

JUDICIAL ELECTIONS

DIRECTIONS IN THE STUDY OF INSTITUTIONAL LEGITIMACY

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Research concerning judicial legitimacy remains imperfect. In this essay, I explore the proper measurement of the concept of legitimacy, the specification of the genesis of legitimacy, and the consideration of legitimacy of other institutions.

by **SARA C. BENESH**

James Gibson, in his book *Electing Judges*, has once again set the standard for inquiry into the legitimacy of courts and the forces that coalesce to influence that legitimacy. Legitimacy is the source of the courts' substantial influence within our system of government and, as such, there is no question that the study

of legitimacy is as important now as ever. But, in many ways, especially for state courts, we know barely anything about this all-important source of judicial power. Systematic, careful, and creative analyses of the questions raised when we consider legitimacy, then, are sorely needed and Gibson's work contributes sig-

nificantly to what we know by urging us to do three things: (1) consider citizen expectations when attempting to ascertain the impact of various

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behaviors on the legitimacy of courts, (2) compare citizen reactions to campaigns for judicial positions with campaigns for state legislatures to determine the extent to which judicial elections are unique, and (3) consider the possibility that elections themselves confer legitimacy on state courts, even when campaigns serve, in some ways, to detract from it.

But the research concerning judicial legitimacy (at any level) remains imperfect. There are three major areas that deserve increased attention, more research, and better understanding: (1) the proper measurement of the concept of legitimacy, (2) the specification of the genesis of institutional legitimacy, and (3) the consideration of the legitimacy of institutions other than courts. In this essay, I consider what we know and what we don't know about institutional legitimacy, and highlight questions for future research.

First, how does one validly and reliably measure the concept we have come to know as "legitimacy?" Legitimacy, or diffuse support, is often conceptualized as an enduring indicator of institutional loyalty.¹ "Diffuse support refers to a 'reservoir of favorable attitudes or good

will that helps members to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging to their wants."² Gibson, Caldeira, and Spence argue that diffuse support is "institutional loyalty; it is support that is not contingent upon satisfaction with the immediate outputs of the institution."³ Furthermore, they argue that this institutional loyalty obtains even if the institution fails to make agreeable decisions in the short-term. Specific support, on the other hand, is "satisfaction with the immediate outputs of the institution."⁴ Because these conceptualizations have characterized measurement of institutional legitimacy for decades in scholarly research, we should expect that the indicators used to measure diffuse support capture long-term sentiment as opposed to short-term satisfaction with decisions or with policy outputs. Most of the research in this area, especially on the Supreme Court, has used a number of survey question responses combined into an index that aims to measure respondents' disposition towards the Court, and, in part of his book, Gibson adopts a similar scale. The trouble is, no uniform number or set of questions comprises the diffuse support, or legitimacy, index and it appears that some components (trust, for example) tap short-term rather than long-term institutional support. Although the questions on limiting the Court's power, generally, doing away with the court altogether, or limiting the Court's jurisdiction over certain specific areas of policy likely tap that persistent diffuse support discussed by Easton, other questions focus on how much an individual perceives the courts to be involved in politics, favor certain groups or people over others, or can be trusted to do the right thing or consider the best interests of the public in making decisions—all of those questions likely tap policy outputs in the short-term.

Caldeira and Gibson,⁵ in their first attempt to create an index of diffuse support, argued for an index containing questions that "pose respon-

dents with tough questions about their willingness to accept, make, or countenance major changes in fundamental attributes of how the high bench functions or fits into the U.S. constitutional system."⁶ That index was comprised solely of those sorts of questions ("do away," "eliminate power to declare acts unconstitutional," "right to decide controversial issues limited," "make sure proposal to abolish Court is defeated," "rewrite the constitution to reduce powers").

But most newer research also includes some variant of the question, "Can the Supreme Court usually be trusted to make decisions that are best for the people?" Given what we know about trust in the American government, this strikes me as potentially problematic. Most of the research in American politics that considers *trust* treats it as a measure of satisfaction with current outputs of government and not an indicator of a reservoir of good will. Consider Staton,⁷ who argues that judicial trust may be distinct from diffuse support altogether, and Mishler and Rose⁸ who describe trust as a "running tally" of evaluations of past governmental performance. Further, Keele⁹ finds that a number of short-term indicators, such as presidential approval, economic performance, congressional approval, scandals, and crime all influence trust, concluding that "it has become evident that evaluations of authorities are important predictors of trust."¹⁰ Keele¹¹ also finds that partisans trust government more strongly when their party is in power, and so, trust in government taps explicitly into the expected outputs or policies that will be made by those running it. Mishler and Rose, in search of the origins of trust in post-Communist societies, find that institutions accrue trust via performance.¹²

Surely trust is consequential, even if based on evaluations of current incumbents. Some argue that since Congress and the presidency, unlike the federal courts, rely on direct election, low levels of trust in government are a challenge for democracy,¹³ as trust has been linked to

1. David Easton, *A FRAMEWORK FOR POLITICAL ANALYSIS*. (Englewood Cliffs, NJ: Prentice Hall, 1965).

2. *Id.*, 273.

3. James L. Gibson, Gregory A. Caldeira, and Lester Kenyatta Spence. *Measuring Attitudes toward the United States Supreme Court*, 47(2) *AM. J. POL. SCI.* 354 (2003), 356.

4. *Id.*

5. Gregory A. Caldeira and James L. Gibson. *The Etiology of Public Support for the Supreme Court*, 36 *AM. J. POL. SCI.* 635 (1992).

6. *Id.*, 638.

7. Jeffrey K. Staton, *Constitutional Review and the Selective Promotion of Case Results*, 50(1) *AM. J. POL. SCI.* 98 (2006).

8. William Mishler and Richard Rose, *What are the Origins of Political Trust? Testing Institutional and Cultural Theories of Post-Communist Societies*, 34(1) *COMP. POL. STUD.* 30 (2001), 38.

9. Luke Keele, *The Authorities Really Do Matter: Party Control and Trust in Government*, 67(3) *J. POL.* 873 (2005).

10. *Id.*, 874.

11. *Id.*

12. *Supra* n. 9.

13. Todd Donovan and Shaun Bowler, *REFORMING THE REPUBLIC: DEMOCRATIC INSTITUTIONS FOR THE NEW AMERICA* (New York: Prentice Hall, 2004); Robert D. Putnam, *BOWLING ALONE* (New York, NY: Simon and Schuster, 2000).

voter participation¹⁴ and compliance with the laws.¹⁵ But treating trust as a component of *legitimacy*,¹⁶ essential to the operation of branches of government (specifically, the courts), may be problematic. If short-term influences, such as perceptions of the economy,¹⁷ scandals, crime levels,¹⁸ job approval,¹⁹ media behavior,²⁰ partisanship, and ideological congruence,²¹ all drive trust in government, then including trust in an index purporting to measure diffuse support seems undesirable.

Careful measurement of concepts related to legitimacy are critical if we are to understand how people form opinions about and dispositions toward our governing institutions, specifically our courts. Inadequate measures may lead us to “mistakenly conclude that Court legitimacy is more volatile than it is in fact were a more valid measure of legitimacy available”²² or that the Court is either more or less loved than we think it to be. Knowing the true baseline—the true level at which people accord diffuse, long-term, enduring support to the Court—and what drives variation in that measure, is essential in understanding which actions of the Court will be tolerable and which might actually threaten its legitimacy. I argue (along with my coauthors)²³ that a major consideration in operationalizing diffuse support is whether or not a measure taps into long-term support for the institution in the way Easton envisioned it or whether instead it taps into short-term approval. Making more careful use of these theoretical underpinnings of the concept of legitimacy would go a long way to better understanding the power of courts, its genesis, and its influences.

Even in this single book, Gibson uses two very different ways of measuring “legitimacy,” and does so in ways that are not necessarily only tapping long-term, diffuse support. In Chapter 4, Gibson uses a variant of the familiar list of questions discussed above, but he includes a trust measure (“The Kentucky Supreme Court can usually be trusted to make decisions that are right for the state

as a whole”), which is a known determinant of specific and not diffuse support.²⁴ He uses an additional question that reads, “Judges of the Kentucky Supreme Court who consistently make decisions at odds with what a majority of the people in the state want should be removed from their position as judge.” Given that Kentucky judges are elected, and most respondents knew that, why should a positive answer to that question be considered to be indicative of a lack of institutional regard? In other words, judges who make “bad” decisions *should* be ousted. That is *exactly* the reason states choose to elect their judges in the first place.

In Chapter 3 and in other parts of the book, he relies on two questions about fairness and impartiality (of a hypothetical judge or senator and of an institution composed of people selected in the same way as the hypothetical judge or senator) and a query about how likely it is that the respondent would accept decisions made by the judge or the senator as legitimate,

none of which are classic indicators of diffuse support. Indeed, Gibson, Caldeira, and Spence²⁵ suggest that questions about partiality may also be more of a short-term than a long-term measure of support in that they likely tap respondent perceptions of policy outputs. It is unclear to me how a respondent would react to questions that use the actual word “legitimate” or that change the referent from the actor to the institution. They do scale well, but using these measures blurs the conceptual distinction between specific and diffuse support. Indeed, such measurement choices introduce the possibility that results can no longer be read as concerning legitimacy but ought to be read as job approval or something similar.

Of course Gibson is not alone in measuring legitimacy in various and sundry ways, sometimes as a result of reliance on surveys collected for other purposes. I used “confidence”²⁶ and so did Caldeira²⁷ and Wenzel et al.²⁸ Others have used feeling thermometers and still other work has

14. Marc J. Hetherington, *The Political Relevance of Political Trust* 92(4) AM. POL. SCI. REV. 791 (1998); Marc J. Hetherington, *The Effect of Political Trust on the Presidential Vote: 1968-96*, 93(JUNE) AM. POL. SCI. REV. 311-326 (1999).

15. Tom R. Tyler, *WHY PEOPLE OBEY THE LAW*. (New Haven: Yale University Press, 1990); Tom R. Tyler, *Public mistrust of the law: A political perspective*. 66 U. CIN. L. REV. 847 (1998).

16. James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23(3) L. & SOC'Y REV. 469 (1989); Caldeira and Gibson *supra*, n. 6; James L. Gibson, and Gregory A. Caldeira, *The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice*, 39(MAY) AM. J. POL. SCI. 459 (1995); James L. Gibson, Gregory A. Caldeira, and Vanessa Baird, *On the Legitimacy of National High Courts*, 92 (JUNE) AM. POL. SCI. REV. 343 (1998); James L. Gibson, Gregory A. Caldeira, and Lester Kenyatta Spence, *Measuring Attitudes toward the United States Supreme Court*, 47(2) AM. J. POL. SCI. 354 (2003); Gibson, Caldeira, and Spence, *supra* n. 4; James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and 'New Style' Judicial Campaigns*, 102(1) AM. POL. SCI. REV. 59 (2008); James L. Gibson and Gregory A. Caldeira, *Confirmation Politics and the Legitimacy of the US Supreme Court: Institutional Loyalty, Positivity Bias, and the Alito Nomination*, 53(1) AM. J. POL. SCI. 139 (2009); James L. Gibson and Gregory A. Caldeira, *CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE* (Princeton, NJ: Princeton University Press, 2009).

17. Adam Przeworski, John Alvarez, Jose Antonio Cheibub and Fernando Limongi, *What Makes Democracies Endure?* 7(1) J. DEMOC. 39 (1996).

18. V.A. Chanley, T.J. Rudolph and W.M. Rahn, *The Origins and Consequences of Public Trust in Government: A Time-Series Analysis*, 239 PUB. OP. Q. 64 (2000).

19. Hetherington, *supra*, n. 15; Luke Keele, *Social Capital and the Dynamics of Trust in Government*, 51(2) AM. J. POL. SCI. 241 (2007); Mishler and Rose, *supra*, n. 9.

20. Diana C. Mutz and Byron Reeves, *The New Videomalaise: Effects of Televised Incivility on Political Trust*, 99(1) AM. POL. SCI. REV. 1 (2005).

21. Keele, *supra*, n. 10; Thomas J. Rudolph and Jillian Evans, *Political Trust, Ideology, and Public Support for Government Spending*, 49(3) AM. J. POL. SCI. 660 (2005).

22. Gibson, James L., Gregory A. Caldeira, and Lester Kenyatta Spence, *Measuring Attitudes toward the United States Supreme Court*, 47(2) AM. J. POL. SCI. 354 (2003), 357.

23. Aaron Weinschenck, Shawn C. Fettig, Sara C. Benesh, *Measuring the Legitimacy of the U.S. Supreme Court*, presented at the ANNUAL MEETING OF THE MIDWEST POLITICAL SCIENCE ASSOCIATION (Chicago, IL, April 2012).

24. See, e.g., James L. Gibson, *A Note of Caution About the Meaning of 'The Supreme Court Can Usually be Trusted...'*, 21(3) L. & Crs. 10 (2012).

25. *Supra* n. 23.

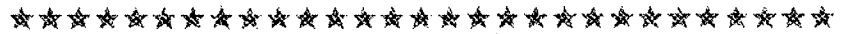
26. Sara C. Benesh, *Understanding Public Confidence in American Courts*, 68(3) J. POL. 697 (2006).

27. Gregory A. Caldeira, *Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209 (1986).

28. James P. Wenzel, Shaun Bowler, and David J. Lanoue, *The Sources of Public Confidence in State Courts: Experience and Institutions*, 31(2) AMER. POL. RES. 191 (2003).

used combinations of these measures.²⁹ One major opportunity for future research is an explicit consideration of the measurement of legitimacy, employing careful theoretical consideration as well as rigorous empirical testing of the questions used. Gibson has gone far further than anyone else in this quest, although he occasionally commits the same lapses as other researchers studying this issue.

The question, whence legitimacy derives, is also essential if we are to move forward with our understanding of the power of courts and the extent to which their legitimacy is enduring. Gibson suggests that elections are legitimacy-conferring, but he, like Bonneau and Hall,³⁰ seems to assume that this is true rather than specifically demonstrating it. He assumes that the change over time in his panelists' responses to the fairness questions is due to the election that came between them. Might it not instead be that these panelists have become more supportive of courts over the course of the study *because* they were questioned multiple times about how they feel about courts (i.e., might the change be an experimental artifact)? We know knowledge is related to support, and, perhaps, panelists learned and paid more attention to courts as a result of participating in the panel. Although there was an election in the middle of the study, with these data it is not possible to separate the influence of that election from the influence of the administration of the study. Similarly, Bonneau and Hall³¹ argue that judicial elections are legitimacy-conferring, but they base this con-



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clusion on voting behavior and do not measure public perceptions of courts.

Couple this with the fact (as Gibson admits) that campaigns vary in content and intensity. Furthermore reading the ads Gibson studied, this election seems fairly tame. Generalizability, then, is potentially lacking. Do elections have the potential to enhance legitimacy? I suppose they could, provided they operate as other elections theoretically do; but the evidence that supports the claim of the legitimacy-conferring power of elections for other offices is not airtight either. We also know how negatively the public feels about campaigns and campaign funding; given the different position courts occupy in a democracy—i.e., that courts are the only institution seen as a protector of minorities³²—the question remains open.

It is absolutely a contribution, however, to move past assumptions about what people want from judges and attempt to measure those expectations and their influence on legitimacy. Indeed, the question of whether people want independence or accountability is one point of emphasis for Gibson. He argues that elites' assumptions about the desirability of independence are tenuous and that, instead, citizens may prefer accountability and surely vary in their preferences and expectations. People in the U.S. like to elect their judges. From Gibson's own analysis and others, that they also want those judges, once in office, to behave differently from "mere" politicians. Indeed, although Gibson seeks to debunk the myth of desired independence, he does not directly ask what

respondents prefer. Indeed, some of the evidence Gibson uses to suggest a desire for accountability might just as validly be read as an expression of support for independence. For example, a majority of respondents agreed that judges should strictly follow the law, regardless of what people may want, and that judges ought to be especially protective of the minority. While Gibson suggests these are mere platitudes, to me this item may tap notions of judicial independence.

Regardless, Gibson's proffered "expectancy theory" seems eminently reasonable and is a large contribution to the literature. It may well be, though, that expectations of judges are systematic and influenced by respondents' experiences with various selection systems. Kentucky, Gibson's focus, has always elected its judges. Citizens in states that have only just begun to elect their judges or citizens from states that have abandoned elections in favor of some other system will likely have different expectations for judicial behavior than the Kentuckians surveyed here, and so, again, generalizability may be lacking.

Once again the discussion leads back to what drives legitimacy? Is it the ability to vote for judges, and to hold them accountable, such that the longer a state has elections, the more legitimate their courts become? Critics of electing judges argue that these new-style judicial campaigns are undermining institutional legitimacy; Bonneau and Hall³³ and Gibson argue instead that electing judges enhances courts' legitimacy. Is it that judicial campaigners live up to citizens' expectations for their behavior,

29. See, e.g., Weinschenk et al, *supra*, n. 24.

30. Christopher Bonneau and Melinda Gann Hall, *IN DEFENSE OF JUDICIAL ELECTIONS* (New York: Routledge, 2009).

31. *Id.* Bonneau and Hall do make some other excellent points about judicial elections, however, demonstrating quite clearly that partisan elections have several specific advantages over nonpartisan elections, for example.

32. David Pozen, *Are Judicial Elections Democracy-Enhancing?*, in Charles Gardner Geyh, ed., *WHAT'S LAW GOT TO DO WITH IT? WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE* (Stanford: Stanford University Press, 2011).

33. *Supra* n. 31.

and when they continue to do so, citizens afford them greater legitimacy? Or does a running tally of liked decisions build legitimacy? This "running tally" is part of the explanation Gibson, Caldeira, and Baird give for cross-national variation in high court legitimacy.³⁴ Bartels and Johnson³⁵ argue that perceived ideological disagreement directly decreases institutional legitimacy; but most research has argued that diffuse support is immune to policy evaluation, and that it would take *many* disliked decisions to erode the Court's reservoir of good will. As Gibson notes, we do not know where people start in levels of esteem they hold for courts and we are not sure of the long-term consequences of making unpopular decisions or taking increasingly huge campaign contributions for judicial legitimacy. We surely need a better understanding of the genesis of legitimacy in order to understand what might enhance or undermine it. Caldeira started us out, long ago, by thinking about political socialization.³⁶ Casey spoke of myths.³⁷ And Gibson and Caldeira³⁸ have offered positivity bias. Most of these treatments of the question focus on the U.S. Supreme Court, which is a far different institution from nearly every state supreme court. From where does legitimacy derive for the state courts? Is it with actual experience with the courts perhaps, as I have suggested?³⁹ Is it with democratic values, as Gibson suggests? Or a generalized feeling of trust in government, as many have substantiated? We need to identify the process by which people acquire legitimacy in order to be able to model potential influences on legitimacy and predict whether a court (the U.S. Supreme Court, one of the many state supreme courts) can go from having high levels of legitimacy to losing a substantial amount of it.

Finally, very little research has applied any of these ideas about legitimacy or about diffuse support stemming from a reservoir of good will to institutions other than courts. That surely seems curious, especially when Gibson's analysis compares the

courts and the legislatures on other dimensions. It seems that Gibson missed an opportunity to present the first results on what drives diffuse support for legislatures and how it compares with support for courts. Researchers are fond of Gibson and Caldeira's quote that "to know the courts is to love them"⁴⁰ and we assume that the same cannot be said of the legislature,⁴¹ but this is not a fair comparison because we know only whether the public *approves* of Congress (and maybe state legislatures, but we don't often hear about them either) and we know approval taps short-term policy agreement and not a reservoir of good will. Indeed, we have little idea whether the public grants to its legislatures enduring support of the sort Gibson and his colleagues have studied with respect to the U.S. Supreme Court, high courts in other nations, and now, the state courts.

We lack information to apply Gibson's expectancy theory to other institutions as well. What do people expect of legislatures or executives, and how, if at all, do those expectations differ from their expectations of courts and judges? Do those differences mean scholars may expect something different when studying legislatures rather than courts when it comes to the potential influence of elections on legitimacy? We tend to believe courts are the best-loved of government institutions, but perhaps the dismal public approval rating of Congress belies a more obdurate, underlying legitimacy that would suggest that, although people are not fond of current office-holders or of their policy outputs (or lack thereof) they, like the Framers, do value the legislative branch and would neither do away with it nor greatly curb its ability to make policy. We just don't know because we've never asked.

Overall, Gibson's book has taught us much about the effects of judicial elections (especially in Kentucky) and has left us with the impression that, while certain types of campaign behaviors might harm the perception that courts and judges make decisions in an impartial way,

those same behaviors do the exact same thing to the state legislatures. Hence, the focus on changing the way we select judges might be misplaced. Perhaps, we should focus on what people really hate—money in politics. Moving to partisan elections, which require less money because they provide more information, according to Bonneau and Hall,⁴² would help move us toward that goal. Indeed (as noted earlier), Gibson reaffirms Bonneau and Hall's claim that elections may enhance court legitimacy, an idea that ought to be further explored and measured directly rather than assumed. This work, like the body of excellent work done on court legitimacy, continues to demonstrate that legitimacy or diffuse support is a slippery concept, and we have more work ahead of us. ★

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34. *Supra* n. 17.

35. Brandon Bartels and Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57(1) *Am. J. Pol. Sci.* 184 (2013).

36. Gregory A. Caldeira, *Children's Images of the Supreme Court: A Preliminary Mapping*, 11 *L. & Soc'y Rev.* 851 (1977).

37. Gregory Casey, 1974. *The Supreme Court and Myth: An Empirical Investigation*, 8(3) *L. & Soc'y Rev.* 385 (1974).

38. *Supra* n. 17.

39. Benesh *supra* n. 27; Sara C. Benesh and Susan E. Howell, *Confidence in the Courts: a Comparison of Users and Non-users*, 19 *BEHAV. SCI. & L.* 199 (2001).

40. Gibson and Caldeira 2009, *supra*, n. 17, 122.

41. John R. Hibbing and Elizabeth Theiss-Morse, *CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARD AMERICAN POLITICAL INSTITUTIONS* (New York: Cambridge University Press, 1995). Of course, Christopher D. Johnston and Brandon L. Bartels, *Sensationalism and Sobriety: Differential Media Exposure and Attitudes Toward American Courts*, 74 *PUB. OP. Q.* 260 (2012), qualify that claim by noting that information coming from different sources of news outlets can have differential impacts on Court legitimacy.

42. *Supra* n. 31.