

# Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?

**James L. Gibson**

*Sidney W. Souers Professor of Government*  
Professor of African and African American Studies

Department of Political Science

Director, Program on Citizenship and Democratic Values  
Weidenbaum Center on the Economy, Government, and Public Policy

Washington University in St. Louis  
Campus Box 1063, 170 Seigle Hall  
St. Louis, MO 63130-4899  
United States  
[jgibson@wustl.edu](mailto:jgibson@wustl.edu)

*Fellow, Centre for Comparative and International Politics*  
*Professor Extraordinary in Political Science*  
Stellenbosch University (South Africa)

**Gregory A. Caldeira**

*Distinguished University Professor*  
*Dreher Chair in Political Communications and Policy Thinking*  
*Professor of Law*

Ohio State University  
2022 Derby Hall  
Columbus, Ohio 43210-1373  
United States  
[caldeira.1@osu.edu](mailto:caldeira.1@osu.edu)

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## **Abstract**

Does understanding how U.S. Supreme Court justices actually decide cases undermine the institutional legitimacy of the nation's highest court? To the extent that ordinary people recognize that the justices are deciding legal disputes on the basis of their own ideological biases and preferences – a tenet of Legal Realism and the Attitudinal Model – the belief that the justices merely “apply” the law – Mechanical Jurisprudence – is difficult to sustain. Although it is easy to see how the legitimacy of the Supreme Court – the most unaccountable of all American political institutions – is nurtured by the view that judicial decision making is discretionless, mechanical, and technical, the sources of institutional legitimacy under Legal Realism are less obvious. Here we posit – and demonstrate, using a nationally representative sample – that the American people understand judicial decision making in realistic terms, that they extend legitimacy to the Supreme Court, and they do so under the belief that judges exercise their discretion in a principled and sincere fashion. Belief in Mechanical Jurisprudence is not a necessary underpinning of judicial legitimacy; belief in legal realism is not incompatible with legitimacy.

*“Americans are not quite willing to accept the fact that the Court is a political institution and not quite capable of denying it.” (Dahl 1957, 279)*

*“Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal.” (Segal and Spaeth 2002, 86).*

*“We are all realists now.” (Packer 2006, 83)*

**H**as Legal Realism undermined the institutional legitimacy of the United States Supreme Court? This slightly facetious question – after all, who would be bold enough to suggest that the writings of academics could harm one of the most powerful judicial institutions in the world? – can be generalized to ask: Does acknowledging that the justices of the U.S. Supreme Court rely on their personal values in deciding cases (i.e., the Attitudinal Model of Segal and Spaeth<sup>1</sup>) destroy the “Myth of Legality” — “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” (Scheb and Lyons 2000, 929)— and thereby threaten the Court’s legitimacy? If the American people knew the truth about the decision-making process on the Supreme Court (truth = Legal Realism and the Attitudinal Model), would they still be willing to extend institutional support to the Court?

Although these questions seem rather simple to resolve, in fact little extant empirical research has attempted to provide answers, and, more generally, the views of the American people are likely more complicated than simply specifying the answer as “yes, they rely on their own values, and are therefore not legitimate” or “no, they follow the law, ignoring their own values, and therefore are legitimate.”

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<sup>1</sup>In some respects, the Attitudinal Model is merely the modern version of Legal Realism. For a useful review of the evolution of thought about how judges make decisions see Fiscus 1991. On the history of Legal Realism, see Tamanaha 2009.

Moreover, the empirical literature presents us with some important puzzles and unexplained findings and processes.

From existing research on public attitudes toward law and courts, we do know that, generally, to know more about courts is to hold them in higher esteem. This finding holds in many parts of the world (e.g., Gibson, Caldeira, and Baird 1998); but this simple empirical relationship is far from simple to understand. Presumably, those who know more about courts know more about the realities of how courts actually operate and how judges actually make decisions, and they therefore accept some version of Legal Realism. The conundrum is that scholars typically assume that the legitimacy of judicial institutions can best be sustained by the “Myth of Legality,” or some theory of mechanical jurisprudence, and that turning back the “purple curtain” threatens judicial legitimacy.<sup>2</sup> Thus, to the extent that increased awareness of courts is associated with a more realistic understanding of how courts and judges make decisions, and to the extent that the realist reality is that judges are policy makers who rely on their own values in making decisions, awareness should be *negatively* – not positively – correlated with institutional support. That positive correlations are so routinely found must indicate some sort of break in the presumed causal chain. *Either knowledge does not produce a realistic understanding of decision making, or legitimacy may not depend upon citizens being duped into believing in theories of mechanical jurisprudence and the myth of legality.*

The nature of these interrelationships is crucially important for many sorts of issues confronting the judiciary today. For instance, is it possible to discuss openly judges as policy makers without threatening judicial legitimacy? Many (e.g., Fiscus 1991) seem to assume that acknowledging the policy-

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<sup>2</sup>An anonymous reviewer of one of our earlier publications commented: I often think that arguing that knowledge breeds respect through exposure to legitimizing symbols is a weak argument to make. Indeed, I think the influence of knowledge on legitimacy depends largely on what sort of knowledge a given person has. If knowledge is limited to having seen the Court building or toured it or having sat in on oral arguments, then perhaps that does make a person more likely to worship the Court. But, if knowledge instead means a familiarity with, say, the attitudinal model of decision making, maybe knowledge could be damaging.

making role of judges undermines perceptions of legitimacy and judicial impartiality – as, for examples, in the minority viewpoint on the U.S. Supreme Court in the case of *Republican Party of Minnesota v. White* (which extended free speech rights to candidates for judicial office, allowing them to debate public policy issues during their quests for judicial office); or in the unwillingness of nominees to the federal bench to discuss their policy views during confirmation hearings (see Williams and Baum 2006).<sup>3</sup> Most generally, can we as a nation hold honest and sincere discussions of judges and judicial decision making without impugning the legitimacy of courts in general and the Supreme Court in particular? To what degree is the legitimacy of the Supreme Court grounded in a myth that seems to become more unsustainable with every passing year?

The purpose of this paper is to investigate the relationships among knowledge of the Supreme Court, beliefs about the nature of judicial decision-making, and willingness to ascribe legitimacy to the Supreme Court as an institution. The theoretical framework for this analysis is the well-known Legitimacy Theory.<sup>4</sup> In brief, that theory asserts that: (1) courts are uncommonly dependent upon legitimacy because they have few institutional means of ensuring compliance with their decisions (no purse, no sword); (2) courts value legitimacy highly because legitimacy includes a presumption that decisions, even unpopular ones, ought to be accepted and complied with; and (3) legitimacy depends upon the courts not being viewed as just another political institution; instead, legitimacy requires that citizens distinguish between what judges do and what other politicians do. At the empirical level, we consider four questions: (1) does knowledge increase institutional support, (2) does institutional support depend on belief in the myth of legality, (3) to what view of judging do the most knowledgeable

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<sup>3</sup>The confirmation hearings statements of Sonia Sotomayor set off some furious criticism by legal scholars of her depiction of the process of judicial decisions (mechanical jurisprudence) – see Mauro 2009. Some even accused her of lying. See Dworkin 2009.

<sup>4</sup>For a most useful recent review of Legitimacy Theory see Tyler 2006. For a superb collection of essays on legitimacy, mostly from psychologists, among whom the theory has received great currency, see Jost and Major 2001. For an empirical investigation of the theory, see Gibson and Caldeira 2009.

subscribe, and (4) is the knowledge – support relationship mediated by distinctive views of how judges go about making decisions? We conclude the paper by returning to the whimsical question of whether in fact Legal Realism and the Attitudinal Model have in fact damaged the legitimacy of the U.S. Supreme Court.

We begin this paper with an overview of the empirical findings on the legitimacy of the Supreme Court, the ways in which knowledge enhances legitimacy, and the limited findings on popular belief in the myth of legality.

## **Institutional Support for the Supreme Court**

The U.S. Supreme Court is a deeply legitimate institution. Gibson, Caldeira, and Baird (1998) have established this conclusion in comparative perspective and the finding has been reconfirmed with additional data since then (e.g., Gibson 2007). The Supreme Court is not unique in its store of legitimacy – the German Federal Constitutional Court enjoys just as much legitimacy – but few courts in the world have accumulated more institutional support than the Supreme Court.<sup>5</sup>

That support is obdurate and resistant to change. Even highly controversial decisions like *Bush v. Gore* seem not to detract from the support people extend to the Court.<sup>6</sup> Indeed, the title of a recent paper asks the question: “Is the Supreme Court Bulletproof?” (Farganis 2008). Extant research suggests few avenues through which the legitimacy of the Supreme Court might be threatened.

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<sup>5</sup>A considerable literature has emerged that examines the legitimacy of high courts worldwide. In addition to the Gibson, Caldeira, and Baird (1998) article, see Gibson and Caldeira (2003) on South Africa, Fletcher and Howe (2000) and Hausegger and Riddell (2004) on Canada, Baird (2001) on the German FCC, and Gibson (2008) on South Africa.

<sup>6</sup>In a comparison of data from a survey conducted at the height of the controversy with survey data from 1995 and 1987, Gibson, Caldeira, and Spence (2003a) found no evidence whatsoever that the court’s legitimacy took a dip owing to its decision. Other scholars report similar findings; for instance, Price and Romantan (2004, 953, emphasis added) draw the following conclusion from their research: “On the whole our findings are consistent with the hypothesis that the election — even with the vituperative disputes in its wake — served to *boost* public attachment to American political institutions.” Others (e.g., Yates and Whitford 2002, Kritzer 2001, Gillman 2001, and Nicholson and Howard 2003) reach a similar conclusion.

An exception to this general finding has recently been discovered by Gibson and Caldeira (2009), who found that the politicized advertisements broadcast both in favor of and in opposition to the nomination of Judge Samuel Alito to the High Bench undermined the Supreme Court's legitimacy. Gibson and Caldeira speculate that the message of these ads was that the Supreme Court is just another political institution, and that citizens exposed to that argument were less likely to extend support to the Supreme Court. The Court is best able to maintain its legitimacy by pointing toward its distinctive "non-political" role in the American political system.

Thus, the U.S. Supreme Court profits from a large store of reasonably stable institutional support. To the extent that there is a threat to that support, it comes from events that challenge the view of the Court as a uniquely non-political political institution.

### **To Know the Court is to Love It**

A considerable body of research, conducted throughout the world, indicates that greater knowledge of judicial institutions is associated with a willingness to ascribe greater institutional legitimacy. For instance, Gibson, Caldeira, and Baird (1998) show that the most knowledgeable citizens in about twenty countries are most likely to extend support to their high court. And the impact of knowledge is independent of satisfaction with the short-term outputs of the court.

We also understand something of the process by which knowledge enhances support. According to Positivity Theory, as advanced by Gibson and Caldeira (e.g., 2009), greater knowledge of courts is associated with greater contact with them and, concomitantly, with greater exposure to the legitimizing symbols typically attached to courts. It seems that knowing about courts typically means knowing that courts are special institutions, different from ordinary political institutions, and, as such, that they are worthy of the esteem of the citizenry. Whatever the precise process involved, more knowledgeable people are inevitably more supportive of courts.

## **Knowledge and the Myth of Legality**

At the same time, however, a reasonable hypothesis posits that greater exposure to the judiciary is associated with a more realistic view of how courts and judges actually operate. Exposure to courts should be associated with the understanding that judges have discretion available to them when they render their decisions, that the process of decision-making involves far more than “applying” the law to the facts in a mechanical or syllogistic fashion, and that judging inevitably involves and implicates judges’ personal values. To know more about courts is therefore to know that collegial courts like the Supreme Court often, if not typically, render divided and, on occasion, deeply and bitterly divided, decisions. If judges cannot agree on what the law is, then belief in mechanical jurisprudence is difficult to sustain.

Paradoxically, however, the limited evidence we have indicates that greater political knowledge is associated with a *less* realistic view of how courts actually operate. For instance, long ago, Casey (1974) demonstrated that the more one knows about law and courts, the more one is likely to believe in the theory of mechanical jurisprudence. Something about being exposed to information about courts contributes to people embracing this traditional mythology of judicial decision making (see also Scheb and Lyons 2000, and Brisbin 1996).

This paradox is all the more interesting in cross-institutional perspective. Hibbing and Theiss-Morse (1995) have shown, for instance, that greater awareness of the Supreme Court leads to *more* support for it, whereas greater awareness of Congress is associated with *less* support for that institution. Kritzer and Voelker (1998) offer similar evidence. When people are exposed to judicial institutions, they apparently learn more than a single lesson: They may understand that the court has made a decision in favor of (or opposed to) their interests, but they also learn something about the institution itself. Given the dense syndrome of legitimizing symbols courts employ, it is not surprising that this exposure enhances

institutional legitimacy.

## **The Myth of Legality**

But do Americans actually subscribe to a mythical view of judicial decision making, and does this view contribute to judicial legitimacy? The evidence is not entirely clear.

Baird and Gangl (2006) investigate this hypothesis, although their analysis is based upon the judgments of college students. They posit that perceptions of legalistic decision-making enhance the perceived fairness of the decision-making process, a key underpinning of judicial legitimacy. In their experiment, they used media reports to try to convince the students that a Court decision was based more on political (legal realism) than legal (mechanical jurisprudence) considerations. Unfortunately, but tellingly, the experiment failed on this score, with a majority of the students believing that the justices followed legalistic considerations *even when* told about the role of ideological factors (2006, 602). Although this result limits the value of the experiment, the finding does demonstrate the powerful framing effects of the belief in legalistic decision making and how deeply embedded it is among the political beliefs of many Americans. Importantly, their analysis also demonstrates that greater belief in the myth of legality is associated with greater perceptions of fairness (see also Baird 2001).

Baird and Gangl also report an unexpected finding for which they have no explanation. Perceptions of legalistic decision making enhance fairness judgments, but perceptions of political decision making do not detract from fairness. Political decision making is portrayed in their experiment by the belief that the “members of the Court engaged in bargaining and compromise to reach this decision.” Whether the student believed that bargaining was involved had no impact on perceived procedural fairness (2006, 605).

We suspect that the reason for this finding lies in the conceptualization employed by Baird and Gangl. They clearly postulate a unidimensional continuum ranging from legalistic to political decision

making.<sup>7</sup> Legalistic refers to relying upon the law in making decision; political decision making involves bargaining and compromise. What Baird and Gangl did not appreciate, however, is that two forms of political decision making exist: principled and strategic. Bargaining and compromise can be principled, and hence not necessarily objectionable; this process of decision making can focus on real issues and legitimate ideological, philosophical, and legal disagreement. But bargaining and compromise can also be strategic, especially when the actors are attempting to maximize some form of their self interest (e.g., political ambition) rather than reach a negotiated solution to the issue at hand. We hypothesize that to the extent that the American people view discretionary and ideologically-based decision making as principled, those beliefs will *not* undermine the Supreme Court's legitimacy.

This then leads to the puzzle with which this paper is concerned: Greater attention to courts is most likely associated with greater exposure to legitimizing symbols and therefore with *enhanced* judicial legitimacy. But, greater exposure is also associated with a more realistic view of judicial decision making, a view emphasizing discretion and policy making, and that view may tend to *undermine* judicial legitimacy. Reconciling this paradox is important for developing a more thorough understanding of citizen beliefs about the judiciary.

Logically, then, these findings can only be explained by two processes. First, most people must know little about the Court and therefore accept the myth of legality, which leads to the ascription of legitimacy. Or, second, knowing more about the Court must produce realistic understandings of judicial decision making that do not undermine the legitimacy of courts. Thus, one of the most important questions this research seeks to answer is whether institutional support is undermined by holding a realistic understanding of the role of discretion and values-based decision making when it comes to the U.S. Supreme Court.

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<sup>7</sup>Indeed, their measure forces this conception on the students: "To what extent do you think that justices on the Court used legal considerations as opposed to their ideological beliefs in rendering their decisions?" (2006, 601).

## The Survey

This research is based primarily on a nationally representative sample interviewed three times in 2005 and 2006. The initial interviews were conducted face-to-face from mid-May until mid-July, 2005; the second-wave interviews were fielded from mid-January 2006 through mid-February 2006; and the final interview was conducted a few months later, in May or June, 2006. Additional details about the panel survey are available in Appendix A. Most of the variables utilized in this analysis are drawn from the  $t_2$  interview.

## Analysis

### Measuring Institutional Legitimacy

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

Six items are used as the indicators of institutional loyalty:<sup>9</sup>

*If the U.S. Supreme Court started making a lot of decisions that most people disagree with, it might be better to do away with the Supreme Court altogether. (75.6 % supportive of the*

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

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

Court)

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

(49.7 % supportive of the Court)

*The Supreme Court can usually be trusted to make decisions that are right for the country as a whole. (70.7 % supportive of the Court)*

*The U.S. Supreme Court gets too mixed up in politics. (35.9 % supportive of the Court)*

*Judges on the U.S. Supreme Court who consistently make decisions at odds with what a majority of the people want should be removed from their position as judge. (54.9 % supportive of the Court)*

*The U.S. Supreme Court has become too independent and should be seriously reined in. (59.2 % supportive of the Court)*

At the aggregate level, these items seem to indicate reasonably high levels of support for the Court, a finding consistent with recent literature (e.g., Gibson 2007).<sup>10</sup> The six-item pool has an alpha of .67, indicating a reasonable level of reliability.

### **Measuring Judicial Knowledge**

Knowledge of the Court was measured by a set of three items, asked at both the t<sub>1</sub> and t<sub>2</sub> interviews. The items asked how Supreme Court justices are selected (appointed), their term (life), and which national institution has the “last say” in interpreting the constitution (the Court). We created an index on the basis of the responses to these items; the index varies from 0 to 3. As we have noted elsewhere (DELETED FOR IDENTIFICATION 2009a, 2009b), these questions do not tax the American people: Fully 43.1 % of the respondents answered all three questions correctly, and the average number of correct answers is 2.0

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

(median = 2.0).

### **Replicating the Knowledge – Support Relationship**

A robust correlation exists between knowledge and institutional support:  $r = .36$ , which is of course highly statistically significant ( $p < .000$ ). Those who know more about the Supreme Court are substantially more likely to express support for it. This finding confirms the conventional wisdom on the connection between knowledge and support, and provides the beginning point for our analysis of the interrelationship between realism and institutional support.

### **Perceptions of Supreme Court Decision Making**

How do the American people perceive decision making on the U.S. Supreme Court? One possibility is that most Americans accept the theory of mechanical jurisprudence. A century ago, Pound (1908) described mechanical jurisprudence as the perception that judges have little discretion in decision making; that law, not judicial philosophies, ideology, and partisanship, structure decision making; and that courts are distinctively non-political institutions. Believing in mechanical jurisprudence stands as a crucial linchpin in many theories of institutional legitimacy. After all, mechanical jurisprudence provides at least a partial answer to the quandary produced by the lack of any realistic political accountability in one of the most powerful policy-making institutions in American democracy. If judges are making discretionary decisions based on their political ideologies, and are doing so without any serious mechanisms of accountability, then significant questions of democratic legitimacy arise. To the extent that judges are mechanically following and applying the law, worries about legitimacy recede.

We formulated several propositions about judicial decision making and asked our respondents to indicate their degree of agreement or disagreement with each on a five-point Likert response set. The first such statement has to do with discretion:

Since the constitution must be updated to reflect society's values as they exist today, Supreme Court judges have a great deal of leeway in their decisions, even when they claim to be "interpreting" the constitution.

To this statement, 70.1 % agreed; thus, perceptions of available discretion in Supreme Court decision making are widespread.

But on what basis do judges exercise their discretion? We offered three possibilities to the respondents:

Judges always say that their decisions are based on the law and the Constitution, but in many cases, judges are really basing their decisions on their own personal beliefs.

Judges' values and political views have little to do with how they decide cases before the Supreme Court.

Judges' party affiliations have little to do with how they decide cases before the Supreme Court.

Most Americans (61.9 %) agree that judges actually base their decisions on their own personal beliefs, even while a smaller majority (51.8 %) recognizes that values and political views influence how decisions are made. On the question of partisan influences on decision making, the balance of opinion changes, with a slim plurality believing that party affiliations have little to do with judges' decisions (47.4 % versus 43.8 %).

In general, belief in the theory of mechanical jurisprudence – indicated by agreeing with the first two statements but rejecting the second two – is not particularly widespread in the U.S. Of the four propositions concerning the exercise of discretion, on average, only 1.4 was endorsed by the respondents, with a median of only a single statement.<sup>11</sup> Only 1.9 % of the sample subscribed to the theory of mechanical jurisprudence in response to all four of the propositions. Most Americans have a fairly

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<sup>11</sup>For these purposes, the items were all scored so that high scores indicate belief in the mechanical viewpoint.

realistic view of how Supreme Court justices make their decisions. Thus, from the responses to these questions, it appears that most Americans reject the mechanical jurisprudence model: Most believe that discretion exists, and that discretionary decisions are made on the basis of ideology and values, even if not strictly speaking on partisanship. These are beliefs we associate with Legal Realism.

At the same time, however, a majority of Americans — albeit a slim one (52.6 %) — reject the view that “judges are just politicians in robes.”<sup>12</sup> Thus, for many, discretionary and value-based decision making does not constitute the essence of the politician’s function. Instead, something more is required.

So, to reiterate, acknowledging discretion and value-based decision making is distinct from viewing judges merely as politicians. The correlation between the four-item mechanical jurisprudence index and the belief that judges are politicians in robes is only .12. Those who believe that judges are politicians are more likely to perceive discretionary decision making, but those more likely to perceive discretionary decision making are not necessarily more likely to view judges as politicians.

These findings suggest to us a typology based upon two factors: (1) whether judges are seen as having discretion and (2) whether the exercise of discretion is “political” or not. For the latter, we define “political” primarily in terms of whether discretion is exercised in a principled or self-serving or strategic fashion. We do so relying heavily on the work of Hibbing and Theiss-Morse (2001), who argue that disapproval of Congress is largely grounded in the perception that Members of Congress are typically advancing their self-interest above all else. Table 1 reports this typology. Obviously, if people do not recognize discretion, then the question of how discretion is exercised is not relevant; we term those cells the Mechanical Jurisprudence Model. The exercise of principled discretion is dubbed the “Judiciousness Model.”<sup>13</sup> The “Typical Politician Model” describes self-interested decision making. We assume that the

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<sup>12</sup>The respondents were asked to agree or disagree (on the same five-point Likert response set) with the statement: “Supreme Court judges are little more than politicians in robes.”

<sup>13</sup>During the confirmation hearings for Judge Alito, Professor Anthony Kronman (former Dean of the Yale Law School) provided a useful understanding of “judiciousness” (DCH e-Media 2006): “The temperament of the judge, as I see it, is marked by modesty, by caution, by

dominant view of American judges is the Judiciousness Model and that the most prevalent view of parliamentarians and executives is the Typical Politician Model.

[PLACE TABLE 1 ABOUT HERE]

Thus, we posit three main types when it comes to perceptions of the judiciary: Those who perceive relatively high discretion but who believe that judges exercise discretion in a relatively principled fashion; those who see relatively high discretion but who believe that judges tend toward being strategic politicians of the ordinary sort; and those who perceive relatively low discretion as available to judges. According to our survey data (using the items discussed above), very roughly speaking, about one-fourth of the American people fall into each of these three categories, with the remaining one-fourth being uncertain and/or confused.<sup>14</sup>

### **Connecting Beliefs About the Process of Judging to Institutional Support**

Table 2 reports the results of regressing institutional support on these various measures of perceptions and political knowledge.<sup>15</sup> Several interesting findings emerge from this table. First, Model I reveals that

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deference to others, in different roles with different responsibilities, by an acute appreciation of the limitations of his own office, and by a deep and abiding respect for the past.

There is a name that we give to all of these qualities taken together. We call them judiciousness. And in calling them that, we recognize that they are the special virtues of a judge.”

<sup>14</sup>Our conclusion about the distribution of these various attitude types is based on responses to the “politicians in robes” item and to a four-item index of belief in judicial discretion. For instance, 26.0 % of the respondents reject the view that judges are politicians in robes, but nonetheless perceive judicial discretion on at least two of the four propositions. We present these estimates as nothing more than “order-of-magnitude” figures.

<sup>15</sup>In the analysis that follows, we are not necessarily positing causal relationships among the various attitudes and we are therefore not trying to model attitudes comprehensively. Our goal is to determine “what views go with what” and this can often be accomplished via bivariate correlation coefficients. We treat simple correlations as “total effects,” recognizing of course that for some purposes one might wish to disassemble total effects into direct and indirect pathways, and, as such, our hypotheses depend only upon whether various attitudes covary, whatever their causal interrelationships.

support is greatest among those who *reject* the view that judges' political views are irrelevant to their decision making, and this is a fairly substantial (and of course highly significant) relationship ( $\beta = -.28$ ). In seeming contradiction, Model I also indicates that support is higher among those believing no leeway in decision-making exists ( $\beta = .12$ ) and that judges do not base their decisions on their personal beliefs ( $\beta = .16$ ).

[PLACE TABLE 2 ABOUT HERE]

Model II clarifies these relationships considerably. Only two of the decision-making assessments are significantly related to institutional support: Support is highest among those disagreeing that political views are irrelevant (i.e., asserting that such views *are relevant*) and among those asserting that judges are not simply politicians in robes. The latter item reduces the impact of the two propositions connected to judicial insincerity to statistical insignificance, which seems to confirm the view that responses to these items are picking up the belief that judges are like “ordinary politicians” in describing their decision-making processes in insincere ways. The results in Model II support two basic but quite important conclusions: Support for the Court is not damaged by acceptance of the basic tenets of the Legal Realism, but support depends upon seeing judges as different from ordinary politicians, in part because, unlike politicians, they are principled in their decision making.

Finally, the addition of knowledge to this equation changes the findings little, except to reiterate that knowledge itself has a substantial positive and direct impact on institutional support.

For only one of these perceptions is its impact conditional upon knowledge: As knowledge increases, the connection between the belief that judges are not merely politicians in robes and institutional support increases. Indeed, over the range of the knowledge indicator (0 through 3), the impact of the robes variable doubles, which is of course statistically significant ( $p = .014$ ).<sup>16</sup> Perhaps this

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<sup>16</sup>This relationship can be easily modeled within a single, interactive equation in which knowledge and the “politicians in robes” items are included as both additive and multiplicative terms. In the equation, the addition of the interactive term increases the explained variance in institutional support to a statistically significant degree ( $p = .009$ ), and the coefficient for the interactive term is, by definition,

is an indication that knowledgeable people understand better what it means to not be a politician in robes, and consequently that this understanding more readily translates into institutional support.

### **Connecting Political Knowledge to Beliefs About the Process of Judging**

To what degree do these beliefs about judging reflect varying levels of knowledge about the operation of the Supreme Court? As we have noted, this is a crucial linkage in the institutional support model. Table 3 reports the relationships.

[PLACE TABLE 3 ABOUT HERE]

The correlations in this table are all over the map. At one extreme, those who are more knowledgeable are less likely to assert that the political views of the justice are *irrelevant*, with only 28.0 % of the most knowledge respondents subscribing to this viewpoint. This percentage contrasts with roughly one-half of those with low knowledge asserting that the political views of justices are irrelevant. On this item, knowledge is associated with rejection of the mechanical view of judging, and a realistic view of judicial decision making

At the other extreme, those most knowledgeable are most likely to reject the view that judges are merely politicians in robes. The contrast between the percentages is striking, with 69.4 % of the most knowledgeable but only 21.4 % of the least knowledgeable rejecting this statement. To the extent that the mechanical view asserts that what judges do is different from what ordinary politicians do, knowledge contributes to belief in the mechanical theory. However, the “politicians in robes” item may actually have a different meaning to the respondents.

For the other three items, the differences are less stark, and, indeed, on the question of whether

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also significant at this level. The unstandardized regression coefficient for the interactive term is .021 ( $\beta = .517$ ). This method of analysis supports the same substantive conclusion: As knowledge increases, the relationship between institutional support and rejecting the view that judges are merely politicians in robes strengthens.

judges rely on their personal beliefs in decision-making, those at all knowledge levels accept that personal beliefs are important. The more knowledgeable are slightly less likely to believe that the partisan affiliations of judges are irrelevant ( $r = -.09$ ) and slightly more likely to accept the view that there is no leeway in constitutional interpretation ( $r = +.09$ ). By noting the percentages in the column pertaining to the most knowledgeable respondents, one can see that the most knowledgeable respondents do not generally embrace the theory of mechanical jurisprudence.

Knowledgeable respondents seem to have fairly complicated view of judging. They do not believe that the political views of the judges are irrelevant, and only a minority denies discretion in judicial decision-making, but at the same time they see judging as different from ordinary politics. Perhaps the key to understanding their views can be found in the item on whether leeway in constitutional interpretation exists.

The leeway item was designed to measure perceptions of the availability of discretion in decision making. But perhaps that is not what the question is actually measuring. Among the most knowledgeable, responses to this item are completely uncorrelated with the other statements (maximum  $r = .05$ ), with the exception of the statement about politicians in robes, where the correlation is  $.22$ . We suspect that at least some respondents viewed this statement as more about judges being disingenuous than about discretion. It is possible that these respondents are keying on the phrase “even when they claim to be ‘interpreting’ the constitution.” Perhaps some view this as a statement about whether judges are strategic or not, in the sense of doing one thing but claiming to do another. The failure of this item to correlate with the other discretion questions, while having a positive correlation with the politicians in robes item, may indicate that this proposition is measuring perceptions of strategic and insincere activity on the part of judges. The data, however, do not allow further analysis of this possibility.

To recap: The most knowledgeable respondents recognize discretion, accept that judges rely on their political values in decision making, even while seeing judges as different from ordinary politicians,

especially in not being insincere and strategic. Perhaps this is the model of principled but discretionary judicial policy making, a model that renders realistic views compatible with judicial legitimacy.

## **Discussion and Concluding Comments**

The most important conclusion of this analysis is that the legitimacy of the U.S. Supreme Court does not depend on the perception that judges merely “apply” the law in some sort mechanical and discretionless process. The American people know that the justices of the Supreme Court exercise discretion in making their decisions – what better evidence of this fact is there than the multiple and divided judgments by the group of nine? They are also aware that the justices’ discretion is guided by ideological and even partisan considerations, to at least some degree. None of these understandings seem to contribute to undermining the legitimacy of the Supreme Court. Instead, legitimacy seems to flow from the view that discretion is being exercised in a principled, rather than strategic, way.

How do the American people discover that courts exercise discretion in a principled fashion? The answers can be found in both childhood socialization and the powerful symbols of judicial power.

Americans learn from the earliest days of their civics education that the American political world is divided into three branches (Caldeira 1977). Moreover, civics training attempts to reinforce the view that judges deal with law, not politics, and that judges typically are not politicians in the usual sense. We suspect that most schoolchildren come to appreciate that judges of the Supreme Court do something different from what the president or Congress does.

This view that judging is different from politics is reinforced every time the citizen pays attention to the real world of judicial politics. Judges wear special dress, are shown extraordinary deference and respect, and they work in buildings that often looks very much like temples. Citizens taught from civics courses that judges are different have that view reinforced every time the judiciary catches their attention.

When citizens pay attention to courts, two things happen. First, they acquire information about

the justices, the cases, and the institution. They may learn about personalities, about rulings in areas of interest, and about the structure and function of the institution. They therefore become more knowledgeable about the institution.

The second lesson learned concerns the symbols of judicial power – these symbols teach that the judiciary is different from other political institutions. The two aspects of learning may or may not be connected to each other, but we posit that factual learning contributes to higher political knowledge and symbolic learning contributes to higher institutional support.

Being informed about courts means that one understands that judges make decisions in a principled fashion. The mistake of some research is to assume that principled decision making can only be understood as discretionless or mechanical decision making. The most important argument of this paper is that the American people accept that judicial decision making can be discretionary, grounded in ideologies, but also principled and sincere. What the American people find detestable about political decision making is that it is strategic. The synonym for “strategic” is insincere; the reason why people distrust politicians is because they believe they are not sincere, they say and do what is useful and self-serving at the moment. The way that judges are different from ordinary politicians is that they are sincere, and their sincerity adds tremendously to their legitimacy and the legitimacy of their institution.

So, in the end, the generation of political scientists who have taught their students Legal Realism and the Attitudinal Model seems to have done little to undermine the legitimacy of the Supreme Court. The American people seem quite capable of understanding the true nature of decision making in the third branch, but at the same time regard courts as highly legitimate within the American political scheme. Judges are certainly politicians; but what distinguishes judges in the minds of the American people is that judges exercise discretion in a principled fashion. Were other politicians to act more like judges, perhaps the legitimacy of all American political institutions would be elevated.

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## **Appendix A: Survey Design, the 2005 – 2006 Panel Survey**

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

During the course of the Alito confirmation process, we attempted to re-interview the respondents from the 2005 survey.<sup>17</sup> The fieldwork began on January 19, 2006, and was completed on February 13, 2006. A total of 335 individuals from the 2005 survey was re-interviewed. If we were to treat this as an entirely new survey, not a re-interview, and apply the AAPOR criteria to calculate the widely used Modified Response Rate #3, the rate would be 53.2 %.

Since  $t_2$  interviews were completed with only one-third of the original respondents, questions about the representativeness of the sub-sample naturally arise. We have considered this issue in some detail.

One way in which the representativeness of the  $t_2$  sample can be assessed is to determine whether those who were interviewed in the second survey differ from those who were not interviewed. The null hypothesis ( $H_0$ ) is that no difference exists between the two subgroups.

We have investigated this hypothesis by examining the level of knowledge the respondents hold

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<sup>17</sup>We decided to exclude two categories of individuals from the second-wave project: (1) those for whom the initial interview was in Spanish, and (2) those living in areas decimated by Hurricane Katrina. This resulted in 969 individuals being eligible for re-interviewing.

about the Supreme Court. Table A1 reports the relevant statistical analysis. For instance, the first entry in the table reports that 72.8 % of the respondents who were interviewed at  $t_2$  knew that Supreme Court justices are appointed to the bench, whereas only 61.7 % of those not interviewed were similarly informed. This difference is highly statistically significant ( $p < .001$ ), but the strength of the relationship is not very strong ( $\phi = .11$ ).

[PLACE TABLE A1 ABOUT HERE]

Overall, the  $t_2$  sub-sample is slightly more knowledgeable about the Supreme Court than those who were not interviewed. The differences are not great but nor are they entirely trivial. Consequently, some statistical adjustments to the  $t_2$  sample are necessary.

The initial 2005 sample was subjected to minor post-stratification, adjusting the sample on a handful of demographic attributes (as is conventional these days). When we apply exactly the same methodology to the  $t_2$  data, using the frequency distributions for the demographic variables from the 2005 survey, the gap between interviewed and not-interviewed reduces considerably. For instance, without  $t_2$  weighting, the mean number of correct answers to the three knowledge questions among those who were interviewed is 2.03. With weighting, that mean reduces to 1.87, which is much closer to the mean of 1.72 for those who were not interviewed. Consequently, we have weighted the  $t_2$  data by this factor, and, after doing so, the  $t_2$  sub-sample is reasonably representative of the initial sample.

Thus, we draw two general conclusions from that analysis. First, the  $t_2$  sub-sample is reasonably representative on its face, and second, with minor post-stratification, the 2006 sub-sample closely mirrors the 2005 population from which it was drawn. We therefore believe inferences can confidently be drawn from our analysis, even if the confidence intervals of this relatively small sub-sample are larger than we might prefer.

The  $t_3$  survey was in the field from May 24 through June 22, 2006, and resulted in 259 completed interviews. Only respondents interviewed at  $t_2$  were eligible for inclusion in the  $t_3$  re-interview survey

(334 respondents), resulting in a 77.6 % raw response rate, and a rate of 82 % according to AAPOR's Response Rate #3 formula.

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

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

**Table A1. Differences Between Those Interviewed and Those Not Interviewed in 2006**

Percentage knowing that <sup>a</sup>	t <sub>2</sub> Outcome	
	Not Interviewed	Interviewed
Justices are appointed to the bench	61.7	72.8
Justices serve life terms	56.2	68.8
Supreme Court has “last say” on the constitution	54.4	61.6
Mean number of correct answers	1.7	2.0

<sup>a</sup> Knowledge was measured during the 2005 interview. These data are weighted by t<sub>1</sub> post-stratification weights.

**Table 1. A Typology of Perceptions of the Nature Judging**

		The Basis of the Exercise of Discretion	
The Availability of Discretion		Principled	Self Interested
Available		Judiciousness Model	Typical Politician
Not Available		Mechanical Jurisprudence	

**Table 2. The Impact of Perceptions of Decision-Making Processes on Support for the U.S. Supreme Court**

Predictor	r	Model I			Model II			Model III		
		b	s.e.	$\beta$	b	s.e.	$\beta$	b	s.e.	$\beta$
Political view irrelevant	-.28	-.05	.01	-.28 ***	-.04	.01	-.24 ***	-.03	.01	-.20 ***
Partisanship irrelevant	-.01	.01	.01	.03	.01	.01	.06	.01	.01	.07
No leeway in constitutional interpretation	.15	.02	.01	.12*	.00	.01	.01	.00	.01	.01
Decisions not based on personal beliefs	.15	.03	.01	.16**	.01	.01	.08	.02	.01	.09
Not politicians in robes	.44				.07	.01	.39 ***	.06	.01	.33 ***
Political knowledge	.36							.04	.01	.23 ***
Intercept		.49	.05		.34	.05		.26	.05	
Standard Deviation — Dependent Variable		.19			.19			.19		
Standard Error of Estimate		.18			.16			.16		
R <sup>2</sup>				.12 ***			.25 ***			.30 ***
N		331			331			331		

Note: Significance of standard regression coefficients ( $\beta$ ): \*\*\*  $p < .001$  \*\*  $p < .01$  \*  $p < .05$

**Table 3. The Relationship Between Court Knowledge and Belief in Mechanical Jurisprudence, 2006**

% Believing in the Mechanical Viewpoint	<u>Knowledge of the Supreme Court</u>				<i>r</i>
	0	1	2	3	
Political views irrelevant	50.8	50.8	38.9	28.0	-.23
Partisanship irrelevant	47.6	52.5	44.4	47.9	-.09
Decisions not based on personal beliefs	32.6	26.7	33.3	29.4	.01
No leeway in constitutional interpretation	7.1	20.3	20.0	30.6	.09
Not politicians in robes	21.4	47.5	44.4	69.4	.28

Note: The table entries are the percentages of respondents at each level of court knowledge who endorse the mechanical jurisprudence viewpoint. The table reports data for those responding in all three waves of the panel study. Both knowledge and support for mechanical jurisprudence were measured at  $t_2$ ,  $331 \leq N \leq 335$ .

The propositions are:

Judges' values and political views have little to do with how they decide cases before the Supreme Court. (Agree)

Judges' party affiliations have little to do with how they decide cases before the Supreme Court. (Agree)

Judges always say that their decisions are based on the law and the Constitution, but in many cases, judges are really basing their decisions on their own personal beliefs. (Disagree)

Since the constitution must be updated to reflect society's values as they exist today, Supreme Court judges have a great deal of leeway in their decisions, even when they claim to be "interpreting" the constitution. (Disagree)

Supreme Court judges are little more than politicians in robes. (Disagree)