

Courts, Cooperation, and Legitimacy

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The following two chapters are part of a book manuscript dealing with the role of courts in society.

Chapter 2 claims that cooperation among citizens is essential to the stability of a society and that cooperating behavior includes a willingness to comply with the law. The chapter considers the ways in which courts instill cooperative attitude and “rule of law” norms. To be influential, courts must be perceived by the public as a legitimate part of government.

Chapter 3 turns to the factors that lead to a perception of the legitimacy of the courts. To do this, the chapter contrasts the segment of the public that knows little and cares less about the workings of the courts with educated and interested court observers. For the general population, education that shows the courts to be a non-political part of government is extremely important, as are the symbols and rituals of the courts. For educated observers, legitimacy also depends on the self-restraint of the courts, the respect shown by the other branches of government, and the quality of court decisions and opinions. The chapter applies theories of legitimacy from political science and psychology and uses survey data of the public opinion of the courts in its analysis of how the judicial system achieves a public perception of legitimacy.

Chapter 2 - Role of Courts/Cooperation

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Courts advance social stability in a number of ways. They resolve disputes of all kinds – private and public as well as economic and social. Through the process of dispute resolution, they also create incentives for desirable conduct. Court decisions do this through both deterrence and education. Punishment of criminal wrongdoers, damage awards against those who breach contracts, and injunctions to compel compliance are all ways to force people to follow the law. However, instilling norms that lead people to comply willingly with the law is more important than sanctions. As Douglass C. North has written, “Strong moral and ethical codes of a society is the cement of social stability which makes an economic system viable.”¹ Walter Murphy made the same point when he wrote:

The stability, even the continued existence, of a constitution depends heavily on public opinion. Indeed, some analysts have argued that, as an empirical fact and not merely as a normative ideal, all governments ultimately rest on public opinion. . . The power of judges, Alexis de Tocqueville observed, “is enormous, but it is the power of public opinion. They are powerful as long as people respect

¹ Douglass C. North, **Structure and Change in Economic History** 47 (19XX). The new institutional economics sometimes describes contract enforcement as having three different forms: (1) first-party enforcement, in which the party obligated to perform willingly carries out the contract obligations even if it means a financial loss; (2) second-party enforcement, in which the party who is owed performance sets up structures to assure that the other party performs, such as hostages in medieval trade or modern day liens and mortgages; and (3) third-party enforcement, in which someone not party to the contract, like a court, adjudicates disputes. First-party enforcement, by far the most efficient, results from norms that lead the party to perform its obligations. These norms result from a wide set of influences, such as religious precepts (do not lie, by failing to deliver what is promised) or concerns for personal or business reputation (do not be known as someone who reneges on a contract).

the law; but they would be impotent against popular neglect or contempt of the law.”²

Rousseau phrased the same conclusion this way: “It is in the end the law that is written in the hearts of the people that counts.”³

In most societies, people co-exist because they willingly get along with each other and abide by the laws governing social and economic interaction. Of course, there are always people—like terrorists and criminals—who refuse to cooperate with others, so we need the military and police to contain them. But for the most part, the rest of society pretty much gets along—we cooperate without the need for coercion. However, this cooperative state does not just arise over night. It is the product of many factors, including the role of courts.

The question of why people cooperate to live peacefully together lies at the heart of understanding society. Philosophers, theologians and social scientists of all types have pondered that question. Within the social sciences, scholars from different fields have phrased the question differently. For example, Robert Putnam has asked how a society creates “social capital ... such as trust, norms, and networks, that can improve the efficiency of society by facilitating coordinated actions.”⁴ In economic terms, it is the same as asking how to minimize free-riding; in game-theoretic terms, it is asking how to induce people to cooperate rather than to defect.

² Walter F. Murphy and Joseph Tanenhaus, Publicity, Public Opinion, and the Court, 84 Nw. U.L. Rev. 985, 991-992 (1990), quoting A. deTocqueville, Democracy in America 90 (J. Mayer & M. Lerner eds. 1966).

Similarly, different types of scholars approach answers from different perspectives. We have no definite explanations for the prevalence of cooperation, but we have some plausible theories for this type of behavior. Biologists would emphasize genetic and evolutionary factors. Many economists cite the importance of incentive structures – a system of laws, sanctions and rewards – to induce cooperative behavior and to limit free-riding.⁵ Some commentators point out that cooperation is the product of the interest-seeking of the members of society⁶ or that cooperation results because people see that cooperative groups do better economically and socially than groups lacking cooperation.⁷

To understand why most people cooperate, it helps to begin with a recognition of the mental models that people construct to bring order to the complex world. What people know is the result of the inputs from our five senses, which is then sent to the brain for processing where our “belief systems” control how we analyze the inputs and make decisions. As Douglass North has explained:

the world we ... are trying to understand is a construction of the human mind. It has no independent existence outside the human mind; thus our understanding is unlike that in the physical sciences, which can employ reductionism to understand and expand comprehension of, the physical world. Physical scientists, when they seek a greater understanding of some puzzle in the physical world, can build from the fundamental unit of their science to explore the dimensions of the problem they seek to comprehend. The

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⁴ Robert D. Putman, **Making Democracy Work** 167 (1993).

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⁶ Russell Hardin, *The Social Evolution of Cooperation*, in **The Limits of Rationality X**, Karen Cook & Margaret Levi, ed., 1990.

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social sciences do not have anything comparable to genes, protons, neutrons, elements to build upon. The whole structure that makes up the foundation of human interaction is a construct of the human mind and has evolved over time in an incremental process . . . It is essential to remember that the constructs humans create are a blend of “rational” beliefs and “non-rational” ones (superstitions, religions, myths, prejudices) that shape the choices that are made.⁸

The shared belief systems of a society are passed on from generation to generation as part of the society’s cultural heritage.⁹

Since most people in most societies cooperate with others, it must be that their belief systems include a sense that cooperative conduct is the proper conduct. To put it another way, these belief systems include norms that lead to cooperative behavior, which includes a willingness to follow the law. The norms that encourage people to comply with the law, which I will refer to as “rule of law” norms, are central to achieving cooperative behavior in a society.

Cooperative norms are passed on from one generation to the next as part of a society’s cultural heritage. Cooperative norms are taught through religion, upbringing or formal education.¹⁰ Peers are also influential. The media also plays an important educational role.¹¹ People teach cooperative norms through ostracization of law breakers and by treating them as

⁸ Douglass C. North, **Understanding the Process of Economic Change** 83 (2005).

⁹ *Id.* See Douglass C. North, **Institutions, Institutional Change, and Economic Performance** 37 (1990) (“Cultural can be defined as the transmission from one generation to the next, via teaching and imitation, of knowledge, values and other factors that influence behavior.” Quoting R. Boyd & P. J. Richerson, **Culture and the Evolutionary Process** 2 (1985).)

¹⁰ Eg., Richard H. McAdams, The Origin, Development, and Regulation of Norms, 96 Mich. L. Rev. 338, 388 (1996).

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immoral.¹² Publicizing law breakers, as through registers of sexual offenders, helps that end.

Robert Putnam is well-known for the proposition that participation in civic, social or other organizations imbues traits and skills that make for good citizens.¹³ Path dependence is important. The strength of cooperative norms in earlier generations and the events in a country's history influence the degree of cooperation today. In addition, belief systems are dynamic and constantly evolving. People constantly test their own beliefs and theories without even thinking of it as they move through life.¹⁴ As a result, a successful society needs to not only pass on cooperative norms as part of its culture, it must also constantly reinforce the importance of cooperative, law-abiding conduct.

Three lessons from behavioral economics help us to understand the role of the judiciary in norm creation and reinforcement. First, decades of experiments have shown that reciprocity is a powerful principle followed by people in their interactions with others. People follow the rule: If you cooperate, I will cooperate; if you don't, I won't. This concept leads to "tit for tat" play in experimental games and in one-on-one relations in the real world.¹⁵ More importantly, the

¹² E.g., Paul G. Mahoney & Chris W. Sanchirico, Norms, Regulated Games and the Role of Law, 91 Cal. L. Rev. 1282, 1284 (2003); Richard A. Posner, Social Norms and the Law: An Economic Approach, 87 Am. Econ. Rev. 365, 366 (1997).

¹³ Robert D. Putnam, Bowling Alone: America's Declining Social Capital, 61 J. Democracy 65, 66 (1995).

¹⁴ North, Understanding at 83.

¹⁵ Robert Axelrod, The Evolution of Cooperation (1984); Dan M. Kahan, The Logic of Reciprocity: Trust, Collective Action and Law, 102 Mich. L. Rev. 71, 73 (2003); Eric A. Posner, Standards, Rules, and Social Norms, 21 Harv. J. L. Pub. Pol'y 101, 108 (1997).

reciprocity principle also describes how people act in a society, not just in one-on-one relations.

Dan Kahan has explained this effect as follows:

Individuals who have faith in the willingness of others to contribute their fair share will voluntarily respond in kind. And spontaneous cooperation of this sort breeds more of the same, as individuals observe others contributing to public goods and are moved to reciprocate. In this self-sustaining atmosphere of trust, reliance on costly incentive schemes becomes less necessary. By the same token, individuals who lack faith in their peers can be expected to resist contributing to public goods thereby inducing still others to withhold their cooperation as a means of retaliating.¹⁶

In the same manner, people are more likely to act to benefit others, or exhibit “other-regarding preferences,” when they believe that other people also exhibit other-regarding behavior.¹⁷ Without a supportive social context, it is harder for other-regarding norms to predominate. This is like the broken windows theory of law enforcement: if the government enforces housing codes to make an area look better, there will be less crime because the people will appear to be more law-abiding.¹⁸

¹⁶ Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 *Mich. L. Rev.* 71, 72 (2003); see Richard H. Levy, *The Tie That Binds: Some Thoughts About the Rule of Law, Law and Economics, Collective Action Theory, Reciprocity, and Heisenberg’s Uncertainty Principle*, 56 *U. Kan. L. Rev.* 901, 908-909 (2008); Dan M. Kahan, *Signaling or Reciprocating? A Response to Eric Posner’s Law and Social Norms*, 36 *U. Rich. L. Rev.* 367, 375 (2002).

¹⁷ Lynn A. Stout, “Social Norms and Other Regarding Preferences,” in *Norms and the Law* 13, 33 (John N. Drobak ed., 2006). See Cristina Bicchieri, Richard Jeffrey, and Brian Skyrns, *The Dynamic of Norms* 27 (1997); Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundation of Corporate Law*, 149 *U. Pa. L. Rev.* 1735, 1773 (2001); Scott T. Allison & Robert L. Kerr, *Croup Correspondence Biases and the Provision of Public Goods*, 66 *J. Personality & Soc. Psychol.* 688, 688 (1994); S.S. Komorita et al., *Reciprocity and the Induction of Cooperation in Social Dilemmas*, 62 *J. Personality & Soc. Psychol.* 607, 608 (1992); Robyn M. Dawes, *Social Dilemma*, 31 *Ann. Rev. Psychol.* 169, 187-188 (1980).

¹⁸ See Dan M. Kahan, *Social Influences, Social Meaning and Deterrence*, 83 *Va. L. Rev.* 349, 369 (1997).

Numerous experiments with a Prisoner's Dilemma game with repeated play in a population of at least 8 to 10 players show that the players will cooperate if they believe that most other players are cooperating.¹⁹ These experimental results are consistent with the importance placed on the norm of reciprocity in instilling cooperation throughout a society.²⁰ Similarly, mutual trust in the cooperation of others has a strong effect on the overall level of cooperation in a society.²¹

These studies lead to the second important principle: people will "follow what others do." Some cognitive scientists believe that this "follow others" principle is often the basis for choosing one action over another to resolve a moral dilemma.²² Just as people will cooperate if they see that cooperation is the prevalent course, people have a tendency to be law-abiding if they observe others adhering to the law. Consequently, one of the goals of a society should be to establish rule of law norms in a sizeable percentage of the population, in order to induce others to follow along, making for a more law abiding society overall.

¹⁹ Gary Miller, *Managerial Dilemmas: The Political Economy of Hierarchy* 187-188 (1992); Diana Richards, *Reciprocity and Shared Knowledge Structure in the Prisoner's Dilemma Game*, 45 *J. Conflict Resolution* 621, 621 (2001); Bjorn Lomborg, *Nucleus and Shield: The Evolution of Social Structure in Iterated Prisoner's Dilemma* 61 *Am. Sociological Rev.* 278, 307 (1996).

²⁰ Anthropologists and evolutionary psychologists note that all societies have norms based on conditional cooperation. Diana Richards, *Reciprocity and Shared Knowledge Structure in the Iterated Prisoner's Dilemma Game*, 45 *J. Conflict Resolution* 621, 621 (2001).

²¹ Gary Miller, *Managerial Dilemma* 186 (1992); Toshio Yamagushi & Karen S. Cook, *Generalized Exchange and Social Dilemmas*, 56 *Social Psy. Q.* 235-248 (1993).

²² See, e.g., Gerd Gigerenzer, *Gut Feelings: The Intelligence of the Unconscious* 182 (2007).

The third lesson of the behavioral experiments is the importance of “respected authority.” Studies show that people are more likely to exhibit other-regarding behavior when they believe that those preferences enjoy the support of a “respected authority.”²³ Experimental games show the influence of the person who controls the game. For example, in social dilemma games, the players will tend to cooperate if instructed to do so, and they will defect if told to. Even hints can have this effect. Experiments with the Contribution Game show that more players will cooperate if they are told that they are playing the “Community Game,” while more will defect if they are told that they are playing the “Wall Street Game.”²⁴ This happens because the controller of an experimental game is an important authority for the players of the game. The same happens in the real world. To many, the President of the United States is a respected authority whose pronouncements carry great weight. That is why so many people were willing to trust President Bush’s pursuit of war in Iraq, and why so many follow “their President” regardless of the President’s policies. Likewise, many people view the courts as respected authority whose

²³ Lynn A. Stout, *Social Norms and Other-Regarding Preferences*, in *Norms and the Law* 13, 32 (John N. Drobak, ed., 2006). This is consistent with business studies that emphasize the importance of leaders who instill trust in their workers and teams. Gary Miller, *Managerial Dilemmas: Political Leadership in Hierarchies*, in *The Limits of Rationality* 324, ___ (Karen Cook and Margaret Levi, eds., 1990); Ellen M. Whitener, *Managers as Initiators of Trust: An Exchange Relationship Framework for Understanding Managerial Trustworthy Behavior*, 23 *Academy of Management Behavior* 513, 513 (1998); William T. Bianco & Robert H. Bates, *Cooperation by Design: Leadership, Structure and Collective Dilemmas*, 84 *Am. Pol. Sci. Rev.* 133, 144 (1990). Cf. Elliot Aronson, Judith Turner and J. Merrill Carlsmith, *Communicator Credibility and Communication Discrepancy as Determinants of Opinion Change*, 67 *J. Abnormal & Social Psychology* 31 (1963) (more credible communicators are more apt to influence opinion).

²⁴ Margaret M. Blair and Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 *U. Pa. L. Rev.* 1735, 1770 (2001). In a Contribution Game, the players are given an amount of money (say \$20) and told that they may put all or some of that money into the pot. After the pot is doubled, the money in the pot is divided equally among all the players. If no one else defects, the best strategy is to contribute nothing to the pot and

decisions guide the conduct of people, businesses, and governments. This is especially true of the United States Supreme Court, which seems to have near oracle status in our society.

These descriptions about norms and human behavior are, of course, generalizations. Not every person responds the same way to the same influences. Some people may learn civic traits by participating in social clubs; others will not. The same holds for the degree to which people are influenced by reciprocity or the views of respected authority. There must be some type of distribution of cooperative norms in any population, with some people at one end always cooperating and some people at the other end always defecting. Plus, the distribution of these personality traits probably varies across the populations of different countries. All of this makes it difficult to make definitive statements about what can be done to make a society more accepting of the rule of law. Nonetheless, there are some aspects of society in general – and of the judiciary in particular – that are closely related to rule of law norms.

Even though this chapter considers the importance of a regime that leads people willingly to comply with the law, it should be clear that a regime based on willing compliance also depends on enforcement and sanctions. Self compliance will break down in a society composed of a substantial number of law breakers who permeate society. There are some people in every society who will act in their own self-interest and take advantage of others, regardless of the

receive a share of the doubled amount of what the others contributed. If others will defect, the best strategy is for all

influences described above. These are the rebels, the bandits, and the terrorists of a society. The only way these people can be made to comply with the law is through an effective criminal and civil law system (which includes the laws themselves, as well as effective enforcement). Special deterrence is designed to hinder the lawbreakers from repeating their criminal conduct. What is more important, however, is the general deterrence of criminal and civil law, by which the punishment of wrongdoers acts as an incentive for others to abide by the law.²⁵ Every society has people who would cheat, renege on obligations, and generally take advantage of others if they thought they would not be punished. As a result, punishment of some deters many of those who would be otherwise be predisposed to violate the law. General deterrence is an important effect, because if more people violate the laws when they observe a lack of enforcement, even more people will join the law breakers. This is another consequence of the “follow others” rule.

To give an example of this phenomenon, consider driving above the speed limit on a highway. Thirty years ago, the actual speed limit was enforced by police at 5 mph above the posted speed limit. As the police began to decrease their enforcement of speed limits (in some areas even eventually diminishing to non-enforcement), people began to drive 10-20 mph above the speed limit and to drive more recklessly. Without enforcement, this type of driving should be expected. Drivers observe other drivers’ conduct and view this driving as the acceptable norm. In

players to contribute all their money to the pot.

a way, driving on many highways has reached a new equilibrium based on unregulated conduct because drivers follow what other drivers do. The lesson is that there must be some enforcement of the law to maintain law-abiding behavior. It is within this regime of some law enforcement that norms can induce a large majority of people to adhere to legal requirements.

The greater the number of people who comply willingly with the law the better off a society. Self-regulation is more efficient than enforcement. If people choose not to steal from or to defraud others, if people willingly abide by their contracts, the fewer the resources that are needed to run a legal system.²⁶ More important than efficiency, the degree of freedom is greater in a society built on cooperation rather than on coercion. Similarly, there is more fear in a society in which coercion is needed to assure compliance with the law. As a consequence, rule of law norms lead to a better society.

Courts are important to the creation and reinforcement of rule of law norms. They perform an educational function in their identification of desirable conduct. They give public meaning to bare legal standards like due process of law. Their pronouncements are taught in schools, publicized in the media and discussed in society. Courts have a “great capacity to exercise moral leadership. As Eugene V. Rostrow once remarked of the United States Supreme

²⁵ Lawrence M. Friedman, *American Law 208* (20XX). Russell Hardin, *The Social Evolution of Cooperation*, in *The Limits of Rationality XX, YY* (Karen Cook & Margaret Levi, eds. 1990).

²⁶ First-party (self) enforcement of obligation is always less costly than third-party (government) enforcement. Cite to R. Richter and Claude Menard.

Court, a high court is an educational body, and its members are inevitably teachers in a great and vital national seminar.”²⁷ This “expressive function” of the courts motivates people through non-punitive methods.²⁸ For example, Richard McAdams sees this aspect of the law as changing “behavior by signaling the underlying attitudes of a community,”²⁹ while Larry Lessig concludes that expressive law is powerful enough at times to change social norms.³⁰ Regardless of the mechanisms at work in particular situations, the expressive function of the law is a powerful complement to coercive law.³¹

²⁷ Vojtech Cepl and Mark Gillis, “Making Amends After Communism,” 7 J. of Democracy 118, 123 (1996); see Ralph Lerner, “The Supreme Court as Republican Schoolmaster,” *Supreme Court Review*, 1967, pp. 12, Maggie Wittlin, *Buckling Under Pressure: An Empirical Test of the Expressive Effects of Law*, 28 *Yale J. Reg.* 419, 420 (2011) (the law can “make statements expressing values, and that these statements can affect behavior”).

²⁸ See Robert Cooter, *Expressive Law and Economics*, 23 *J. Legal Stud.* 585, 585-586 (1998); Cass R. Sunstein, *On the Expressive Function of the Law*, 144 *U. Pa. L. Rev.* 2021, 2028 (1996); Christopher L. Eisgruber, *Is the Supreme Court an Educational Institution*, 67 *N.Y.U. L. Rev.* 961, 964 (1992). See also Richard McAdams, “An Attitudinal Theory of Expressive Law”, 79 *Or. L. Rev.* 339 (2000) (“various economic theorists [have suggested] that law affects behavior “expressively” by what it says rather than by what it does.”); Brandon L. Bartels and Diana C. Mutz, “Explaining Processes of Institutional Opinion Leadership”, 71 *J. Politics* 219, 249 (2009) (“[T]he Court is more influential than Congress in using its institutional credibility to move opinion, and it can do so fairly unconditionally”); Jason Mazzone, “When Courts Speak: Social Capital and Law’s Expressive Function,” 49 *Syr. L. Rev.* 1039, 1042 (1999) (“[C]ourts often play a crucial role in generating and advancing debate over important social issues.”); Patricia Funk, “Is There An Expressive Function of Law? An Empirical Analysis of Voting Laws with Symbolic Fines,” 9 *Am. L. & Econ. Rev.* 135 (2007) (finding support for the existence of an expressive function of law by empirically examining Swiss election turnout.); Stoutenborough, Haider-Markel, and Allen: “Reassessing the Impact of Supreme Court Decisions on Public Opinion: Gay Civil Rights Cases,” 59 *Political Research Q.* 419, 428 (2006) (“Our results endorse the contention that Supreme Court decisions can influence public opinion in the area of gay civil rights.”).

²⁹ Richard McAdams, *An Attitudinal Theory of Expressive Law*, 79 *OR. L. REV.* 339, 340 (2000).

³⁰ Lawrence Lessig, *Social Meaning and Social Norms*, 144 *U. PENN. L. REV.* 2181, 2186-87 (1996) (legislation barring dueling had this effect).

³¹ Some scholars have argued that social norms influence behavior by imposing non-pecuniary costs. For example, a newly established norm barring littering will impose a new burden on individuals who, in the absence of the norm, would litter. Robert Cooter, *Expressive Law and Economics*, 27 *J. LEGAL STUD.* 585, 603-605 (1998). For norms that involve public conduct and impose minimal costs, “social benefits such as praise and esteem . . . may offset the costs of obeying.” Maggie Wittlin, *Buckling Under Pressure: An Empirical of the Expressive Effects of Law*, 28 *Yale J. Reg.* 419, 426 (2011). This influence can cause an individual to become accustomed to complying with the norm. After getting used to the new norm, the individual might alter his preferences. This would then lead to the individual seeking to comply not for the social benefits but simply because the individual prefers compliance as a

The influence of the courts is strong because, as explained above, most people do what they see others do. If a significant portion of the public believes in the importance of what the courts say, other people will be prone to believe likewise. So the courts' influence spreads through society. These conclusions, however, are premised on the courts being perceived as a branch of government that should be believed. To phrase it another way, courts must be viewed to be a legitimate branch of government if they are to have the type of influence described in this chapter. They must be "respected authority."

Chapter 3 - Judicial Legitimacy

(Draft September 29, 2011)

Normative legitimacy of a government is different than sociological legitimacy. The former requires "conditions under which a government has the right to make and enforce laws for a particular population."³² We can disagree what those conditions are, but they include particulars like: "that the content of the laws be just; that the deliberation and publicity surrounding the law be fair and open; and that the form of government under which those laws were passed be open to the consent of the people."³³ Unlike normative legitimacy, sociological

strictly personal matter. Robert Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 ORE. L. REV. 1 (2000).

³² Andrew Rehfeld, *The Concept of Constituency: Political Representation, Democratic Legitimacy, and Institutional Design* 13 (2005).

³³ *Id.* at 14.

legitimacy describes whether a population approves of a government without assessing the correctness of this approval. As Richard Fallon has explained:

When legitimacy is measured in sociological terms, a constitutional regime, governmental institution, or official decision possesses legitimacy in a *strong* sense insofar as the relevant public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward. The sociological usage traces to Max Weber. For Weber, legitimacy numbered among several foundations of political authority. “Legal legitimacy,” he thought, played the foremost role in explaining the generally law-abiding character of modern states. In the Weberian sense, legitimacy signifies an active belief by citizens, whether warranted or not, that particular claims to authority deserve respect or obedience for reasons not restricted to self-interest.³⁴ Normative and sociological legitimacy are distinct concepts. It is possible for an

illegitimate government to be perceived by the populous as legitimate. Germany under Hitler and Libya under Gaddafi are two examples of an illegitimate government that was sociologically legitimate. Although the concepts are distinct, a government that is normatively legitimate is more likely to be perceived as legitimate. Any study of sociological legitimacy is compounded by the separate notion of compliance with the law, without reference to beliefs or perceptions. When we observe people complying with laws, we cannot tell if they are doing so out of a perception that the legal system is legitimate, as a result of some form of coercion, or for other reason. Tom Tyler notes a similar dichotomy: a commitment “through personal morality means obeying a law because one feels the law is just,” while commitment “through legitimacy means obeying a law because one feels that the authority enforcing the law has the right to dictate

behavior.”³⁵ However, when we observe someone following the law, we cannot tell if they are doing so out of personal morality, as a result of a belief in legitimacy, or some combination of the two.

The intertwining of normative legitimacy, sociological legitimacy, and the various reasons for compliance with the law affects the surveys used to study the public’s views of the courts. People who answer surveys about the courts may conflate normative and sociological legitimacy or may assume that their tendency to follow the law comes only from the perception of legitimacy. Even though the surveys have these defects, they are the best information we have about the public’s attitudes toward the courts.

This chapter is concerned only with the sociological legitimacy of the courts, not with normative legitimacy. To the extent compliance with the law is relevant, this chapter is concerned only with compliance that results, at least in part, from a perception of the legitimacy of the court system.

A society’s belief in the legitimacy of its courts is far from unshakable. Much of what people know is learned from other people. We begin to learn from our parents in infancy, we learn from our teachers, and we spend our lives learning from others. For the most part, we trust the people who teach us, so we believe them without any need for verification. Of course there

³⁴ Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 *Harv. L. Rev.* 1787, 1795 (2005) (footnotes omitted). Fallon distinguishes two other forms of sociological legitimacy from legitimacy: as a legal concept and as a moral concept.

³⁵ Tom R. Tyler, *Why People Follow the Law: Procedural Justice, Legitimacy, and Compliance* 4 (1990).

is knowledge gained directly from our senses. No one needs to teach us that the sun is in the sky every day. Most of what we know of the physical world is verifiable by testing; historical facts can be supported by contemporaneous records. Yet most of us believe that the earth revolves around the sun even though we have not performed any experiments to verify that conclusion. Similarly, we believe that George Washington was the first President of the United States without examining any historical documents. This knowledge is part of the culture that is passed on from generation to generation. We believe it firmly, even if a few outliers try to convince us otherwise. There is another type of knowledge, however, that is not verifiable nor clearly supported by historical record. Some theories about how the world operates are strongly accepted by experts; yet they appear to many people to be only opinion. This type of knowledge is more susceptible to be changed by contrary opinion in the minds of some people notwithstanding what experts say. The disbelief in the theory of evolution is one example of this.

The importance of the rule of law in the United States and the unique role played by the court system in our form of governance is part of our cultural heritage. Virtually all experts believe that judges are not politicians and that the judiciary is not a political branch of government. Of course, scholars recognize political aspects to judicial decisionmaking, but they know it is tiny when compared to the politics involved in the legislative and executive branches. Nonetheless, there are influential people who claim that judges are politicians. A belief throughout society that the judiciary is a legitimate, non-political branch of government is essential to a system based on the rule of law. Yet, that belief is an “opinion” in the sense described above and is therefore susceptible to being changed. Therein lies the danger.

This chapter is about the ways that people learn of the legitimacy of the judiciary in the United States. It ends by examining the ways some politicians, scholars, and members of the media undermine that belief.

To assess the relationship between public opinion and the acceptance of rule of law norms, a good starting point would be an examination of the public's perception of the legitimacy of the legal system in general.³⁶ Naturally, people learn and experience the law from the many participants in the legal system. In criminal matters, to the extent people associate the police with the legal system (probably a not uncommon phenomenon), legitimacy of a legal regime also hinges on the quality of law enforcement.³⁷ To the extent people do distinguish between the police and courts, the actions of the police have little relevance. In another sense, it would be desirable to focus on the legitimacy of the entire system of courts in the United States, asking whether people perceive the judiciary to be legitimate. However, most of the relevant research concerns the United States Supreme Court, not other courts. As a result, this chapter for the most part examines the public's perception of the Supreme Court. Focusing on the Supreme Court alone in most instances should be adequate for analyzing judicial legitimacy. Unless someone has participated in lower court proceedings, most people will usually think of the

³⁶ Compare Frank J. Michelman, *Is the Constitution a Contract for Legitimacy?* 8 *Rev. Const. Stud.* 101, 105 (2003) (the only meaningful questions of moral legitimacy concern the legal system as a whole), with Richard H. Fallon, Jr., *Legitimacy and the Constitution* 1787, 1811 (2005) (rejecting Michelman's position because "it forecloses all but the most holistic inquiries into moral legitimacy").

³⁷ Tom R. Tyler and Yuen J. Huo, *Trust in the Law. Encouraging Public Cooperation with the Police and the Courts* (2002).

Supreme Court when they consider the legitimacy of courts. Plus, many people will just assume that their beliefs about the Supreme Court hold for other courts. Finally, because the Court is known for decisions on controversial topics, it is the court most open to claims of illegitimacy. As a result, the public's perception of the legitimacy of the Supreme Court is a fair indicator that courts in general are perceived to be legitimate.

Many of the studies of public attitudes toward the Supreme Court are based on a model developed by David Easton, which distinguishes between "diffuse" and "specific" support of a government body.³⁸ Easton explained diffuse support to be "a reservoir of favorable attitudes or good will that helps members to accept or to tolerate outputs to which they are opposed or the effects of which they see as damaging to their wants."³⁹ As Walter Murphy eloquently explained: "This more catholic support helps a polity ride out most of the domestic crises generated by frustrated demands, allowing the system or its institutions, as Lear would put it, to 'bide the pelting of this pitiless storm.'"⁴⁰ On the other hand, specific support for a government body

³⁸ See David Easton, *A Systems Analysis of Political Life* 273 (1965); David Easton, *A Re-Assessment of the Concept of Political Support*, 5 *British J. Pol. Sci.* 4, 435 (1975); James L. Gibson, *The Legitimacy of the Supreme Court in a Polarized Polity*, XX *J. Empirical Legal Studies* YY, 5-6 (2007); Walter F. Murphy & Joseph Tanenhaus, *Publicity, Public Opinion, and the Court*, 84 *Nw.U.L. Rev.* 985, 992-993 (1990).

³⁹ David Easton, *A System Analysis of Political Life* 273 (1965).

⁴⁰ Walter F. Murphy & Joseph Tanenhaus, *Publicity, Public Opinion, and the Court*, 84 *Nw. U. L. Rev.* 985, 994 (1990), quoting W. Shakespeare, *King Lear*, act. III, sc. 4, l. 29 (J. Wilson ed. 1981) (1608).

arises from agreement with its policies and decisions. Easton explained specific support as “a quid pro quo for the fulfillment of demands.”⁴¹

Numerous surveys of the public show that the Supreme Court as an institution enjoys a high level of diffuse support among the American people.⁴² In one of his more recent studies, James Gibson concluded that attitudes toward the Court are not significantly affected by ideological predispositions or political party affiliation.⁴³ He also observed “a fairly strong relationship between support for democratic institutions and processes and loyalty toward the Supreme Court.”⁴⁴ In addition, his study showed that the more people know about the Court, the more favorably predisposed they are toward the Court.⁴⁵ Gibson explains this relationship as follows:

Attentiveness to the institution is associated with knowledge of its structure and function, but also with exposure to the legitimizing symbols to 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 institutions.⁴⁶

⁴¹ David Easton, *A Systems Analysis of Political Life* 249 (1965).

⁴² James L. Gibson, *The Legitimacy of the United States Supreme Court in a Polarized Polity*, XX J. Empirical Studies YY, ZZ (2007); Gregory A. Caldeira & James L. Gibson, *The Etiology of Support for the Supreme Court*, 36 Am. J. Pol. Science 635, XXX (1992); Walter F. Murphy & Joseph Tanenhaus, *Publicity, Public Opinion, and the Court*, 84 Nw. U. L. Rev. 985, XXX (1990). [other citations to follow.]

⁴³ James L. Gibson, *The Legitimacy of the United States Supreme Court in a Polarized Polity*, XX J. Empirical Studies YY, ZZ (2007) (p. 18 of paper).

⁴⁴ *Id.* at [p. 22 of paper]. See Walter F. Murphy and Joseph Tanenhaus, *Publicity, Public Opinion, and the Court*, 84 Nw. U. L. Rev. 985, 1019 (1990).

⁴⁵ *Id.* at [p. 21 of paper].

⁴⁶ *Id.*

Not surprisingly, the surveys demonstrate that the public's understanding of the Supreme Court is rudimentary.⁴⁷ However, one finding in the aftermath of the Supreme Court's decision in Bush v. Gore⁴⁸ is striking. According to a survey by Gibson, Caldeira, and Spense, diffuse support for the Supreme Court increased significantly after that decision, notwithstanding the strong criticism by many legal scholars that the Supreme Court acted illegitimately in that case.⁴⁹ This result cannot be explained by party affiliation nor by the public's understanding of the sophisticated legal issues in the case. Rather, the survey authors hypothesize that the well-publicized controversy motivated ordinary citizens "to pay attention to the U.S. Supreme Court—when their attitudes come out of hibernation."⁵⁰ Since most people are predisposed to support the Court, increased attention to the Court raised its level of legitimacy.⁵¹

⁴⁷ In a recent paper, Gibson and Caldeira show that the public's knowledge is much greater than previously thought. James L. Gibson and Gregory A. Caldeira, *Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court*, 71 *J. Pol.* 429 (2009). However, even this greater state of knowledge is basic and unsophisticated.
⁴⁸ 531 U.S. 98 (2000).

⁴⁹ Gibson and Caldeira explain this rise in support of the Court after Bush v. Gore with their theory of "positivity" bias as follows:

- [w]hen ordinary citizens become motivated to pay attention to the U.S. Supreme Court—when their attitudes come out of hibernation—they approach the context with preexisting beliefs about law and politics. Some have in the past developed strong loyalty to judicial institutions, a loyalty that makes them particularly receptive to the legitimizing judicial symbols that envelope any event or controversy attracting the attention of the mass media. These citizens may initially pay attention to the court out of dissatisfaction and displeasure. But, because they are susceptible to (predisposed to) the influence of strong legitimizing legal symbols, they tend to wind up accepting the argument that courts are different from other political institutions and that "politics" plays a limited role in the judicial process. Suspicions about partisan and ideological influences on legal processes are dispelled, owing to the frame created by standing commitments to the Court. In this bias we see the powerful influence of institutional legitimacy: To the extent that an institution has built a loyal constituency, it possesses a "reservoir of goodwill" that allows it to "get away with" unpopular decisions. This is precisely what Gibson, Caldeira, and Spence argue happened in the fabled *Bush v. Gore*.

⁵⁰ James L. Gibson, Gregory A. Caldeira, and Lester K. Spense, *The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?* 33 *Brit. J. Pol. Sci.* 535 (2003). See Richard H. Fallon, Jr.,

These studies of the public show the gulf between ordinary citizens and legal professionals when it comes to assessing the work of the Supreme Court. Although it may seem strange to many of us who spend our life with the law, most people really do not care much about courts (including the Supreme Court). People are more interested in their families, religion, sports, hobbies, and the other aspects of ordinary life. It is normal human nature to care more about a reality television personality than a Supreme Court Justice. The vast majority of the ordinary public has a casual understanding of and interest in the legal system. Walter Lippman reminded us in *The Phantom Public*, a book published more than 75 years ago, that most people are too busy with the routine needs of life to have the time to become educated about political issues.⁵² This is true not just about politics and governance in general, but also about the work of the courts. There are a few legal issues that interest some of the members of the ordinary public (such as the right to bear arms or the right to a same-sex marriage), and there are times of great public moment (like the dispute over the Florida election results between George Bush and Al Gore) when they pay more attention to the courts. However, to the general public, courts are usually just part of the background noise of their lives. On the other hand, there are people who

Legitimacy and the Constitution, 118 Harv. L. Rev. 1787, 1816 (2005) (“Bush v. Gore attracted a swarm of allegations of illegitimacy.”)

⁵¹ James Gibson and Gregory Caldeira, Confirmation Politics and the Legitimacy of the U.S. Supreme Court: Institutional Loyalty, Positivity Bias, and the Alito Nomination, 53 Am. J. Pol. Sci. 139, 140 (2009).

⁵² Walter Lippman, *The Phantom Public* 24-27 (193X). Richard Fallon gently refers to “the public’s relative lack of attentiveness.” Richard H. Fallon, Jr., Legitimacy and the Constitution, 118 Harv. L. Rev. 1787, 1830 (2005). See

are not legal professionals but are nonetheless educated and interested in the work of the courts.

These members of the educated public understand not only the work of the courts but also the historical and political context of court decisions. Of course, there are people who fit between these two extremes. The public likely ranges across a continuum of interest in and knowledge of the courts. These differences among people mean that some factors will be more effective in creating a perception of legitimacy in some people than in others.

I. Sources of Judicial Legitimacy

With more than 300 million people in the United States, it is impossible to explain with any degree of certainty what factors actually induce most people to perceive the courts as legitimate. Many different people are influenced by many different factors, most by a combination of numerous factors. Plus, it is difficult to disaggregate the various factors that influence someone. Consequently, any assessment of the sources of the public's perception of the legitimacy of the courts will be imprecise and tentative. Nonetheless there are some sources of legitimacy that appear to be the most influential for a sizeable portion of the population, including even those who know or care little about the courts.

Many people view the courts as legitimate because that notion is part of the cultural heritage passed down from generation to generation in our country. Judicial legitimacy has

also Walter F. Murphy and Joseph Tanenhaus, Publicity, Public Opinion, and the Court, 84 Nw.U.L. Rev. 985, 990

become so firmly entrenched by over 200 years of experience with courts in the United States that it is now part of what people throughout the world know to be the American form of government. One generation passes on to the next not only the laws and other institutions that structure a society, but also the beliefs we hold about how a society operates. We pass on these beliefs through many forms of education — parents, formal schooling, peers, the media, and so on. This process of passing on the cultural heritage through education is what makes the curriculum in high school and college, directed at students in their formative years, so important to judicial legitimacy.

Many people will also be prone to view the courts as legitimate simply because the courts are part of a government that they find legitimate. In a sense, judicial legitimacy is a by-product of a legitimate government. There may be endless reasons for the public's belief in the legitimacy of government, such as a commitment to democracy, political tolerance, or an orientation toward liberty, but that acceptance of government leads to judicial legitimacy.⁵³ The

(small portion of public have sophisticated understanding of Court.)

⁵³ See James L. Gibson and Gregory A. Caldeira, *Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court*, 71 *J. Politics* 429, 437 (2009) (support for the Court “is a function of (1) broader support for democratic institutions and processes, including support for the rule of law, a multiparty system, political tolerance, and the relative value assigned to social order versus individual liberty”); Gregory A. Caldeira and James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 *Am. J. Pol. Sci.* 635, 658 (1992). To take one perspective, there are a wide range of philosophical underpinnings of government legitimacy. For example, some philosophers argue that a government is legitimate if the rulers are ethical and promote fairness and justice throughout society (e.g., Plato), if the government allows its citizens to reach their full potential and promotes such things as wealth, liberty and comfort (e.g., Aristotle), if the government ensures impartial justice that grants citizens the right to life, liberty, and protection of property (e.g., Locke), if a government provides basic political rights to its citizens in a structure limited by constitutional checks (e.g. Mill), or if political power is exercised in accordance

United States has enjoyed over two centuries of peaceful acceptance of our form of government, save for the Civil War, so one would expect a belief in the legitimacy of courts to follow.

Social psychological research shows that three characteristics lead to legitimacy: power, expertise and trustworthiness.⁵⁴ These are obvious characteristics of courts. Everyone knows that judges can order the execution of people in some states, send people to jail and make them pay fines in criminal cases, and order parties to pay billions of dollars in civil lawsuits. It is hard to conceive of other institutions, whether public or private, more powerful than that. Similarly, the public must view courts to have a special expertise, since they routinely resolve seemingly complex legal issues.⁵⁵ People know that law practice requires special training and examination and that judges are generally experienced lawyers. Finally, trustworthiness is important because systemic corruption erodes legitimacy. Lawrence Friedman has written that courts need to be independent of political control and impartial in their treatment of the parties.⁵⁶ Bribery is a rare problem in the judiciary in the United States, so the occasional instances do not undermine the general perception of trustworthy courts. (Some countries have a more difficult task in policing

with a constitution, guidelines, and values, “the essentials of which all citizens, as reasonable and rationale, can endorse in light of their common human reason” (John Rawls, *Justice as Fairness: A Restatement* 6 919XX)).

⁵⁴ 2 *Taxpayer Compliance* 215-16 (Jeffrey Roth, John Scholz and Ann White eds (19XX); Lindsey & Aronson, 2 *The Handbook of Social Psychology* 489 (1985); Stanley Milgram, *The Individual in a Social World: Essays & Experiments* 102 (19XX). See also Walter F. Murphy and Joseph Tanenhaus, *Publicity, Public Opinion, and the Court*, 84 *Nw. U. L. Rev.* 985, 1006-1007 (1990) (importance of trust in the Supreme Court), Michael J. Petrick, *The Supreme Court and Authority Acceptance*, 18 *W. Pol. Quarterly* 5, 11 (1968).

⁵⁵ See Barry Friedman, *Mediated Popular Constitutionalism*, 101 *Mich. L. Rev.* 2596, 2632 (2003) (decisions are obscure and complicated to public); Michael J. Patrick, *The Supreme Court and Authority Acceptance*, 21 *W. Pol. Q.* 5, 11 (1968) (expertise).

judicial corruption than the United States. Our large size and federal structure results in government officials usually prosecuting judges who are strangers to them. In some countries, the prosecutors and judges are university classmates, professional acquaintances, and sometimes even friends. Those personal relationships can hinder investigations into corruption.)

There is a body of scholarship supporting procedural justice as a central factor in judicial legitimacy.⁵⁷ Procedural justice is “concerned with the means by which social groups (including governments, private institutions, and families) apply the requirements of corrective and distributive justice to particular cases . . . A conception of procedural justice specifies the conditions under which the application of the norms of corrective justice to particular cases is *fair*.”⁵⁸ Tom Tyler, who has written extensively on procedural justice in both law and social psychology journals, also stresses the importance of fairness: “Considerable evidence suggests that the key factor shaping public behavior is the fairness of the processes legal authorities use when dealing with members of the public.”⁵⁹ In order for participation to establish legitimacy, however, it must be meaningful. Fair processes “must go beyond the mere willingness to ‘hear’ a

⁵⁶ Lawrence M. Friedman, in *Norms and the Law* XX, YY (John N. Drobak ed., 2006).

⁵⁷ See, e.g., John Thibaut and ___ Walker, *Procedural Justice: A Psychological Analysis* (197X); Lawrence M. Friedman, *American Law* 221-222 (20XX); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004); John M. Scheb and William Lyons, *Judicial Behavior and Public Opinion: Popular Expectations Regarding Factors that Influence Supreme Court Decisions*, 23 *Pol. Behavior* 181-194 (2001).

⁵⁸ Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 208 (2004).

⁵⁹ Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 *CRIME AND JUSTICE* 283, 283 (2003). See also *id.* At 300-01 (“Taken together, these findings suggest some key elements in a procedure that will be generally viewed as being fair. Those elements are that decision making is viewed as being neutral, consistent, rule-based, and without bias; that people are treated with dignity and respect and their rights are acknowledged; and

party in the literal sense, it must achieve ‘fairness’ in the sense of a willingness to weigh the arguments.”⁶⁰ People must believe that the decisionmaker pays attention to their evidence and arguments and uses them in reaching a decision.⁶¹ Based on a series of studies of the interaction between procedural fairness and trust in authority, David De Cremer and Tom Tyler found that procedural fairness has its greatest impact on cooperation when people are dealing with authorities in whom they trust.⁶² The most important finding of the studies, according to the authors, was that “the effect of procedural fairness emerged primarily when trust in the authority was high.”⁶³ Thus, procedural fairness “had a positive effect on cooperation when the authority was trustworthy but not when the authority was not trustworthy.”⁶⁴

If these conclusions are valid, the notion of procedural justice should enhance the legitimacy of the courts in general. For the most part, courts are trustworthy authority that provide fair procedures to litigants. However, in response to studies that show some correlation between the public’s views of Supreme Court procedure and legitimacy, James Gibson expresses some skepticism:

But to me it is not very likely that citizens develop their positions on the legitimacy of remote political and legal institutions on the basis of their

that they have an opportunity to participate in the situation by explaining their perspective and indicating their views about how problems should be resolved.”)

⁶⁰ Paul G. Chevigny, *Fairness and Participation*, 64 N.Y.U. L. Rev. 1211, 1212 (1989).

⁶¹ David De Cremer & Tom R. Tyler, *The Effects of Trust in Authority and Procedural Fairness on Cooperation*, 92 APPLIED PSYCHOLOGY 639, 640 (2007).

⁶² *Id.* at 648.

⁶³ *Id.* at 646.

⁶⁴ *Id.*

perceptions of whether the decisionmakers in those institutions consider all sides to an issue, give everyone an opportunity to express her or his views, etc. Indeed, I consider it far more likely that views on the legitimacy of an institution reflect childhood socialization experiences and fundamental political values as well as accumulated satisfaction or dissatisfaction with the institution's policy outputs.⁶⁵

Others have criticized the conclusion of the procedural justice proponents for overlooking the importance of the outcomes to the litigants. Regardless of this debate, it is highly likely that the perception of fair procedural treatment of litigants has some influence on the legitimacy of courts.

A. The Effects of Secondary Education

One of the most effective ways to cultivate respect for the courts is through education from high school through college.⁶⁶ There are copious studies of civic education in high school, many of which attempt to assess the relationships between education and civic knowledge and political attitudes in adulthood. Although the surveys are only rough measures and subject to considerable disagreement on some effects, there is enough evidence to draw some plausible, tentative conclusions about a significant effect on diffuse support for the Supreme Court. In general, secondary education paints an extremely positive picture of the Supreme Court, by emphasizing that the Court protects individual rights and that Justices are above politics. Often

⁶⁵ James L. Gibson, *Institutional Legitimacy, Procedural Justice, and Compliance with Supreme Court Decisions: A Question of Causality*, 25 *Law & Soc'y Rev.* 631, 632-33 (1991). See also James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 *Law & Soc'y Rev.* 469 (1989); Tom R. Tyler and Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 *Law & Soc'y Rev.* 621 (1991).

the Court is depicted as part of a racist society when it decided *Plessy v. Ferguson*, but then redeemed itself in *Brown v. Board of Education* and continued on that path since then. This story is true, but it simplifies the history of the Court and diminishes criticism. More importantly, it is a beneficial story because it helps establish the perception of the Supreme Court as legitimate.

While the exact statistical data varies from study to study, it is clear that the vast majority of high school students takes at least one civics, government, history or social studies class by graduation.⁶⁷ Although there is some evidence that the overall quality or quantity of this education may have declined,⁶⁸ it is highly likely most students are still receiving at least some level of civics education while in high school. To examine what was being taught about the

⁶⁶ See Gregory A. Calderia & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 Am. J. Pol. Sci. 635, 658 (1992) (“basic political attitudes toward the regime and its institutions reflect fundamental political values acquired through socialization during childhood”).

⁶⁷ See, e.g., Molly W. Andolina, Krista Jenkins, Cliff Zukin & Scott Keeter, *Habits from Home, Lessons from School: Influences on Youth Civic Engagement*, 36 POL. SCI. & POL. 275, 278 (2003) (“Nearly three-quarters (70%) of current high school students took a course that required them to pay attention to government, politics, or national issues in one of the two previous school years.”); Carole Hahn, *Citizenship Education: An Empirical Study of Policy, Practices and Outcomes*, 25 OXFORD REV. OF EDUC. 231, 236 (1999) (More than 75 percent of U.S. students take a course in “civics or government” before high school graduation. “Additionally, virtually all high school students have at least one year of US history that includes much political education.” (citing U.S. DEP’T OF EDUC., NAT’L CTR. FOR EDUC. STATISTICS, 1994 HIGH SCHOOL TRANSCRIPTS STUDY (1997))); MARY ELIZABETH OUTWATER, *THE EFFECT OF EDUCATION AND MEDIA COVERAGE ON PUBLIC OPINION OF THE SUPREME COURT AND CONGRESS* 23 (2004) (“More than half of the fifty states mandate that students take at least one civics course before they can graduate 12th grade.” (citing KENNETH W. TOLO, POLICY RESEARCH PROJECT ON CIVIC EDUC. POLICIES AND PRACTICES, *THE CIVIC EDUCATION OF PUBLIC YOUTH: FROM STATE POLICIES TO SCHOOL DISTRICT PRACTICES* (1999))).

⁶⁸ See, e.g., William A. Galston, *Civic Education and Political Participation*, 37 POL. SCI. & POL. 263, 264 (2004) (“According to *The Civic Mission of Schools*, a recent national report cosponsored by Carnegie Corporation of New York and the Center for Information and Research on Civic Learning and Engagement (CIRCLE), most high school civic education today comprises only a single government course, compared to the three courses in civics, democracy, and government that were common until the 1960s.”).

Supreme Court in these courses, two studies looked at the textbooks used in the classrooms.⁶⁹

The books serve as important measures of the curriculum because teachers are likely to use them as primary sources of information and for curriculum structure,⁷⁰ with the textbooks used an estimated 70 percent of class time.⁷¹ Reliance on textbooks is particularly likely because a large portion of teachers have limited experience or formal training for teaching the civics subject matter.⁷² Both studies showed that the Supreme Court makes up only a small portion of the overall curricula, likely compounded by the fact that specific coverage of the Court is often relegated to the end of course.⁷³

Although the amount of Supreme Court coverage varies from textbook to textbook and from classroom to classroom, several themes consistently appear to emerge and overlap. As to be

⁶⁹ Tom Donnelly, *Popular Constitutionalism, Civic Education, and the Stories We Tell Our Children*, 118 YALE L.J. 948, 972 (2009) (“Among American scholars, [text book analysis] is a standard method for determining the content of classroom instruction.” (citing Richard C. Remy, *Treatment of the Constitution in Civics and Government Textbooks in Teaching About the Constitution in American Secondary Schools* 107, 107 (Howard D. Mehlinger ed., 1981)); STEPHEN M. CALIENDO, *TEACHERS MATTER: THE TROUBLE WITH LEAVING POLITICAL EDUCATION TO THE COACHES* 62-63 (2000).

⁷⁰ “[M]ost school textbooks are the basis of ‘curriculum planning, course organization and day-to-day lesson planning.’” Donnelly, *supra* note 3, at 974 (citing Remy, *supra* note 3, at 107). “[H]igh school teachers still rely heavily upon textbooks for both homework assignments and the content of their classroom instruction.” *Id.* at 972 (citing Remy, *supra* note 3, at 107).

⁷¹ See Donnelly, *supra* note 3, at 974 (citing DAVID TYACK, *SEEKING COMMON GROUND: PUBLIC SCHOOLS IN A DIVERSE SOCIETY* 61 (2003)).

⁷² See, e.g., CALIENDO, *supra* note 4, at 3 (arguing that schools often assign “talented coaches” to teach social studies because there seems to be an assumption that unlike biology or calculus, teaching civics courses requires no specialized education); Donnelly, *supra* note 3, at 974 (“Fewer than half of high school history teachers majored or minored in history. The result is that these poorly trained instructors must lean heavily on the textbook--especially as novices.” (citing DIANE RAVITCH, *THOMAS B. FORDHAM INST., A CONSUMER'S GUIDE TO HIGH SCHOOL HISTORY TEXTBOOKS* 13 (2004), available at [http://www.edexcellence.net/doc/Historytextbooks\[02-06-04\].pdf](http://www.edexcellence.net/doc/Historytextbooks[02-06-04].pdf))). “In fact, it has become almost cliché to suggest that many high school social studies teachers are there because schools need some place to put the coaches. The reality however, does not much differ from the lore.” CALIENDO, *supra* note 4, at 55.

expected, history textbooks emphasize the Supreme Court as the final interpreter of the Constitution.⁷⁴ Furthermore, the books do little to acknowledge direct challenges to Supreme Court authority⁷⁵ or to consider whether any of the challenges may have had any legitimate bases.⁷⁶ Furthermore, during the past several decades, the textbooks have continued to shift closer to a view of Supreme Court judicial supremacy and away from alternative constitutional interpretation views like popular constitutionalism.⁷⁷ While the textbooks do discuss and legitimate some “subtler and longer-term methods of checking the Court,”⁷⁸ such as judicial nominations, including the Bork nomination,⁷⁹ other major public mobilizations against the

⁷³ See *id.*, at 59-62 (noting that while information about the Court may be included in discussions about the Executive or Legislative branches, an official unit on the Court is usually relegated to a “cursory review” near the end of the class, if covered at all).

⁷⁴ Donnelly, *supra* note 3, at 982-84; see also CALIENDO, *supra* note 4, at 73.

⁷⁵ “Today’s textbooks consistently describe the Court as the final interpreter of the Constitution,” Donnelly, *supra* note 3, at 984, and only “a few of these incidents [of popular resistance to the Court] are consistently included in contemporary textbooks,” *id.* at 985.

⁷⁶ Only one contemporary textbook addresses the impeachment of Justice Samuel Chase, with most largely focusing on Jefferson’s judiciary challenges in *Marbury v. Madison*, which culminates with “the establishment of judicial review and a celebration of this famous case.” Donnelly, *supra* note 3, at 986-87. Accounts of *Worcester v. Georgia* “depict a powerful President [Jackson] staring down a powerless Court for [the] evil purpose” of displacing Native Americans. *Id.* at 988. Jackson’s veto of the Second Bank of the United States appears in every contemporary textbook, yet the books tend to focus on “Jackson’s personal background and ideological support for the common man,” focusing much less, if at all, on Jackson’s constitutional claims. *Id.* at 990-91. “President Franklin D. Roosevelt’s ‘court-packing’ scheme is mentioned by every contemporary textbook. Roosevelt mostly emerges from this episode as an overly political President, attempting to subvert the independence of the Court. . . . [and] [e]very contemporary account questions the legitimacy of President Roosevelt’s motives.” *Id.* at 992.

⁷⁷ See *id.* at 982-994 (noting a gradual shift toward judicial supremacy through accounts of several major Supreme Court decisions reported consistently in textbooks).

⁷⁸ *Id.* at 994.

⁷⁹ See *id.* at 996-97.

Court's authority are often either underemphasized⁸⁰ or vilified.⁸¹ Ultimately, the “Marbury myth” of judicial supremacy seems to appear consistently in contemporary textbooks.⁸²

Another theme consistently appearing in the discussions about the Court is its role regarding race, civil rights, and liberties.⁸³ Donnelly noted that after combining the Court-related content data from the eleven history textbooks analyzed, 67.3 total pages – 43.2% of the Court-focused content – featured race. This included discussions of segregation and desegregation (26.2% of content), slavery (9% of content) and affirmative action (8% of content).⁸⁴ Not surprisingly, three of the six cases appearing in all eleven textbooks were *Brown v. Board of Education*,⁸⁵ *Dred Scott v. Sandford*,⁸⁶ and *Plessy v. Ferguson*,⁸⁷ with the books “provid[ing] a redemptive narrative arc, as the Court moves from reinforcing slavery and racism in American

⁸⁰ See *id.* at 995-996 (noting that the books illustrate that “social movements often converge around controversial Court decisions” like *Roe v. Wade*, thus lending “recognition and legitimacy to these forms of norm contestation.”).

⁸¹ See *id.* at 997-999. The Southern reaction to *Brown* is “the clearest, most consistent, and most fully developed account of social mobilization in our contemporary textbooks.” *Id.* at 997. “What emerges from the account of *Brown* is the image of a heroic (and redeemed), but limited, Court – largely unable to quell the fire of racist resistance.” *Id.* at 998.

⁸² See *id.*, at 982-984. Some textbooks literally define judicial review as judicial supremacy. *Id.* at 982 “For instance, one textbook defines ‘judicial review’ as ‘[t]he role of the Supreme Court as the final authority on the meaning of the Constitution.’” (citing KENNETH JANDA, JEFFREY M. BERRY & JERRY GOLDMAN, *THE CHALLENGE OF DEMOCRACY: GOVERNMENT IN AMERICA* 321 (1994)). *Id.* Another says, “The Court, and not Congress, is the interpreter of the Constitution.” *Id.* at 982 (citing GERALD A. DANZER ET AL., *THE AMERICANS* 207 (2007)). Another asserted, “Of the greatest significance to the nation was whether the Supreme Court had the power to declare a law of the land unconstitutional,” and Chief Justice Marshall “answered that question with a resounding, epoch-making Yes!” *Id.* at 983 (citing DANIEL J. BOORSTIN & BROOKS MATHER KELLEY, *A HISTORY OF THE UNITED STATES* 191 (2005); see also WILLIAM DEVERELL & DEBORAH GRAY WHITE, *UNITED STATES HISTORY* 269 (2007) (“[Marbury] established the Court as the final authority on the Constitution.”); JESUS GARCIA ET AL., *CREATING AMERICA: A HISTORY OF THE UNITED STATES* 317 (2007) (“[Marbury] states that the Supreme Court has the final say in interpreting the Constitution.”)).

⁸³ See *id.*, at 977 (“Not surprisingly, race plays a central role in the Court’s story.”).

⁸⁴ *Id.* at 978.

⁸⁵ 347 U.S. 483 (1954).

⁸⁶ 60 U.S. 393 (1857).

society to pioneering equal rights for African Americans.”⁸⁸ In a broader context, the Court is regularly credited as “the defender of the Constitution and guarantor of rights and liberties.”⁸⁹

Finally, the Court is portrayed in a mythical, secretive and, arguably, less realistic fashion than the other branches of government. “[T]he Court’s near-anointed status is reinforced by the assertion that justices are not subject to the same pressures (and potential evils) as ‘politicians.’”⁹⁰ Unlike other politicians, justices are said to “interpret” or “apply” the law, not “make” it.⁹¹ And the process is different, because unlike elected politicians – whom high schoolers have been taught are pressured by interest groups, the electorate, other officials, party leaders, and other forces — students are told, however, that the process by which Supreme Court justices make decisions is more ‘rational,’ since they are ‘insulated’ from such pressure.”⁹² Furthermore, the Court’s secrecy is also emphasized, leading Stephen Caliendo to note, “If part of the Court’s legitimacy is perpetuated by its mystery, high school Government text books are

⁸⁷ 163 U.S. 537 (1896).

⁸⁸ Donnelly, *supra* note 3, at 978. “It is important to note that this canonical [redemptive race relations] narrative only emerges in the 1960s and early 1970s, in the wake of the *Brown* decision.” *Id.* at 979. *Dred Scott* and *Plessy* have, over time, emerged as “constitutional sin,” *id.* at 979-81, whereas the Court in *Brown* is characterized as heroic, often in stark contrast to the “evil Southern backlash,” *id.* at 981-82.

⁸⁹ CALIENDO, *supra* note 4, at 66. “Students primarily learn about the Court in high school Government class through applied material about the Constitution, the Bill of Rights, and other civil liberties and rights.” *Id.* at 59. “The very fact most teachers cover the Court primarily during the individual rights sections suggests that the Court is being portrayed as the guarantor of rights.” *Id.* at 62. Similarly, in her analysis of five widely-used college-level textbooks, Outwater found that “the most obvious difference in the treatment of [Congress and the Supreme Court] . . . is that the courts are painted as the defenders of democracy and freedom much more than Congress is.” OUTWATER, *supra* note 58, at 26.

⁹⁰ CALIENDO, *supra* note 4, at 74.

⁹¹ *Id.* at 74.

⁹² *Id.*

contributing greatly to the Court's objective."⁹³ And while books may emphasize the political nature of the Court by focusing on its central role in shaping public policy regarding civil rights and liberties⁹⁴ and by briefly describing the preferred ideology of individual justices,⁹⁵ "most books . . . do not focus on the political nature of the Court's actions,"⁹⁶ and point out that the Justices are not ordinary politicians.⁹⁷ The final message is that Justices "are inherently political beings, but they are not supposed to be, so they do everything they can to isolate themselves from the public and political pressure to maintain their independence."⁹⁸ Since the Supreme Court's legitimacy depends on its non-political nature, this type of narrative in high school is particularly important.

It is difficult to assess the effect of this type of education on the students' attitudes toward the courts.⁹⁹ Part of the difficulty stems from the use of surveys of self-reported attitudes by the

⁹³ *Id.* at 75 ("Students must ask themselves, 'Why must this branch operate in such secrecy when the other two branches are so visible?' The suggested answer implies the importance of the Court's work and the resulting necessity for the Court to be removed from the evils of the public.").

⁹⁴ *See id.* at 76.

⁹⁵ *See id.* at 76-77.

⁹⁶ *Id.* at 76

⁹⁷ *Id.* at 79.

⁹⁸ *Id.*

⁹⁹ Some commentators conclude that "[s]ocialization scholars have provided evidence that civic training in adolescence can influence adult behavior." *See* Molly W. Andolina et al., *supra* note , at 275 (citing FRED I. GREENSTEIN, *CHILDREN AND POLITICS* (1965); HESS & TORNEY, *supra* note 97; PAUL DAWSON & KENNETH PREWITT, *POLITICAL SOCIALIZATION* (1969); EASTON & DENNIS, *supra* note 80); *see, e.g.*, Greg A. Caldeira, *Children's Images of the Supreme Court: A Preliminary Mapping*, 11 *LAW & SOC'Y REV.* 851. Molly Andolina, et al., found a "slight plurality" of high school students reported that their civics course or courses had a "positive impact on them," with 48% reporting an increase in interest about "politics and national issues" as a result. *See* Molly W. Andolina, *supra* at 275; *see* Donnelly, *supra* note at 966-967. However, 41% of the students surveyed reported their courses had "no impact" on their views on politics and national issues, while another 8% said their interest actually decreased. According to Lee Ehman, despite the overwhelming exposure to civics courses by high

students themselves. There seems to be a consensus, however, that high school educators provide important information about the courts. For example, Lee Ehman, whose research indicates that “the typical civics and government courses . . . [do] little to modify political attitudes,”¹⁰⁰ still maintains that “the main weight of the available evidence seems to point to the school as an important, if not the most important source of *political information* for secondary school-age youth in the United States.”¹⁰¹ Stephen Caliendo argues that “it is safe to surmise that we hear more about the Court during our formal political education than at any other time in our lives.”¹⁰² There are several likely reasons for this. First, the Court receives relatively little media attention compared to other government institutions.¹⁰³ It often receives its most attention during irregular confirmation hearings, which focus on individual justices, not the institution itself. Its decisions

school students, “it is clear that the civics and government curriculum itself is impotent in the political socialization of attitudes. Ehman, *supra* note , at 103.

¹⁰⁰ Ehman, *supra* note , at 103 (emphasis added).

¹⁰¹ *Id.* at 101, 103. Compared to other factors such as family and the media, schooling is an important agent for transmitting political information to youth and *increases in importance from grade school to high school.* *Id.* at 112 (emphasis added). “That schooling is relatively more important in influencing political knowledge than political attitudes and beliefs should not be surprising. Most educators would support the contention that student attitudes and beliefs should be built on a solid knowledge base, and the school curriculum is oriented toward providing that knowledge than fostering particular attitudes.” *Id.* at 113.

¹⁰² CALIENDO, *supra* note , at 69.

¹⁰³ *See id.* at 14 (noting despite an increase in Court coverage “however, the American public is not exactly inundated with stories about the Court”); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2621-22 (2003) (during a study measuring the amount of coverage of Supreme Court decisions in St. Louis in 1989, only one-quarter of the 144 Court decisions were covered by any network, and only 16 cases were covered on all three networks” (citing CHARLES H. FRANKLIN & LIANE C. KOSAKI, *MEDIA, KNOWLEDGE, AND PUBLIC EVALUATIONS OF THE SUPREME COURT, IN CONTEMPLATING COURTS* (Lee Epstein ed. 1995)); Jeffery J. Mondak, *Policy Legitimacy and the Supreme Court: The Sources and Contexts of Legitimation*, 47 POL. RES. Q. 675, 678 (1994) (“Many Supreme Court decisions receive minimal attention from news media, and numerous other rulings are ignored entirely. Conversely a small portion of the Court’s actions generate extensive media coverage. . . . Between those extremes are Supreme Court rulings receiving moderate attention from news media. Many decisions gain front-page coverage from newspapers, but receive little or no subsequent media attention.”); OUTWATER, *supra*

often go relatively unnoticed, with controversial decisions being the exception, not the norm,¹⁰⁴ and often laypersons, if not the news media, are unable to understand, let alone remember the holdings.¹⁰⁵ Furthermore, the Court usually intentionally limits its biggest decisions to the end of its term.¹⁰⁶ And finally, the individual members of the Court rarely criticize each other publicly.¹⁰⁷ This is quite contrary to the President or Congress, which receives regular media attention and constantly engages in open debate and personal attacks.

Caliendo proposes that because of this lack of media coverage and publicity, knowledge about the Court – which we essentially get only from school¹⁰⁸ – goes largely unchallenged. “Since people talk about what is in the news, it is unlikely that people are getting much information about the Court through interpersonal communication.”¹⁰⁹ Generally our political attitudes learned in school are challenged regularly throughout life because “politics is all around us,”¹¹⁰ and thus our attitudes adjust or reinforce as we encounter new challenges and

note 1, at 34 (“There have been numerous findings suggesting the Supreme Court receives considerably less total [media] coverage than the other branches.”).

¹⁰⁴ See Mondak, *supra* note , at 678.

¹⁰⁵ See Friedman, *supra* note , at 2632 (noting members of the mass public often cannot understand the content of Court opinions and thus know little more than what the media or “opinion leaders” tell them, and even then, decisions are often obscure and complicated).

¹⁰⁶ See *id.* at 2631 (“[T]he Court’s scheduling practices keep it off the public radar except in rare bursts. The Court hands down most of its decisions in a fairly compressed period of time, and typically many of the most controversial come down in the last couple of weeks in the term.”).

¹⁰⁷ See OUTWATER, *supra* note , at 37 (“Supreme Court justices do not participate in public debate and only rarely blatantly criticize their colleagues in public (at least not by name)); Petrick, *supra* note , at 5 (“[The Court’s] inner bickerings are generally kept secret . . .”).

¹⁰⁸ CALIENDO, *supra* note 4, at 18-19 (“Any direct information about the Court however, will be learned at school – more specifically in the high school civics or American Government course.”).

¹⁰⁹ *Id.* at 68-69.

¹¹⁰ *Id.* at 3.

situations.¹¹¹ However, while this is true for more “salient political institutions, actors, and issues”¹¹² political socialization in high school is a likely “predictor of political attitudes that are out of the mainstream of political discourse (such as latent support for political institutions, especially an institution as invisible as the Court.). . . . In other words, we have to be thinking about [the Court] in order to change our minds about it.”¹¹³ Therefore, if the knowledge learned in high school classes about the Court is relatively limited and generally portrays the Court as a guardian of individual rights, a racial liberator, and the ultimate arbiter of the Constitution, and this knowledge proceeds to go unchallenged, it is not surprising to see the public generally showing higher levels of diffuse support for the Court.¹¹⁴ Caldeira and Gibson found that “basic political values – especially orientation toward liberty and social order – strongly predict attitudes toward the Supreme Court” and they “found commitment to social order quite strongly reflected basic attributes of personality, which presumably, are acquired early in life and which

¹¹¹ *Id.* at 13.

¹¹² *Id.*

¹¹³ *Id.* at 3.

¹¹⁴ Whether schools “actively” instill students with attitudes about the Supreme Court or “passively” teach basic information which goes relatively unchallenged, it is likely that schools play a role in long-standing public perception of the Court. The textbooks tell a consistent and clear story about the Court – perhaps made even more consistent by the decrease in nuance in the text and the lack of attention paid to the Courts in the typical curriculum. This is likely why when Caliendo asked students, without providing any options to chose from, “to name *one* institution they felt best protects their rights,” the Supreme Court “was listed by over half the students who gave answers. *Id.* at 86 (emphasis added) (“The Supreme Court was listed by half of the students who gave answers and nearly 40 percent of all students surveyed.”) Similarly, 67 percent of students surveyed “believed that justices are not politicians.” *Id.* at 47 (noting that even in the class with the most cynical (or realistic) views about Supreme Court Justices, 46% of the students did not label Justices as “politicians”).

persist with minimal change.”¹¹⁵ As Caliendo noted, “If the goal of the schools, public or private, is to maintain support and legitimacy for the existing political structure in this county, then the drafters of the goals should take comfort in the revelation that U.S. schools are doing precisely that.”¹¹⁶

B. The Importance of Symbolism and Ceremony

The symbols and rituals of the courts are important reminders of the special role played by courts in society. These are attributes of courts that remind everyone, including those who have little interest in judicial proceedings, that the courts are different from the other, political branches of government. In this way, they enhance the perceived legitimacy of the courts.

Throughout all of humankind, people have used symbols and rituals to denote importance.¹¹⁷ Courthouses are often impressive buildings, both inside and out. Judges wear robes and sit on daises above the people. Historical words are used to begin judicial proceedings; frequently legal jargon is used throughout a hearing or trial. Legal argumentation and decisionmaking involve an openly distinctive and formal methodology, which relies on an

¹¹⁵ Caldeira & Gibson, *supra* note , at 658 (“Our findings strongly support . . . [that] basic attitudes toward the regime and its institutions reflect fundamental political values acquired through socialization during childhood.”); see also James L. Gibson, *Institutional Legitimacy, Procedural Justice, and Compliance with Supreme Court Decisions: A Question of Causality*, 25 L. & SOC’Y REV. 631, 633 (1991) (“I consider it far more likely that views on the legitimacy of an institution reflect childhood socialization experiences and fundamental political values as well as accumulated satisfaction or dissatisfaction with the institution’s policy outputs.”).

¹¹⁶ CALIENDO, *supra* note , at 112. Caliendo also notes that none of the teachers he observed “introduced material that challenged the existing political structure of the U.S. government in my presence, nor did they claim in their interviews to do so.” *Id.* at 111. “If progressives are concerned about the system-reinforcing nature of American political (civic) education, this study will do nothing to alleviate their concerns.” *Id.*

application of statutes and precedent in a seemingly neutral manner.¹¹⁸ Nearly everyone knows this, even those who have never been in a courtroom or read an opinion, from education, television, movies, or other forms of media. Many people speak to a judge in ordinary life by using the title “judge” rather than a first name.¹¹⁹ All of these characteristics not only show that the judiciary plays a very important role in society, but also that it is different from the other branches of government. This reinforces the belief that judges are not political and supports a perception of legitimacy.

Gibson and Caldeira explain this effect on the Supreme Court as follows:

[J]udicial symbols proliferate—in part because elites and interest groups realize the power of such symbols and attempt to manipulate them—so it is impossible for attentive citizens to avoid exposure to them. These symbols, judicial robes, the use of “your honor,” even the temple-like Supreme Court building—teach a particular lesson: The court is different. The theory posits that exposure to legitimizing judicial symbols reinforces the process of distinguishing courts from other political institutions. Citizens do not naturally differentiate between the judiciary and other branches of government; that courts are special and different must be learned. The message taught by these powerful judicial symbols is that “courts are different,” and owing to these differences the judiciary deserves more respect, deference, and obedience—in short legitimacy.¹²⁰

¹¹⁷ [Cite to Radcliffe – Brown and other anthropologists re ceremonial customs and social values.]

¹¹⁸ Political scientists have referred to a “myth of legality” as “the belief that judicial decisions are based on autonomous legal principles [and] that cases are decided by application of legal rules formulated and applied through a politically and philosophically neutral process of legal reasoning.” John M. Scheb II & William Lyons, *The Myth of Legality and Public Evaluation of the Supreme Court*, 81 SOCIAL SCIENCE QUARTERLY 929 (2000). See James L. Gibson & Gregory A. Caldeira, *Confirmation Politics and The Legitimacy of the U.S. Supreme Court: Institutional Loyalty, Positivity Bias, and the Alito Nomination*, 53 AM. J. POL. SCI. 139, 142 (2009).

¹¹⁹ See Michael J. Petrick, *The Supreme Court and Authority Acceptance*, 21 W. POL. Q. 5, 18 (1968) (noting that Jerome Hall observed that deference is “paid to the judge even when he is outside the courtroom and clad in ordinary attire,” quoting Jerome Hall, *Authority and Law*, in AUTHORITY, 65 (Carl J. Friedrich, ed. 1958)).

¹²⁰ James L. Gibson & Gregory A. Caldeira, *Supreme Court Nominations, Legitimacy Theory, and the American Public: Dynamic Test of the Theory of Positivity Bias*, July 18, 2007, at 6.

Many other commentators have noted the importance of symbols and rituals to the courts. For example, Murray Edelman has written that the public is likely to be sensitive to the setting in which a political act occurs and consequently judge the act in relation to that setting.”¹²¹ Edelman describes the Court’s setting as similar to a “meeting of the tribal elders [which] calls up an atmosphere in which some measure of suspension of individual criticism and considerable credibility are regarded as appropriate responses. This is at least relatively true, as compared to what is appropriate in response to legislative or Congressional acts.”¹²² Similarly, Michael Petrick believes that “the Supreme Court, amidst a setting of dignity and somberness which other branches of American government so often seem to lack, can pursue activities and promote policies which other agencies practicably cannot.”¹²³ Alpheus Mason noted that at the same time the Court justices became “high-level politicians” and flexed their policy-making muscles beginning around 1890,¹²⁴ there was a “marked rise in the use of robes”¹²⁵ and the Constitution was removed from a closet at the State Department and placed on public view.¹²⁶ Chief Justice Taft observed that robes should be worn not only so witnesses “should be properly advised that

¹²¹ MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* 95 (1964). See Michael J. Petrick, *supra* note , at 15.

¹²² Edelman, *supra* note __, at 108); see Michael J. Petrick, *supra* note , at 15-16.

¹²³ *Id.* at 16. Similarly, Alpheus Mason concludes that “Americans find in the Supreme Court a sense of security not unlike that instilled by the British Crown. Nine black-robed Justices conjure up the image of equal justice under law, saving us from both the tyranny of the multitude and the arrogance of personal government.” Alpheus Thomas Mason, *Myth and Reality in Supreme Court Decisions*, 48 VA. L. REV. 1385, 1386 (1962).

¹²⁴ Mason, *supra* note 7, at 1392.

¹²⁵ *Id.* (citing Jerome Frank, *The Cult of the Robe*, SATURDAY REV. LIT., Oct. 13, 1945, at 13, in JEROME FRANK, *COURTS ON TRIAL* 245 (1949)).

the function performed is one different from, and higher, than that which a man discharges as a citizen in the ordinary walks of life; but also, in order to impress the judge himself with the constant consciousness that he is a high-priest in the temple of justice and is surrounded by obligations of a sacred character.”¹²⁷

C. The Educated and Interested Court Observers

There are people who are not legal professionals but still are knowledgeable about the Supreme Court and interested in its work. Their views of the Court differ from others, as shown by the surveys described in the next section. In addition, because they are so knowledgeable, their opinions are affected by both the decisions and reasoning of the Court. The last part of the Article examines aspects of the judicial process that can affect their perception of the legitimacy of the Supreme Court. These people have an influence on the public’s perception of legitimacy that extends beyond their number in society. Some of these educated and interested court observers influence others because their views are spread by the media and also because some of them are members of the media itself.¹²⁸ If these commentators support or attack a decision, or

¹²⁶ *Id.* (citing JOHN FRANKLIN JAMESON, AN INTRODUCTION TO THE STUDY OF THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE STATES 5 (1886)).

¹²⁷ *Id.* at 1396 (quoting TAFT, PRESENT DAY PROBLEMS 63-64 (1908)).

¹²⁸ See, e.g., Michael L. Wells, “*Sociological Legitimacy*” in *Supreme Court Opinions*, 64 Wash. & Lee L. Rev. 1011, 1031-1032 (“But the general public is perhaps the least important part of the immediate audience for judicial decisions. A more important segment of that audience, and one that will ultimately influence public attitudes as well, consists of dissenting Justices, opinion leaders, and constitutional theorists. These elites do pay attention to reasons as well as results. Their reactions to the Court will, in turn, have a significant bearing on the attitudes of the public at large.”)

claim that the Court has been activist or acted lawlessly, their opinions may well influence others. Their views may affect the public's perception of the appropriateness of a particular Court opinion, that is, the specific support of the Court, but this Article is concerned about their influence on the diffuse support for the Supreme Court and the courts in general.

Surveys of public perception of the Court reinforce the notion that educated and interested court observers are different than ordinary observers and that increased education affects diffuse support for the Supreme Court. Caldeira and Gibson found that “[a]mong opinion leaders,¹²⁹ support for the Court depends heavily upon the policy positions of the individual. . . . That is, for many of these respondents, *diffuse* support behaves as if it were *specific* support.”¹³⁰ Corroborating this finding, Friedman noted, “Numerous studies suggest that among elites, the politically active, whatever one may call them, ‘[s]upport for the Court . . . [is] also very closely correlated with their approval of specific court decisions.’”¹³¹ A study by Franklin and Kosaki found that when looking at respondents’ knowledge about the 1989 Rehnquist Court and their own levels of conservatism, liberals unaware of the Court’s activity rated the Court just higher

¹²⁹ Gregory A. Caldeira & James L. Gibson, *The Etiology of Public for the Supreme Court*, 36 AM. J. POL. SCI. 635, 655 n.16 (1992) (“To identify ‘opinion leaders,’ we have used an item that asked the respondent if others had asked him or her for opinions about politics: ‘How often other people ask your opinions about political matters?’ For most white sample (48%) the answer was ‘hardly ever.’ Only slightly less than 10% reported that people ‘very often’ asked their opinions (the remaining 42% responded that they are asked their views ‘only sometimes’).”).

¹³⁰ *Id.* at 656 (emphasis in original).

¹³¹ Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2618 (2003) (quoting David Adamany & Joel B. Grossman, *Support for the Supreme Court as a National Policy Maker*, 5 LAW AND POL’Y Q. 405, 408 (1983)).

on a “feeling thermometer” than similarly situated conservatives.¹³² However, the most “fully informed” conservative respondents rated the Court much higher while liberals’ ratings dropped.¹³³ This led Friedman to propose, “Depending on what the Court is doing, to know the Court may well be to love or hate it. Diffuse support may well evaporate.”¹³⁴ Furthermore, although not directly related to elite status, Friedman noted evidence that “when members of the public care about what the Court is doing, specific support is more likely to merge with diffuse support.”¹³⁵

Another theory is that members of the educated public actually demonstrate higher levels of diffuse support for the Court than the general public.¹³⁶ In a way, this makes sense, because although these people should be more aware of the Court’s shortcomings, “[p]olitical activism increases support because those who engage in more activity receive more effective socialization to norms that tend to legitimize existing political institutions.”¹³⁷ Through their analysis of

¹³² *Id.* at 2619 (noting “unknowing conservatives” rated the Court below 50 while “unknowing liberals” rated the Court “just above it” (citing Charles H. Franklin & Liane C. Kosaki, *Media, Knowledge, and Public Evaluations of the Supreme Court*, in CONTEMPLATING COURTS 352-75 (Lee Epstein ed., 1995))).

¹³³ Friedman, *supra* note 3, at 2619 (“Yet among the most fully informed, conservatives rated the Court well over 75, while liberals dropped below 50.” (citing Franklin & Kosaki, *supra* note 4, at 371)).

¹³⁴ *Id.*

¹³⁵ *Id.* (citing Caldeira & Gibson, *supra* note 1, at 644; Adamany & Grossman, *supra* note 3, at 423-24; Valerie J. Hoekstra, *The Supreme Court and Local Public Opinion*, 94 AM. POL. SCI. REV. 89, 97-100 (2000)).

¹³⁶ Caldeira & Gibson, *supra* note 1, at 649 (“One of the best substantiated set of hypotheses in research on the origins of diffuse support concerns the effect of political information, elite status, and activism. Those who are more knowledgeable, more ‘elite,’ and more active in politics generally show more support for the Supreme Court.” (citing WALTER F. MURPHY, JOSEPH TANENHAUS & DANIEL KASTNER, PUBLIC EVALUATIONS OF CONSTITUTIONAL COURTS: ALTERNATIVE EXPLANATIONS (1973); Adamany & Grossman, *supra* note 3; Walter F. Murphy & Joseph Tanenhaus, *The Supreme Court and Its Elite Publics: A Preliminary Report*, Presented at the meeting of the Int’l Pol. Sci. Ass’n, Munich (1970)).

¹³⁷ *Id.* (citing PAUL M. SNIDERMAN, PERSONALITY AND DEMOCRATIC POLITICS (1975)).

diffuse support, Caldeira and Gibson found “a small direct effect of educational level on support for the Court: the more highly educated provide more support.”¹³⁸ Similarly, Caliendo noted, “Confidence [in the Court] is generally greater as one increases his or her level of education.”¹³⁹ Handlberg and Maddox noted that “the more educated had more trust in the Court due to their ability to ‘observe and assess the Court with at least a more generalized frame of reference.’”¹⁴⁰

These findings illustrate two major differences in levels of Supreme Court support between the general populace and educated segments of the population: support by the educated observers seems to hinge more on actual Court decisions or actions, thus behaving more like specific support, yet they also appear to generally revere the Court more. This seemingly presents a paradox. However, in using data from the General Social Surveys,¹⁴¹ Caliendo argued that the two findings may coexist, at least regarding education. When charting those with “twelve years of school or fewer,” “up to 4 years of college,” and with “more than 4 years of college” from 1973 to 1998,¹⁴² “there is considerably more fluctuation in support for the Court among the most highly educated in the sample.”¹⁴³ This increased fluctuation likely illustrates Caldeira and

¹³⁸ *Id.* at 653.

¹³⁹ STEPHEN M. CALIENDO, *TEACHERS MATTER: THE TROUBLE WITH LEAVING POLITICAL EDUCATION TO THE COACHES* 38 (2000).

¹⁴⁰ *Id.* (citing Roger Handlberg & William S. Maddox, *Public Support for the Supreme Court in the 1970's*, 10 AM. POL. Q. 333, 345 (1982)).

¹⁴¹ *Id.* at 25 (citing JAMES A. DAVIS & TOM W. SMITH, NATIONAL OPINION RESEARCH CENTER, *GENERAL SOCIAL SURVEYS, 1972-1998* (1998)).

¹⁴² *Id.* at 42 Figure 3.11

¹⁴³ *Id.* at 38.

Gibson’s “opinion leader” finding.¹⁴⁴ Yet, a higher percentage of those with “more than 4 years of college” or “up to 4 years of college” *always* had a “great deal of confidence” in the Court than those with “12 years of school or fewer,” and “more than 4 years of college” usually outpaced “up to 4 years of college.”¹⁴⁵ Therefore, perhaps even if support for the Court by members of the educated public is more susceptible to change due to Court actions and policy preference, as a whole, they may continue to hold the Court in higher esteem.

This seems somewhat unsurprising if we assume those most knowledgeable about, or interested in, the Court likely include academics, politicians, businesspeople, law enforcement officials and others who are also likely to either use or rely upon the Court or take a greater interest in its dealings. Perhaps this explains Casey’s findings that “the social strata most likely to mythify the Court are also the strata most likely to be familiar with its controversial decisions.”¹⁴⁶ Similarly, those “most knowledgeable about judicial decisions are most rather than least likely to mythify the Court; and as knowledgeability declines, mythifying declines instead of rising.”¹⁴⁷

II. Actions that Politicize the Court and Undercut Legitimacy

¹⁴⁴ *Id.* at 38 (“These ‘opinion leaders’ are perhaps, as Caldeira and Gibson . . . found, most likely to evaluate the Court based on its decisions.” (citing Caldeira & Gibson, *supra* note 1)).

¹⁴⁵ CALIENDO, *supra* note 21, at 42 Figure 3.11.

¹⁴⁶ Casey, *supra* note 12, at 407.

¹⁴⁷ *Id.* at 408.

Next to corruption and bias, nothing can undermine the legitimacy of courts more than a perception that courts are acting politically. People expect that courts apply, not make, the law. Educated and interested observers of the courts expect that courts apply the constitution, statutes, and case law consistent with accepted rules of judicial decisionmaking.¹⁴⁸ Richard Fallon labels this “legal legitimacy.”¹⁴⁹ However, anyone educated about courts knows that there is a degree of “making” the law in many lawsuits. Trial courts and lower level appellate courts, who do most of the work of the legal system, are the least likely to appear to be acting politically. The vast majority of their cases do not involve controversial social issues; plus their opinions are relatively invisible, even to interested observers of the courts. It is the controversial decisions by the Supreme Court that are most likely to lead to claims of illegitimacy. Those are relatively few in number, however, so their effect on public attitudes toward the courts is limited.

It may be that “political” decisions by the Supreme Court have less impact than many believe. A number of commentators have persuasively argued that what matters to sociological legitimacy is the outcome of a case, much more than the reasoning. For example, Michael Klarman has suggested “that history’s verdict on a Supreme Court ruling depends more on whether public opinion ultimately supports the outcome than on the quality of the legal reasoning

¹⁴⁸ See, e.g., Michael Wells, “Sociological Legitimacy” in Supreme Court Opinion, 64 Wash. & Lee L. Rev. 1011, 1031-33 (2007).

¹⁴⁹ Richard H. Fallon, Jr., Legitimacy and the Constitution, 118 Harv. L. Rev. 1787, 1794-1795, 1819 (2005). (Legal legitimacy “suggests that a court (1) had lawful power to decide the case or issue before it; (2) in doing so, rested its

or the craftsmanship of the Court's opinion."¹⁵⁰ Identifying eight aspects of a Supreme Court decision,¹⁵¹ Klarman concludes that only a relatively small number of decisions over the life of the Supreme Court have had a significant negative impact on the Court's reputation.

The Supreme Court's opinion in *Bush v. Gore*,¹⁵² the case in which it stopped the recount of ballots following the disputed presidential election in Florida, is a good example of a case in which public attitudes were not harmed by an opinion that the vast majority of legal scholars considered to be illegitimate.¹⁵³ Notwithstanding this deep criticism of the reasoning of the majority, surveys surprisingly showed that public support for the Court actually increased in the aftermath of that decision, as discussed above.¹⁵⁴ It may be that the surveys sampled many more people who did not understand or care about the reasoning of the Court in that case, or even

decision only on considerations that it had lawful power to take into account or that it could reasonably believe that it had lawful power to weigh; and (3) reached an outcome that fell within the bounds of reasonable legal judgment.")

¹⁵⁰ Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 Calif. L. Rev. 1721, 1722 (2001). See also Michael L. Wells, "Sociological Legitimacy" in *Supreme Court Opinions*, 64 Wash. & Lee L. Rev. 1011, 1031 (2007).

¹⁵¹ Klarman identifies these factors as affecting the decision's long-term impact on the Court's reputation: (1) the popularity of the decision, which he sees as the "principle variable"; (2) the intensity of public sentiment; (3) the perception by opponents that the decision will be implemented rather than evaded or nullified; (4) the relative power of the constituencies supporting and opposing the decision; (5) the likelihood that the issue involved in the case will quickly become obsolete; (6) changes in public opinion in the years following the decision; (7) the opportunity for the Court to adjust its decision in later cases; and (8) the impact of the decision in the context of other related decisions. *Id.* at 1748.

¹⁵² 531 U.S. 98 (2000).

¹⁵³ For example, 673 law professors signed a statement that asserts that "the Supreme Court has tarnished its own legitimacy" by its decision in *Bush v. Gore*. Margaret Jane Radin, *Can the Rule of Law Survive Bush v. Gore?* in *Bush v. Gore: The Question of Legitimacy* (Bruce Ackerman ed., 2002), at 110, 113. See, e.g., Richard H. Fallon, Jr., 118 Harv. L. Rev. 1787, 1816-1817 (2005) ("*Bush v. Gore* attracted a swarm of allegations of illegitimacy."); Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 Calif. L. Rev. 1721, 1723 (2001) ("it will be difficult to find neutral and detached lawyers who believe that *Bush v. Gore* was 'grounded truly in principle' or 'in the language or design of the Constitution rather than in the conservative Justices' partisan preference for George W. Bush in the 2000 presidential election.'").

¹⁵⁴ See text accompanying notes supra.

knew much about the issues, than educated and interested observers of the Court. But even for the latter, it is understandable if they did not view the decision as a serious blow to the legitimacy of the Supreme Court. First, there were enough legal scholars, albeit a small minority, who supported the decision as justified by established legal principles that educated court observers could assume that the Court did not act as politically as some said.¹⁵⁵ At least the educated public, and even legal professionals not specializing in constitutional or election law, could have been confused by the disagreements among the scholars.¹⁵⁶ In addition, as Michael Klarman noted in 2001, the effect of the decision would last for only four years, the presidential term involved in the litigation. He wrote: “[A]fter a brief four years has passed, *Bush v. Gore* will become an unhappy memory rather than a constant irritant. Thus, *Bush* seems unlikely to harm the Court’s standing very much.”¹⁵⁷ Ironically, the tragedy of 9/11 moved everyone’s concerns onto terrorism and *Bush v. Gore* quickly vanished into the night.¹⁵⁸

¹⁵⁵ See, e.g., Richard A. Posner, *Breaking the Deadlock: The 2000 Election, The Constitution, and the Courts* (2001); Charles Fried, *An Unreasonable Reaction to a Reasonable Decision*, in *Bush v. Gore: The Question of Legitimacy* (Bruce Ackerman ed., 2002), at 3.

¹⁵⁶ Michael Klarman has noted that people have a tendency to believe the Supreme Court when it states that certain law and cases lead it to reach a particular conclusion. Michael J. Klarman, *supra* note , at 1731 & 43 (2001) (“The Supreme Court enjoys such immense prestige that the conclusion by a majority of justices that ‘X’ is a good legal argument almost conclusively proves it to be so.”)

¹⁵⁷ *Id.* at 1764.

¹⁵⁸ Although very few people pay much attention to *Bush v. Gore* these days, the tremendous and lasting impact of the decision was not foreseeable when the Court ruled in December 2000, nor even when Klarman wrote in 2001. If a recount had resulted in Gore’s election, which many commentators believed to be likely, there would not have been a war in Iraq, 100,000s of people would not have died, and the budget deficit would be trillions less than it is now.

There are other reasons that make it less likely that the courts will be considered to be political actors and hence support judicial legitimacy. Many of these can be categorized as restraint and respect among the branches of government.

When Harry Edwards, the former Chief Judge of the D.C. Circuit, was asked by Chinese judges in 1997 how to create an independent judiciary whose rulings will be enforced by the executive branch, he answered:

I told them, in no uncertain terms, that *self-restraint* has been a crucial key to the success of the judiciary in the United States in establishing the enforceability of its decisions. I described the comparatively weak position of the U.S. judiciary should the executive or legislative branches of the government choose to ignore our judgments. And I explained that our courts have been careful to adhere to the limits placed on their authority by the Constitution and have developed policies of restraint and deference that minimize conflicts with the other branches.

One important feature of this account of judicial independence and self-restraint is that it is *dynamic*. For enforceability to emerge, judges over time must collectively develop the habit of self-restraint. And the executive and legislative branches need to develop, over time, the habit of obeying judicial judgments. The other branches will only develop the habit of obedience if they accept the constitutional legitimacy of judicial action. Self-restraint helps build up the courts' constitutional legitimacy over time, along with other elements of judicial decisionmaking, like following the rule of law and adhering to binding precedent. Over time, self-restraint by judges contributes to a practice of enforcing judicial judgments. As this practice becomes entrenched, the judiciary achieves real independence. Once judicial independence comes into being, however, it needs to be guarded and protected. Judicial self-restraint therefore helps both to generate and to preserve judicial independence."¹⁵⁹

A. Restraint by the Courts

¹⁵⁹ Harry T. Edwards, *Judicial Norms: A Judge's Perspective*, in *Norms and the Law*, John N. Drobak, ed., 230, 232 (2006).

The Supreme Court has only so much political capital with the public. If controversial decisions erode that capital too much, it will undermine the Court's diffuse support and therefore its legitimacy. Many legal scholars have emphasized the ways that the Court throughout its history has been a product of contemporary political and social views.¹⁶⁰ This helps with the timing of potential controversial decisions. Constrained by contemporary views, the Court seldom acts without significant support by the people for its decisions. For example, the foundation for *Brown v. Board of Education* was laid by decades of gradual integration in different parts of society and strategic litigation over various forms of racial discrimination.¹⁶¹ Barry Friedman's book, **The Will of the People**,¹⁶² is a comprehensive story of the correspondence between Supreme Court decisions and popular opinion. Most of what the Court does is not as controversial as it may first appear. Michael Klarman has noted the Court's caution in taking controversial issues. In reviewing the history of the Court's controversial decisions, he classified the cases into four categories. In the first set of cases, the Supreme Court struck down as unconstitutional state regulations that were outliers compared to much of the country, such as in *Griswold v. Connecticut*, the case that created a constitutional right to contraception. Klarman wrote: 'On all these occasions, judicial invalidation of state legislation was relatively

¹⁶⁰ See, e.g., Barry Friedman, *The Will of the People* (2009).

¹⁶¹ Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* 749 (2004). (Decades of social change made for "receptive soil [in which] the Supreme Court planted the seed of *Brown*.")

uncontroversial because national majorities agreed with the results of the Court's constitutional interpretations. Small wonder that an institution that is able generally to mirror national public opinion, while simultaneously perpetuating the noble myth that it heroically defends minority rights from majoritarian oppression, remains so popular with the American public."¹⁶³ His other three categories depend upon the degree of public support for the outcome of the case. He classifies cases like *Dred Scott* and *Roe v. Wade* among the many controversial opinions that had the support of roughly half the country. He sees "only a relative handful" of cases in which the decision is opposed by a clear majority of the nation, such as decisions limiting school prayer or granting procedural rights to criminals, but notes that "a solid 30% to 40% of the American public has sided with the Justices."¹⁶⁴ For his last category of cases, in which an overwhelming majority of Americans opposed the decision, he believes that the number of these kinds of cases "probably can be counted on one hand."¹⁶⁵

In addition to the relationship between the Supreme Court's decisions and public sentiment, the courts have developed a number of legal doctrines that allow the Supreme Court, as well as lower courts, to avoid reaching the merits of a dispute, like the standing, ripeness,

¹⁶² Barry Friedman, *The Will of the People* (2009).

¹⁶³ Michael J. Klarman, *Bush v. Gore* Through the Lens of Constitutional History, 89 *Calif. L. Rev.* 1721, 1749 (2001).

¹⁶⁴ *Id.* at 1750.

¹⁶⁵ *Id.*

political question, and abstention doctrines.¹⁶⁶ Each of these doctrines has its own justification independent of the avoidance of difficult cases, but the doctrines can be used in that manner. For example, although Congress never declared war on Vietnam, the Supreme Court rejected all attempts to challenge the unconstitutionality of the war by asserting the political question doctrine.¹⁶⁷ Similarly, after a Ninth Circuit opinion struck down the Pledge of Allegiance as violative of the first amendment and the Supreme Court granted certiorari to reach the constitutional issue, the Court surprised everyone when it determined that the plaintiff, a non-custodial parent of a student, lacked standing to raise the issue and so dismissed the lawsuit and vacated the decision below.¹⁶⁸

B. Restraint by the President and Congress.

Legitimacy also hinges on the President and Congress treating the judiciary with respect and not repeatedly excoriating the courts for making political decisions. Political attacks on courts can come in many forms. The use of impeachment for political purposes is especially onerous. In the early nineteenth century, Jeffersonians in the United States Senate attempted to impeach Federalist judges, but the failed attempt to impeach Justice Samuel Chase, by one vote,

¹⁶⁶ See John Ferejohn & Larry D. Kramer, *Judicial Independence in a Democracy: Institutionalizing Judicial Restraint*, in *NORMS AND THE LAW* (John N. Drobak ed., 2006), at 161, 178-207.

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¹⁶⁸ *Elk Grove United School District v. Newdow*, 542 U.S. 1 (2004).

marked the end of judicial impeachment as a political weapon.¹⁶⁹ Although there have been rumblings for impeachment of Justices – “Impeach Earl Warren” bumper stickers and billboards in the South in the aftermath of *Brown v. Board of Education* and Gerald Ford’s call for the impeachment of Justice William O. Douglas in 1979, to name two – no real steps have been taken in Congress to use impeachment for political reasons. However, there have been rumblings off and on at the state level to use impeachment for political purposes.¹⁷⁰

Contrast the American experience with some South American countries. As Lee Alston and Andreas Gallo pointed out, the Argentinian President Peron used impeachment to oust the Supreme Court Justices who validated the 1930 coup, starting Argentina on a path to frequent use of impeachment to remove disfavored judges, as was the case in many South American countries during the twentieth century. This helped destroy respect for the rule of law in Argentina for decades.¹⁷¹

Although not as extreme as impeachment, President Roosevelt’s court packing plan was dangerous to the independence and legitimacy of the Supreme Court. If it had succeeded, it

¹⁶⁹ John Ferejohn and Larry D. Kramer, *supra* note , at 161, 167-168, 179.

¹⁷⁰ E.g., Editorial, *Politicizing the Judiciary*, ST. LOUIS POST-DISPATCH, May 9, 2005, at B6 (quoting a Missouri legislator for the proposition that a “judge should be impeached when ‘it is clear to 82 representatives that he is legislating from the bench.’”); Jens Manuel Krogstad and Jason Clayworth, *Five House Members Seek Impeachment of Four Justices*, DES MOINES REG., April 22, 2011, at B1 (attempt to impeach Iowa Supreme Court Justices who overturned a law that banned same-sex marriages); Bill Rafter, *Judicial Removal Week: Judge Thomas Barthold (Ok)*, GAVEL TO GAVEL (Feb. 8, 2010), <http://gaveltogavel.us/site/2010/02/08/judicial-removal-week-thomas-barthold-ok/> (attempt to impeach Oklahoma judge as a result of a lenient sentence in a child rape case).

¹⁷¹ Andres A. Gallo & Lee J. Alston, “Argentina’s Abandonment of the Rule of Law and Its Aftermath,” 26 *Washington U. J. Law and Policy* (2008).

would have made the Court appear to be under the control of the President. Angry over the Supreme Court's repeated ruling against his New Deal reforms, President Roosevelt proposed to increase the size of the Supreme Court from 9 to 15 members and to appoint new Justices who would uphold his policies. Even though the Court was not popular with the general public, the courtpacking plan was even more unpopular.¹⁷² Shortly after Roosevelt's announcement of his plan, his approval rating plummeted to the lowest level of his presidency. The proposal was savagely attacked and ultimately rejected by the Senate Judiciary Committee, albeit shortly after the "switch in time that saved the nine."¹⁷³ Explaining its rejection of the courtpacking plan, the Committee wrote:

The preservation of the American constitutional system is immeasurably more important than the adoption of any legislation, however, beneficial.... If the Court of last resort is to be made to respond to a prevalent sentiment of a current hour, politically imposed, that Court must ultimately become subservient to the pressure of public opinion of the hour, which might at the moment embrace mob passion, abhorrent to a more calm, lasting, consideration.

Friedrich Hayek, in noting the momentous importance of the rejection of the courtpacking plan, applauded the Committee's rejection:

No greater tribute has been paid by a legislature to the very Court which limited its powers. And nobody in the United States who remembers this event can doubt that it expressed the feelings of the great majority of the population.

¹⁷² See Barry Friedman, **The Will of the People** 217-234 (2009).

¹⁷³ *Id.* at 232-234 (concludes that some form of court-packing would have passed if Court had not changed position).

There are a number of other tactics that can be used to limit the courts for political reasons, such as jurisdiction-stripping by Congress or the reluctance in enforcing a Court decision by the Executive.¹⁷⁴ However, both branches have been restrained in the use of these tools.

Public claims of lawless or activist judges by members of Congress and other public figures, including media commentators, also undermine legitimacy. A not too distant example of this kind of conduct was the claims of illegitimate action by state court judges in connection with the Terry Schiavo right-to-die case. Then House Majority Leader Tom DeLay referred to the courts as an “arrogant, out-of-control, unaccountable judiciary.”¹⁷⁵ Senator John Cornyn attributed possible violent attacks on judges to their “making political decisions [without being] accountable to the public.”¹⁷⁶ Claims by politicians that undermine judicial legitimacy seem unending. Recently Governor Rick Perry proposed that Congress have the power to override Supreme Court decisions by a two-thirds vote.¹⁷⁷

Finally, the legitimacy of courts is undermined by scholars who purport to show that court outcomes are driven by the political affiliation of the judges. As Judge Harry T. Edwards explained:

The more that judges are assessed in terms of “political” (result-oriented) decisionmaking, the more likely it is that this will become a self-fulfilling prophecy. Even if judges are able to resist the temptation to conform to the false perception, continued assessments of judicial performance in political terms will promote a “new

¹⁷⁴ Ferejohn & Kramer, *supra* note __, at 167-178.

¹⁷⁵ Mike Allen, *DeLay Wants Panel to Review Role of Courts: Democrats Criticize His Attack on Judges*, WASH. POST, April 2, 2005, at A9.

¹⁷⁶ 151 CONG. REC. S3124 (daily ed. Apr. 4, 2005). A New York Times editorial explained: “[I]n a moment that was horrifying even by the rock-bottom standards of the campaign that Republican zealots are conducting against the nation’s judiciary, Senator John Cornyn, a Texas Republican, rose in the chamber and dared to argue that recent courthouse violence might be explained by distress about judges who ‘are making political decisions yet are unaccountable to the public.’ The frustration ‘builds up and builds up to the point where some people engage in’ violence, said Mr. Cornyn.” “The Judges Made Them Do It,” editorial, New York Times, April __, 2005, A.28.

¹⁷⁷ “Seven ways Rick Perry wants to change the Constitution,” Yahoo! News, Aug. 19, 2011, <http://news.yahoo.com/blogs/ticket/seven-ways-rick-perry-wants-change-constitution-1316>.

reality,” for most people will come to believe that the judicial function is nothing more than a political enterprise. No matter how good the intentions of its servants, the judiciary will be sharply devalued and incompetent to fulfill its role as mediator in a society with lofty but sometimes conflicting ambitions. This would be a horror to behold.¹⁷⁸

[This section will be developed.]

As explained above, there is no way to prove with physical evidence, experimentation, or historical record that a public’s perception of judicial legitimacy advances rule of law norms, a willingness to comply with the law, and cooperative social behavior. Without that type of proof, the conclusions are always subject to contrary opinion that can erode the belief in judicial legitimacy. Luckily, our country grew not only out of war but also out of serious political discussions and ideas. The ideas embodied in the constitution and given flesh during the formative years of our republic resulted in a relatively cooperative and peaceful society. During this period, the courts of the States and the federal government maintained a respected and legitimate position as part of our governance structure. By setting this course, path dependence made it easier for the courts to maintain this position in society throughout our history. However, there are no guarantees that this will continue. That is why attacks on the judiciary can lead to serious problems of governance in the long term.

A major reason for the attempts to undermine legitimacy stems from the political nature of judicial decisionmaking, which is the subject of the next chapter.

¹⁷⁸ Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 Wis. L. Rev. 837, 838-39 (1991).