

COPYRIGHT NOTICE:

**James L. Gibson & Gregory A. Caldeira:**  
**Citizens, Courts, and Confirmations**

is published by Princeton University Press and copyrighted, © 2009, by Princeton University Press. All rights reserved. No part of this book may be reproduced in any form by any electronic or mechanical means (including photocopying, recording, or information storage and retrieval) without permission in writing from the publisher, except for reading and browsing via the World Wide Web. Users are not permitted to mount this file on any network servers.

Follow links Class Use and other Permissions. For more information, send email to:  
[permissions@press.princeton.edu](mailto:permissions@press.princeton.edu)

## Introduction

### THE PUBLIC AND SUPREME COURT NOMINATIONS

The processes by which nominees are confirmed to a seat on the United States Supreme Court have changed rather dramatically over the past fifty years. It is not just that confirmation struggles are more disputatious today; perhaps more important is the expansion of the numbers of actors involved in such disputes. In the past, it was relatively rare for the mass public to play much of a role. Today, one of the crucial elements in confirmation strategies concerns how public opinion will be managed and manipulated. We do not gainsay that elite groups have great influence over whether a nominee is to be confirmed (and that is another important part of how the process has changed). But at least since the days of the Bork defeat and Thomas victory, the preferences of the mass public have been influential in determining who goes on the Supreme Court.

The role of ordinary people has increased in part owing to the far greater availability of information about nominees and the confirmation process. In recent times, cable television has provided extensive coverage of the Senate hearings, and the public's pulse is often taken by media polls during the confirmation period. Evidence from many sources indicates that Americans are remarkably attentive to and even informed about the actors and issues involved when a president puts forth a nominee to the nation's highest court.

And there is little doubt that the stakes of confirmation politics have increased as well. The Supreme Court is divided on many salient socio-legal issues, as are the American people and their elected representatives. Indeed, the whole question of who gets on the Supreme Court has become one of the most important political issues of our time. And even beyond any given issue, debates over the proper role of the judiciary within the American democratic framework are becoming increasingly vocal, even strident. Confirmation politics have entered a new era in which the process is more open than ever before; the public is more engaged than it has been in the past; and nearly everyone believes that confirmation fights are entirely worth fighting.

More generally, the process of nominating and confirming judges to the federal bench has become more intensely politicized than in the

recent past.<sup>1</sup> Perhaps this era can be demarcated by the failed Bork nomination (e.g., Epstein et al. 2006), but the period of the Clinton presidency (and indeed any instance of divided control of the Congress and the presidency) also represents a high-water mark in the politics of contested confirmations. Recent nominations to the Supreme Court have been divisive and controversial. These politicized circumstances constitute a potentially volatile brew.

Many questions arise from this mix of ingredients, questions that scholars heretofore have been unable to address. Perhaps most important is that of ascertaining the effect of politicized confirmation battles on the legitimacy of the Supreme Court and the broader court system in the United States. Many fear that politicization undermines judicial legitimacy: that once the judiciary is seen as just one more political plum, the special reverence Americans hold for their courts will be eroded. The assumption is that whenever Americans are exposed to the politics that has always provided a backdrop for the judiciary, the respect accorded to courts diminishes. The process is fairly simple:

- Americans dislike many of the inherent processes of democratic politics—logrolling, bargaining, compromise, deal making, et cetera.
- The legitimacy of institutions profits when policy makers dissociate themselves from ordinary political processes.
- The great strength of courts is that their decision-making processes are grounded in principle and logic, not politics, and that they are to some considerable degree opaque.
- Any process that associates courts with ordinary politics does so at the risk of considerable damage to the legitimacy of the judiciary.

This set of arguments is widely heard when it comes to campaigning by judges holding elected positions in the state judiciaries (e.g., Geyh 2003). Many fear exactly the same dynamics will undermine the legitimacy the Supreme Court and other federal courts if the politicization of the selection process continues along its current trajectory.

Indeed, the process envisaged by critics is well represented in a somewhat different but related context by the extremely controversial decision the United States Supreme Court made in the 2000 presidential dispute. In *Bush v. Gore*, a perfectly divided Supreme Court—and one divided by political party affiliation as well—awarded the election to George W. Bush. The justice casting what many consider to be the deciding vote (Sandra Day O'Connor) was reported to have proclaimed at a cocktail party “this is terrible” when told that a Gore victory in the election was

<sup>1</sup> On the worldwide tendency toward the politicization of law and the legalization of politics, see Tate and Vallinder 1996.

likely (Gillman 2001, 18, citing Thomas and Isikoff 2000). Various law professors proclaimed in an advertisement in the *New York Times* that the Supreme Court had sacrificed a significant portion of its institutional legitimacy through its ruling in *Bush v. Gore*.<sup>2</sup> It is difficult to imagine how a set of circumstances could arise that would constitute a greater threat to the legitimacy of the Supreme Court than its (so-called self-inflicted) involvement in settling the presidential election in Florida and therefore for the nation.

Yet things are not always as they seem. It turns out that the available evidence is that the Court's involvement in the election did *not* damage its legitimacy. 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."<sup>3</sup> Many academic understandings of the impact of *Bush v. Gore* seem to be considerably off the mark.

How is it that the United States Supreme Court avoided any harmful consequences of the election imbroglio? Again, Gibson, Caldeira, and Spence (2003a) have proffered an answer: the theory of positivity bias. According to this theory, discussed more completely below, anything that causes people to pay attention to courts—even controversies—winds up reinforcing institutional legitimacy through exposure to the legitimizing symbols associated with law and courts. The theory suggests a bias in favor of developing positive feelings for the institution, even during conflicts, and even among losers in such conflicts. While there are many elements to this theory, its central prediction is that legal controversies tend to reinforce judicial legitimacy by teaching the lesson that courts are different from the other institutions of the American democracy, and are therefore worthy of respect.

Does the theory of positivity bias apply to confirmation hearings? No one knows, and it is therefore the purpose of this research to test the theory in that context. Specifically, our objectives in this book are to assess the hypothesis that confirmation hearings are not injurious to institu-

<sup>2</sup> On 13 January 2001, 585 law professors placed an advertisement in the *New York Times* condemning the Court's decision in *Bush v. Gore* as illegitimate. The advertisement, as well as much additional material and criticism, can be found at <http://www.the-rule-of-law.com> (accessed 12/7/2001).

<sup>3</sup> See also Yates and Whitford 2002; Kritzer 2001, 2005; Gillman 2001; Nicholson and Howard 2003.

tional legitimacy, owing to the fact that increased exposure to the judicial process, whatever the circumstances and even when citizens are displeased, results in collateral exposure to the symbols of judicial legitimacy, thereby tending to reinforce rather than undermine institutional support. As Gibson, Caldeira, and Baird (1998, 356) explain: “Generally, to be aware of a court is to be supportive of it. This positivity bias may be associated with exposure to the legitimizing symbols that all courts so assiduously promulgate.”

This theory of positivity bias relies heavily upon the preexisting attitudes people hold toward the United States Supreme Court, and in particular on theories of institutional legitimacy and what some refer to as “diffuse support.” Social scientists now generally agree that few forms of political capital are as useful to political institutions as legitimacy, and no institution is more dependent upon legitimacy than the judiciary. The conventional view is that courts have neither the power of the purse nor of the sword and are therefore dependent upon the voluntary compliance that typically springs from legitimacy. But the truth is that, however useful legitimacy may be to courts, no political institution could be effective without some mechanism for inducing citizens to believe that accepting their policy outputs, even disagreeable ones, is the right thing to do (Tyler 1990, 2006). Indeed, it is perhaps not hyperbole to claim that the concept of legitimacy has become one of the most important building blocks of contemporary theories of institutional stability and efficacy.

But how is it that events come to shape attitudes toward institutions? Many assume such orientations are learned early in life, and are obdurate and resistant to change. Fortunately, some research exists that is directly relevant to the question of how citizens update their views toward institutions like the Supreme Court.

#### CHANGES IN ATTITUDES TOWARD JUDICIAL INSTITUTIONS

From the initial empirical studies of legitimacy came the view that beliefs about institutions were inculcated early in the life-cycle, perhaps even in adolescence, and changed little over time (hence the great interest in research on political socialization—see, for example, Caldeira 1977). The understanding that public attitudes toward institutional legitimacy are highly resistant to change, however, seems no longer tenable.<sup>4</sup> While be-

<sup>4</sup> We equate several terms in this book: institutional legitimacy, diffuse support, and institutional loyalty. This is the same concept Caldeira and Gibson (1992) refer to as “institutional support.” For a full explication of the conceptual and theoretical foundations of this concept, see the discussion in Caldeira and Gibson (1992, 636–42). For a recent review, see Gibson 2008c.

liefs and values acquired early in life may shape perceptions and evaluations of institutional outputs to some degree, legitimacy is nonetheless not immune to forces of change. We know, for instance, that the views of African Americans toward the United States Supreme Court evolved over time from strong support to considerable suspicion (Gibson and Caldeira 1992). We also know that attitudes are to some degree responsive to policy outputs, be it through highly salient decisions (e.g., Grosskopf and Mondak 1998; Gibson, Caldeira, and Spence 2003a) or through decisions with particular local relevance (e.g., Hoekstra 2003). Indeed, the very theory upon which so many studies of legitimacy rely (Easton's theory of diffuse support) acknowledges that sustained disappointment with the outputs of an institution can in the long-term empty the "reservoir of goodwill." Like interpersonal trust and loyalty, a single incident may not destroy a relationship, but repeated violations of expectations over time can entirely deplete loyalty. Few social scientists today believe that support for political institutions is impervious to influence from institutional performance or exogenous shocks and events.

What we do *not* know, however, is whether/why/how/under what conditions change takes place. Did, for instance, the controversies over the Bork and Thomas nominations to the United States Supreme Court have a lasting effect on public perceptions of the institution? We do not know. Moreover, it is even unclear from the research literature whether sizeable short-term reactions to individual judicial decisions have lasting effects (Grosskopf and Mondak 1998). As we have noted, from available evidence it seems that the United States Supreme Court may actually have enhanced its institutional legitimacy via its ruling in *Bush v. Gore* (e.g., Gibson, Caldeira, and Spence 2003a), but even that conclusion is based only on a comparison of aggregate statistics over time, and some recent evidence (which we present below) suggests that the Court's legitimacy has surrendered any gains it might have made from the disputed presidential election of 2000. *When it comes to the question of how legitimacy is created, maintained, and destroyed, social scientists have some theories and conjectures, but precious little data, and scant understanding of processes of opinion updating and change.*

There are many good reasons why we know so little about the dynamics of change, but perhaps the most exculpatory is that longitudinal data are woefully scarce. Consider the data most widely used to understand changing attitudes toward the United States Supreme Court: Apart from one-shot surveys, scholars rely on aggregate time series data from the General Social Survey (measuring confidence in the leaders of the Supreme Court—e.g., Caldeira 1986; Durr, Martin, and Wolbrecht 2000; Ura and Wohlfarth, with Sill 2007); some small collections of individual surveys conducted over time (e.g., our data from 1987, 1995, 2001, and 2005);

a handful of before and after media polls (e.g., Grosskopf and Mondak 1998) and short-term time series (e.g., Kritzer 2001); simulations and mathematical models (e.g., Mondak and Smithey 1997); and a tiny number of studies (outside the laboratory/campus, that is) that directly assess individual-level change (e.g., Tanenhaus and Murphy 1981; Hoekstra 2003). Of course, the major impediment to panel studies of individual-level stability and change lies in the unwillingness of most scholars (and funders) to mount  $t_1$  surveys *prior to* important events taking place. Change can only be assessed when baseline data are available, which means that measurements must be taken well in advance of highly salient controversies. Unlike the periodicity of elections, the events that shape institutional legitimacy occur irregularly and are often difficult to predict in advance. Hence, data and knowledge deficits are enormous when it comes to understanding how legitimacy waxes and wanes.

The purpose of this book is therefore specifically to test hypotheses about the causes and consequences of changes in attitudes toward the United States Supreme Court. Based on a three-wave nationally representative panel survey, this project is centered around the controversy over the nomination of Judge Samuel Alito to the U.S. Supreme Court. Confirmation fights are valuable for testing theories of change because they provide a fecund opportunity to understand how citizens revise and update their attitudes toward the Supreme Court and its institutional legitimacy.

Our contention is that these confirmation processes “wake up” dormant attitudes toward law and courts in the United States by providing a salient window into the operation of the Supreme Court. To take just a simple example, the theory of mechanical jurisprudence—according to which, judges make decisions not on the basis of their ideologies but rather strictly according to the syllogisms of *stare decisis*—is placed under strain during confirmation hearings since nearly all actors focus (to at least some degree) on the ideology of the nominee. Debates are certainly clouded by confused discussions over “judicial activism and restraintism,” but few close observers of the process doubt that ideologies are important. Thus, the central legitimizing symbols upon which the Court relies—its impartiality and its strict adherence to the law—are potentially compromised during politicized confirmation processes. Consequently, although confirmation battles have been rare in recent American politics (Epstein et al. 2003, 352–58), when they occur, they provide a telling opportunity for understanding how citizen attitudes toward courts are formed and shaped.

Typically, courts are thought to be relatively low salience institutions, and the attitudes of people reflect heavily their basic and more general values (e.g., support for democratic institutions and processes, including

minoritarian institutions like the Supreme Court; see Caldeira and Gibson 1995). When a flood of new information becomes available—as is true of politicized confirmation hearings—citizens must somehow incorporate the new information into existing belief systems.<sup>5</sup> The purpose of this study is thus to determine how citizens “update” their views of the Supreme Court on the basis of exposure to highly salient and most likely partisan confirmation disputes.

Although the data necessary to investigate change are rarely available, some recent theoretical advances make it propitious for launching a major new inquiry into institutional legitimacy. The theory of positivity bias has much to say about how events shape public assessments of the judiciary.

#### THE THEORY OF POSITIVITY BIAS

What theories are useful for understanding processes of opinion change when it comes to the United States Supreme Court? As we have developed it, the theory of institutional loyalty and positivity bias suggests that standing commitments to an institution generate a bias in expectations and perceptions of confirmation struggles that predispose people to accept judicial nominees. Because the theory of positivity bias is so central to this project, we consider it in some detail

##### *What is positivity bias?*

As Gibson, Caldeira, and Spence (2003a) explain it, positivity bias is a frame through which contemporary political conflicts are judged. In their theory, the process goes something like the following. People become attentive to courts in the context of policy controversies (e.g., *Bush v. Gore*) or events like confirmation hearings. In such circumstances, judicial symbols proliferate—in part because elites and interest groups realize the power of such symbols and attempt to manipulate them—so it is impossible for attentive citizens to avoid exposure to them.<sup>6</sup>

<sup>5</sup> For instance, Gimpel and Wolpert (1996) report that fully 95 percent of the American people had an opinion about whether Clarence Thomas should be appointed to the Supreme Court.

<sup>6</sup> Gimpel and Ringel (1995, 146) advance a quite contrary hypothesis: “The more one knows about a nominee, the more one is likely to disapprove of him or her.” This conjecture is based on the finding that opposition to a nominee tends to focus on policy disagreements, and that knowledge generally produces more awareness of the policy positions of candidates. (On negativity bias—the argument that displeasure with Court opinions has greater consequences for institutional attitudes than pleasure—see Grosskopf and Mondak 1998.) While this may be so, their argument discounts another extremely important consequence of exposure to courts: As people pay attention to salient judicial events, they become ex-

Legitimizing symbols likely activate preexisting loyalty toward the institution (where it exists), as well as reinforce the understanding that courts are different from other political institutions. Consequently, although policy concerns may have provided the initial impetus for attention to a court, a second dimension, which we term “judiciousness” (Gibson and Caldeira 2006), is often activated and, for some, becomes the dominant frame for judging the events.

Caldeira and Gibson (1995) further suggest that the legitimacy of courts is *not* undermined by the disagreeable opinions issued by the institutions. This is in part related to the ability to shirk responsibility for decisions by reference to the dictates of precedent. If more knowledgeable people are more likely to accept the theory of *stare decisis* and mechanical jurisprudence, just as they are more likely to be attentive to courts, then it follows that they are also more likely to be persuaded by the justices’ denials of responsibility for the decision. This argument stands in sharp contrast to the position of Grosskopf and Mondak 1998, who hypothesize a strong negativity bias in how citizens react to Supreme Court opinions. Such a bias implies that citizens hold the justices accountable for undesirable decisions. The extremely high level of legitimacy the Supreme Court enjoys (and has enjoyed for several decades—see Gibson 2007) seems to be incompatible with the Grosskopf/Mondak theory of negativity.

*Is positivity bias associated with any substantive views of the judicial process?*

We believe that positivity bias is closely connected to the view that courts are different from other political institutions, and that judicial decision making is largely a nonpolitical process. This conception is quite similar to what Scheb and Lyons refer to as the “myth of legality,” by which they mean “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).<sup>7</sup> We hypothesize that those characterized by strong loyalty to courts tend to subscribe more

---

posed to the potent legitimizing symbols that tend to define courts as nonpolitical institutions worthy of respect and deference. Perhaps the findings of Gimpel and Ringel are peculiar to the extreme cases they study (Bork and Thomas).

<sup>7</sup> In referring to this as a “myth” we are only deferring to the term of art that has emerged in the literature (e.g., Baird and Gangl 2006). We suspect that most political scientists view legalistic depictions of Supreme Court decision making as generally empirically inaccurate, but we are not required in this analysis to accept or reject any particular view about how decisions *actually get made* on the Court.

strongly to the myth of legality, and therefore are more likely to view courts as relatively distinct, non-political institutions.

*How does positivity bias arise?*

Our understanding of the origins of positivity bias begins by positing that citizens do *not* naturally differentiate between the judiciary and the other branches of government. That courts are special and different must be learned. For example, long ago, Casey (1974) demonstrated that the more one knows about law and courts, the *less* realistic are perceptions of judicial decision (i.e., the more one is likely to believe in the theory of mechanical jurisprudence). Something about being exposed to information about courts contributes to people embracing this traditional mythology of judicial decision making (Scheb and Lyons 2000; Brisbin 1996). Thus, those most ignorant about politics—and with little exposure to judicial politics—are likely to hold views of courts and other political institutions that are quite similar: Courts are not seen as special and unique.<sup>8</sup>

Exposure to legitimizing judicial symbols reinforces the process of distinguishing courts from other political institutions. The message of these powerful symbols is that “courts are different,” and owing to these differences, courts are worthy of more respect, deference, and obedience—in short, legitimacy. Because courts use nonpolitical processes of decision making (and since the American people do not necessarily approve of the decision-making procedures common to political institutions—Hibbing and Theiss-Morse 1995, 2002), and since judicial institutions associate themselves with symbols of impartiality and insulation from ordinary political pressures, those more exposed to courts come to accept the “myth of legality.”

This process of social learning explains why citizens who are more aware of and knowledgeable about courts tend to adopt less realistic views of how these institutions make decisions and operate (e.g., Scheb and Lyons 2000). For instance, Hibbing and Theiss-Morse (1995) have shown that greater awareness of the Supreme Court leads to *more* support for it, whereas greater awareness of the Congress is associated with *less* support for that institution. Kritzer and Voelker (1998) offer a similar argument. Caldeira and Gibson (1992, 1995) have shown in several contexts that greater awareness of judicial institutions is related to a greater willingness to extend legitimacy to courts. Gibson, Caldeira, and Baird (1998) have confirmed this finding in research in roughly twenty

<sup>8</sup> This conjecture is certainly true of many countries other than the United States, as in the former East Germany, for instance (see Markovits 1995). See also Walker 2006.

countries. Something about being exposed to the institution increases support for it, and there is apparently something unique about exposure to judicial institutions.

*But does this mean that Court legitimacy is immutable?*

We do not use positivity theory to imply that the Supreme Court can never under any circumstances lose its legitimacy. We can imagine that a sustained series of unpopular decisions could alienate multiple, successive constituencies, resulting in a precipitous decline in support for the Court, coupled with growing support for altering the structure and the function of the institution.

Our contention, however, is that the effects of popular and unpopular decisions are asymmetrical. Popular decisions generate unadulterated support for the Court, just as they do for any institution. But the effects of unpopular decisions are discounted, both by processes of shirking and by association with the legitimizing symbols of judicial power. We acknowledge that the decline of institutional legitimacy could become a nonlinear, cascading process in the sense that as the Court's reservoir of support becomes shallower, the impact of unpopular decisions grows. We know of no such cascade in American history, however.<sup>9</sup> Our objective in this book is to determine whether politicized confirmation processes can have a delegitimizing effect on the Supreme Court by providing an image of the Court incompatible with the processes undergirding positivity theory.

*How does positivity bias influence perceptions of decisions and events?*

A positivity bias is actually little more than a frame through which events are perceived and evaluated (on framing, see Druckman 2004). "Issue framing effects refer to situations where, by emphasizing a subset of potentially relevant considerations, a speaker leads individuals to focus on these considerations when constructing their opinions" (Druckman 2004,

<sup>9</sup> In all of our thinking about these processes, we are much influenced by Roosevelt's attacks on the Supreme Court in the 1930s. If an enormously popular president, stimulated to action by a continuous string of unpopular and crippling Supreme Court decisions, cannot succeed in changing the Court, it is difficult to imagine a scenario in which such attacks would succeed. At the same time, however, Gibson and Caldeira (1992) point to declining support for the Supreme Court among some segments of the African American community from roughly the Warren Court era to the Rehnquist Court, so clearly a diminution of Court support is possible. Gaining a greater understanding of the processes of change in Court support is precisely the objective of this book.

672). Framing is a process by which the salience or accessibility of different criteria or dimensions by which an event or case might be judged varies according to preexisting characteristics of the individual. A stimulus activates a frame, and the frame influences how the world is perceived and judged. Elites often compete in proffering frames for the mass public (e.g., Sniderman and Theriault 2004), which typically results in alternative frames being available in the marketplace. Framing effects are not inevitable (Druckman 2004), preexisting attitudes do not always exist, and it is never easy to predict which particular frames will become dominant, but the battle for public opinion is often (if not typically) a battle of one frame against another.

Confirmation battles provide a prime example of competing frames.<sup>10</sup> On one hand, the frame of legality is advanced, typically by proponents of the nominee. Their argument is that the nominee ought to be judged primarily (if not exclusively) on legalistic criteria like judiciousness. On occasion, the opposition will engage the judiciousness battle, but more likely is an attempt to substitute a frame defined by political considerations such as ideology, partisanship, and policy. Which frame comes to dominate depends in part on the nominee and the elements of the specific context, but also in part on whether citizens have preexisting commitments (loyalty) to the institution that can be activated. In the case of the United States Supreme Court, the outcome of a confirmation controversy depends in significant part on the degree to which citizens subscribe to the myth of legality, which is of course a central element of positivity bias. Figure 1 portrays these processes of positivity bias in schematic and stylized form.

For example, Nicholson and Howard (2003) provide a useful earlier effort to use framing theory to account for how the Americans viewed the Supreme Court's decision in *Bush v. Gore*. They analyze three competing frames for the decision: partisan, legal, and election. One of their more interesting findings is that the partisan frame (through which they tried to persuade their respondents that the Supreme Court's decision was made on the basis of partisanship and politics) failed entirely to influence the legitimacy of the Supreme Court, even though the election frame (stressing the role of the Supreme Court in bringing the election to an end) had some limited effect. Their research also strongly confirms Druckman's argument that scholars ought to focus on the conditions under

<sup>10</sup> In an extremely insightful paper, Sniderman and Theriault (2004) argue that research on framing is generally flawed because the typical research design does not employ alternative frames for events. In virtually all important political controversies, multiple, competing frames are typically proffered. As Sniderman and Theriault put (2004, 158), "[T]his whole body of studies on framing has gone terribly wrong by overlooking politics itself."

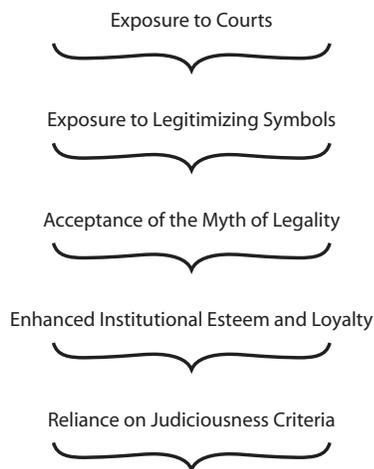


Figure 1.1. The Consequences of Positivity Bias

which issue frames are effective. Perhaps one such condition is related to whether the frame activates well-established, but often dormant, political beliefs and attitudes.

Whether positivity frames are able to override attempts to politicize confirmation processes is an important question both for theory and for the practical politics of confirmations.<sup>11</sup> The job of the successful nominee is to activate the legal rather than political frame through which ordinary citizens perceive and judge the confirmation process. We hypothesize that to the extent that legal expectations are satisfied, the influence of ideology, policy, and partisanship is minimized, which is typically the preferred strategy of policy-minded presidents.

Thus, a central hypothesis emerging from the theory of positivity frames is that preexisting institutional loyalty plays a crucial role in how confirmation processes are perceived and judged. Of course, facts and contexts are not unimportant; how people perceive the details of confirmation fights is crucial to the formation of their preferences. We hypothesize that loyalty interacts with events surrounding the confirmation, causing citizens with a sense of loyalty toward the Court to rely primarily upon criteria of judiciousness in judging the nominee. In contrast, those without a sense of institutional loyalty are likely to judge the confirmation process in terms of ordinary political criteria.

<sup>11</sup> This sentence should not be taken to mean that we believe that any nominations are anything but political. Presidents always seek to advance their political goals (whatever they may be at the moment) through their nominees to the Supreme Court. When we refer to the politicization of a process, we simply mean that some parties to the controversy attempt to substitute a political frame for a legal frame and thus to change the criteria (or dimensions) on which the process is judged.

*Updating Processes: Theories of Individual-Level Change*

Institutional loyalty provides a positivity frame through which confirmation events are perceived and judged. But that is not the end of the causal process: Instead, while preexisting attitudes shape perceptions of events, perceptions of events in turn influence attitudes. We propose that salient judicial events, like contentious confirmation processes, stoke hibernating attitudes, bringing them alive, and potentially changing them. Thus, while one portion of our analysis focuses on events as “dependent variables,” another portion treats them as “independent variables” embedded within a theory of individual-level attitude change.

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

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

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

Learning about the Supreme Court is a dynamic process involving the interaction of experiences and aspirations. Citizens hold expectations of judges and judicial institutions that interact with exposure to messages from the confirmation process.<sup>12</sup> To the extent that perceptions satisfy expectations, attitudes toward the institution are unlikely to change. Dis-

<sup>12</sup> As we note below, these expectations cannot be assumed but rather must be directly measured. And expectations of judges, of course, are well understood within the context of role theory (e.g., see Gibson 1981).

appointment, however, can be a powerful engine for change, especially to the extent that the disappointment emerges from the acceptance of a politicized confirmation frame. To the extent that people come to view nominees to the high bench as “politicians in robes,” the distinctive, non-political character of the Supreme Court can be undermined, opening the door for reconsideration of loyalties toward the institution itself. Because challenges to nominees to the Supreme Court so often focus on ideology, partisanship, and highly realistic views about how the justices go about the business of making the law, these events have great potential to reshape attitudes toward courts.<sup>13</sup> The processes are without doubt complicated, involving interactions between preexisting attitudes and perceptual frames, the availability of highly salient alternative views of the operation of the judiciary, and poorly understood “tipping” processes when the presumption of judiciousness begins to quickly melt away. Whether attitudes toward the legitimacy of the institution change depends in part on the relationship between expectations and perceptions. Where dissatisfaction arises, its impact is strong because it threatens the view that courts are nonpolitical institutions. Thus, confirmation processes have considerable potential for reordering attitudes toward the U.S. Supreme Court. But only by measuring each of the concepts independently (loyalty, before and after, expectations, perceptions, beliefs about the process of judging, et cetera) can these complex causal relationships be unraveled.

Thus, to address the impact of the nomination processes on the legitimacy of law and courts requires a pre- and post-research design centered on a highly salient confirmation event. Such a design, on a somewhat limited and less-than-perfect basis, we implemented in conjunction with the nomination of Judge Alito to the Supreme Court (see appendix A for the methodological details of the survey). This book reports the results of those surveys.

#### OUTLINING THE CHAPTERS THAT FOLLOW

We begin this analysis by confronting directly the oft-heard doubts about the relevance of a study of mass opinion when it comes to courts in general and confirmation debates in particular. Critics often contend that the American people know nothing about law and courts and therefore at-

<sup>13</sup> It is at this point that the Grosskopf and Mondak (1998) theory of negativity may be useful. We doubt that negativity bias has much to do with how people evaluate individual Court decisions. But when people are forced to rethink processes of decision making—indeed, the very function of the Supreme Court within the American political system—negative conclusions (e.g., that the institution is politicized) may indeed have the disproportionate influence of a negativity bias.

tempts to understand their views are both irrelevant and doomed to failure since the bulk of mass attitudes can be best described as random error. We present in chapter 2 evidence rebutting the conventional wisdom, relying on our confirmation survey, a similar survey in 2001, and the American National Election Surveys. We conclude from this chapter that the American mass public is vastly more informed about the Supreme Court than heretofore thought, and, therefore, that something can be learned by studying how Americans react to politicized confirmation processes.

Chapter 3 focuses on public attitudes prior to the Alito nomination. Here, we discuss in detail our theory of institutional loyalty, the predispositions that are so central to the theory of positivity bias. David Easton referred to institutional support as a “reservoir of goodwill,” and theories of legitimacy ever since have stressed the importance of courts not having to attend slavishly to majority opinion. We offer our conceptualization of loyalty, as well as a measurement strategy that has served us well in the past. We contrast loyalty with the well-known measures of confidence in the leaders of the Court, as well as with other approaches to measuring institutional attitudes.

Following our earlier research, we also assess the degree to which support for the Supreme Court is grounded in ideological and partisan divisions within the American people. We find no evidence of a polarized mass public in the contemporary United States when it comes to fealty to the Supreme Court. Instead, support for the Court is more closely associated with general support for democratic institutions and processes, which is an important finding because it suggests that court support is relatively obdurate (since support for democratic values is a core political attitude for most Americans). This chapter largely focuses on the calm before the Alito storm, and provides the baseline data from which change in attitudes can be assessed.

We focus in chapter 4 on the Alito nomination itself. Our survey was in the field immediately after public testimony on the nomination ended, so we are able to examine in more detail than has been possible in the past the attentiveness of people to the process and their expectations and perceptions of it. Much in this chapter will be surprising to most readers—for instance, Judge Alito was seen on average as only slightly to the right of center on the ideological continuum, despite the fact that he promises to be one of the most conservative judges to sit on the High Bench in modern times. Most important, we use the confirmation fight to flesh out positivity theory, testing the hypothesis that preexisting support for the Court led to a predisposition to weight particular criteria heavily in assessing Judge Alito. We refer to this criterion as “judiciousness,” and argue that those who would defeat a nominee must overcome a high barrier in convincing court supporters to rely more heavily on ideological

factors in assessing a nominee. We also examine in this chapter the advertising campaigns for and against Alito's confirmation, based on a systematic analysis of data collected on the broadcasts sponsored by interest groups. We know of no other study of the role of the mass public in a confirmation process that is as comprehensive and theoretically grounded as this one.

The most innovative chapter in this book is undoubtedly chapter 5, for it is here that we actually assess change in attitudes. The simple hypothesis is that change in loyalty toward the Supreme Court is a function of perceptions of the degree of politicization of the confirmation process. For some respondents, the process rendered the "myth of legality" mythical, causing a diminution in support for the Court. For others, paying attention to the process was tantamount to taking a college-level course in the uniqueness of the judiciary in the American political system, and support for the institution was buoyed. Throughout this analysis, we make comparisons to the effect of controversial decisions on court support, considering in particular the fabled *Bush v. Gore* decision. With the possible exception of Hoekstra's analysis, no earlier research has been able to focus so thoroughly on individual-level change (which of course necessitates microlevel panel data), so this chapter makes a substantial empirical contribution to our understanding of positivity bias.

In the final chapter, we take a few steps away from the data and think somewhat more broadly about courts, democracy, and legitimacy. Here, we also outline what we consider to be the next research step for those interested in how understanding how institutional legitimacy is acquired and expended.

Thus, this analysis examines public attitudes and values prior to, during, and after the confirmation struggle, and treats institutional support as both an independent and dependent variable. In the final analysis, we present a new perspective on the importance of the American people for the performance of the country's judicial institutions.