

HOW DO PEOPLE THINK ABOUT THE SUPREME COURT WHEN THEY CARE?

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James Gibson and Michael Nelson have written another compelling paper examining how Americans think about the Supreme Court. Their essential finding is that various versions of criticisms of the Court made by President Donald J. Trump are not substantially undermining public support for the Court. This Reply—prepared for a symposium held at the New York University School of Law—questions how much this and related papers tell us about how people think about the Court when they actually care about the Court. This study and other important ones like it are measuring how people think about the Court when the policy implications of Court decisions are presented to subjects as relatively low. Their findings tell us a lot, but not everything. They do not tell us what happens when passions about the Court are high—precisely the moment when the Court could be at its greatest jeopardy and convincing people to believe in the Court for reasons independent of the policies it delivers is the hardest. We can have confidence about how people think about the Court when they do not care about it, but not how they think about it when they do.

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INTRODUCTION

It is a distinctive honor to reply to an article by one of the founders of a field I write in,¹ and one of his most worthy successors. James L. Gibson’s work on how Americans think about the Supreme Court essentially framed the modern debate on the issue, and Michael J. Nelson has stood ably on Gibson’s giant scholarly shoulders to expand insights on these issues even further.² Their efforts have been dedicated to

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¹ See David Fontana & Donald Braman, *Judicial Backlash or Just Backlash? Evidence from a National Experiment*, 112 COLUM. L. REV. 731 (2012) [hereinafter Fontana & Braman, *Backlash*]; see also David Fontana & Donald Braman, *John Roberts Says People Want the “Democratic Process” to Decide Gay Marriage. He’s Wrong*, WASH. POST (Apr. 29, 2015), https://www.washingtonpost.com/posteverything/wp/2015/04/29/john-roberts-says-people-want-the-democratic-process-to-vote-on-gay-marriage-hes-wrong/?utm_term=.605f7a6fe3c7; David Fontana & Donald Braman, *Supreme Anxiety*, NEW REPUBLIC (Jan. 11, 2012), <https://newrepublic.com/article/99528/supreme-court-voter-reactions>.

² For an example of the power of their insights combined together, a few good examples

demonstrating empirically that Americans believe that the Court is “legitimate,” meaning that they have “a reservoir of favorable attitudes or good will that helps members to accept or tolerate [Court] outputs to which they are opposed or the effect of which they see as damaging to their wants.”³

It is a symptom of their scholarly success that their findings have been almost uniformly accepted—and deeply internalized—by leading legal scholars. Their paper for this symposium at New York University School of Law pushes this even farther, and finds “that criticisms of the Court made by President Trump are not associated with change in support for the Court”⁴

Yet this scholarship has created a false sense of security that the public deeply and durably believes in the Supreme Court. It could be that Americans have said the Court was legitimate because no one cared enough to convince them otherwise. Scholars have not sufficiently measured—and the paper that Gibson and Nelson wrote for this symposium still does not tell us⁵—how people think about the Supreme Court when they *care* about the Court. The literature on public opinion on the Supreme Court asks citizens to express their sentiments when the practical policy stakes of Court decisions appear very low, and when it is therefore easy to tell pollsters that the Court deserves our respect.⁶ I do not write to question the internal validity of these findings, but rather their external validity for contexts about which we also care.

It is certainly an interesting and important finding on its own that we think the Supreme Court is legitimate when we do not care that much about it. It is a different but equally or more important question whether we think the Court is legitimate when we know that the Court significantly influences those policy matters in our lives that we hold most dear. When

would include James L. Gibson & Michael J. Nelson, *Change in Institutional Support for the US Supreme Court: Is the Court's Legitimacy Imperiled by the Decisions It Makes?*, 80 PUB. OPINION Q. 622 (2016); James L. Gibson & Michael J. Nelson, *Is the U.S. Supreme Court's Legitimacy Grounded in Performance Satisfaction and Ideology?*, 59 AM. J. POL. SCI. 162 (2015) [hereinafter Gibson & Nelson, *Satisfaction and Ideology*]; James L. Gibson & Michael J. Nelson, *The Legitimacy of the US Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, 10 ANN. REV. L. & SOC. SCI. 201 (2014) [hereinafter Gibson & Nelson, *Conventional Wisdoms*].

³ Michael J. Nelson & James L. Gibson, *Has Trump Trumped the Courts?*, 93 N.Y.U. L. REV. ONLINE 38, 36 (2018) (citing DAVID EASTON, A SYSTEMS ANALYSIS OF POLITICAL LIFE 273 (1965)). Legitimacy and “diffuse support” are usually used interchangeably in this literature. *Id.*

⁴ *Id.* at 39.

⁵ See Nelson & Gibson, *supra* note 3.

⁶ My article with Donald Braman hypothesizes and finds that citizens react differently when they perceive the practical policy stakes of the Court's actions to be the greatest. See Fontana & Braman, *Backlash*, *supra* note 1.

the Court has done something that one knows of and dislikes, though, it is harder to believe in the Court. It is also in that situation where predictions are most important to make because the Court is most threatened. It is when passions are the highest that our constitutional structures will be most threatened—like our current constitutional moment.⁷

I

DEPENDENT VARIABLES

Gibson pioneered measuring the legitimacy of the Supreme Court in the eyes of the public as the ultimate dependent variable that concerned him.⁸ His paper with Michael J. Nelson for this symposium continues on this trajectory. Legitimacy is measured by asking “respondents about their willingness to consider fundamental changes to the institutional structure of the U.S. Supreme Court.”⁹ This includes questions about whether it is desirable that the Court be “independent.”¹⁰

Answers to these questions are not necessarily predictive of how people behave even during times when policy stakes are not attached to Supreme Court decisions. They presume that the abstract commitments about matters like judicial independence these questions measure motivate human behavior and sentiments.¹¹ It could be that people report a deep attachment to judicial independence because they know they are supposed to do so. It could be that people report a deep attachment to judicial independence but it is an abstract commitment that does not pervasively affect important political behavior—such as voting for a presidential candidate threatening judicial independence.

Even if preferences on these issues tell us something when not many people care about the Court, preferences during these moments do not necessarily measure preferences during moments of the greatest engagement with the Court. Finding that over time people relatively predictably self-report concern for the basic institution of the Supreme Court does not necessarily tell us what people will think moments after a terrorist attack when a President leverages that attack to criticize judicial independence. Donald Braman and I have found, for instance, that attitudes

⁷ See, e.g., Aziz Z. Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. (forthcoming 2018) (discussing the emerging threat to courts from the presidency of Donald J. Trump).

⁸ For a helpful discussion of his general approach to legitimacy, see generally Gibson & Nelson, *Conventional Wisdoms*, *supra* note 2.

⁹ Nelson & Gibson, *supra* note 3, at 37.

¹⁰ *Id.*

¹¹ Donald Braman and I have tried to address this concern by asking subjects about more practical questions than what they think about judicial independence, such as whether they prefer Congress or the Court to decide a gay marriage or a gun rights case. See Fontana & Braman, *Backlash*, *supra* note 1, at 745–47.

about issues like legitimacy do not have as much purchase when practical policy stakes are made more salient.¹² In the hours and days after a terrorist sets off a bomb in the New York City Subway, does it matter whether one thinks the Court is “legitimate,” or rather does it matter whether one thinks the Court is keeping one safe from a second attack in one’s neighborhood?

II

INDEPENDENT VARIABLES

If one wants to know whether citizens believe the Court is legitimate even when it has furthered a policy with which these citizens disagree, then questions must push citizens to think about issues that they care about and present those issues to them in the way they care about them. They must be asked about policy stakes that the Court has shaped that are immediate in their timing and substantial in their effects. There is a consistent finding that when policy stakes are made more salient, other concerns fade in relative importance.¹³ In reality, though, most studies fail to communicate to subjects how important these policy stakes are. Citizens are asked about Court decisions after some time has passed and their resonance has faded. Citizens are asked about Court decisions in sophisticated language that obscures the polarizing policy consequences of Court decisions.

Actions related to the Supreme Court or involving the Court itself are presented as chronologically remote. A compellingly framed question that serves as an example of this in another Gibson and Nelson paper, for instance, asks, “[t]hinking about the United States Supreme Court in Washington and the decisions that it has been making lately, would you say that the Supreme Court is a very liberal court, a somewhat liberal court, a somewhat conservative court, or a very conservative court?”¹⁴ In their latest paper, Gibson and Nelson mention a “recent speech” by President Trump.¹⁵ Decisions “made lately” or a “recent speech” will not make what is happening seem as important as a tweet a few hours ago.

When specific actions related to the Court are put to people, they are framed using language that mutes the policy stakes of these decisions. For instance, the Gibson and Nelson paper presents the following vignette as one of their treatments:

In a recent speech, President Trump discussed the role of the U.S. Supreme Court. President Trump was quite critical of the Supreme Court, saying that the Supreme Court justices are really nothing more

¹² See *id.* at 773–82 (discussing high-salience cases).

¹³ See *id.*

¹⁴ Gibson & Nelson, *Satisfaction and Ideology*, *supra* note 2, at 166.

¹⁵ Nelson & Gibson, *supra* note 3, at 36.

than politicians in robes.¹⁶

This vignette lacks a specific policy context that would motivate subjects. It could have said—as President Trump tweeted after a district court judge in Seattle ruled against him in one of the travel ban cases—that the judge “put our country in such peril. If something [a terrorist attack] happens blame him and court system.”¹⁷ It is different to ask about “the role of the Supreme Court” than it is to ask about putting our country at peril.

This vignette also lacks the language that most people use to understand their world, their politics—and their Supreme Court. It says that President Trump claimed that “justices are really nothing more than politicians in robes.” Referencing the attire of judges will not provoke one to pay attention to the Court as much as then-candidate Trump saying that a district court judge “is a total disgrace” or is biased because of his Mexican ancestry.¹⁸

CONCLUSION

Scholars have reacted with thoughtful expressions of concern and surprise the past few years when polling has suggested declining support for the Supreme Court.¹⁹ A Court thought to be immune from our polarized times now seems dominated by them. Many have wondered whether Americans are starting to think about the Court differently than they did previously. In reality, though, we could be thinking about the Court differently because we care about it more. The Court has made a series of high-profile decisions (e.g., *Citizens United v. FEC*,²⁰ *NFIB v. Sebelius*²¹). Justice Antonin Scalia’s death and the battle over confirming a successor during a presidential election year made the Court even more practically relevant. Politicians like President Trump have started to praise or pillory the Court for its support or opposition on major policy issues. In other words, perhaps Americans were always willing to distrust their federal

¹⁶ *Id.*

¹⁷ See David Lawler, *Donald Trump Travel Ban: ‘Blame Judge and Courts if America Is Attacked’—President Hits Out Ahead of Legal Battle*, TELEGRAPH (Feb. 6, 2017), <http://www.telegraph.co.uk/news/2017/02/04/donald-trump-slams-so-called-judge-blocked-ban-vows-overturn/>.

¹⁸ See Brent Kendall, *Trump Says Judge’s Mexican Heritage Presents ‘Absolute Conflict’*, WALL ST. J. (June 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>.

¹⁹ See, e.g., Eric Posner, *The Supreme Court’s Loss of Prestige*, SLATE (Oct. 7, 2015), http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/10/the_supreme_court_is_losing_public_approval_and_prestige.html.

²⁰ 558 U.S. 310 (2010) (deciding that the government cannot prohibit certain forms of corporate speech during candidate elections).

²¹ 567 U.S. 519 (2012) (upholding some provisions and invalidating other provisions of the Affordable Care and Patient Protection Act).

courts; they just needed forces priming them to do so.

Now that passionate leaders and their passionate followers are paying attention to the Court, we are left without much empirical evidence about what this means for how they will think about the Court. One way to put this is that existing scholarship assumes relatively more of a System 2 framework than a System 1 framework.²² System 1 is generally described as how we think when we think suddenly and therefore automatically and even often emotionally.²³ System 2 is generally described as how we think when we think more gradually, more deliberatively, and therefore more formally rationally.²⁴

Scholars have tended to measure System 2 because they are measuring whether people engaged in retrospective reflections on a body of institutional work are motivated by policy priors in evaluating constitutional issues. Scholars are not measuring whether people think differently about constitutional law in the moments when passions are highest and constitutional structures are most threatened. Much of the harm to the Court is done quickly and rashly, not slowly but surely. The decision by a President and his subordinates to defy a judicial order or to implement it insincerely or half-heartedly, for instance, happens fast and not slow. We therefore likewise need to be prepared to think about the Court fast and not just slow.

²² See generally DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011) (presenting this framework for understanding cognition).

²³ *Id.* at 20–22.

²⁴ See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 19–22 (2008) (describing this way of thinking).