fletcher and Howe 2000; the South African data are from Gibson forthcoming.

Figure 2: The Relationship Between Political Knowledge and Institutional Support

