Open access • Journal Article • DOI:10.2307/1372774

Legitimacy and the empowerment of discretionary legal authority: the United States Supreme Court and abortion rights. — Source link

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Published on: 01 Feb 1994 - Duke Law Journal (Duke Law J)

Topics: Supreme court, Certiorari, Precedent, Abortion and Empowerment

Duke Law Journal

VOLUME 43 FEBRUARY 1994 NUMBER 4

LEGITIMACY AND THE EMPOWERMENT OF DISCRETIONARY LEGAL AUTHORITY: THE UNITED STATES SUPREME COURT AND ABORTION RIGHTS

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Support for this research was provided by the American Bar Foundation, Chicago, Illinois. We would like to thank Bill Felstiner (Past Director) and Bryant Garth (Current Director) for their support of the project. The data was collected by the Survey Research Center of the University of California, Berkeley. We would like to thank Karen Garrett, Lynda Stork, and Tom Piazza, all staff members at the Survey Research Center, for their help in designing the questionnaire and collecting the data.

INTRODUCTION

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[1] the U.S. Supreme Court directly confronted the question of *Roe v. Wade*'s[2] continuing viability. Many commentators speculated that *Roe* would be overruled, tossing the abortion issue to Congress and state legislatures.[3] Yet a majority of the Justices refused to overrule the central holding of *Roe*, which provides constitutional protection for limited abortion rights.[4] Justices

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1. 112 S. Ct. 2791 (1992).

2. 410 U.S. 113 (1973).

3. *See, e.g.*, Linda Ellerbee, *GOP Will Pay for Playing Politics with Abortion*, HOUSTON CHRON., May 31, 1992, at 2 (noting that "it looks as though the Supreme Court probably will overturn *Roe v. Wade* sometime this summer"); Debra A. Vance, *Kentucky Is Found Likely to Ban Abortion*, CHI. TRIB., May 31, 1992, § 6, at 11 ("[S]peculation rises that the Supreme Court's conservative majority soon will overturn Roe v. Wade, the 1973 decision that legalized abortion. The [C]ourt might then give states the power to decide whether abortion would be legal."); *GOP and Abortion Rights*, ATLANTA J. & CONST., May 28, 1992, § A, at 14 ("An increasingly right-wing high court could well overturn Roe."). *But see, e.g.*, Robert Whereatt, Roe *Lawyer Thinks Court Will Overturn Law in 1993*, MINNEAPOLIS STAR TRIB., May 21, 1992, at B4 ("[*Roe v. Wade* lawyer Sara] Weddington said she expects the Supreme Court to issue a decision this summer in a Pennsylvania case that will allow states to erect additional conditions before a woman can get an abortion, but will stop short of overturning *Roe*.").

4. *Casey*, 112 S. Ct. at 2804 (opinion of O'Connor, Kennedy, and Souter, JJ.) ("[W]e are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.") These Justices are careful to circumscribe the reach of this holding.

> It must be stated at the outset and with clarity that *Roe*'s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of

O'Connor, Kennedy, and Souter, in an opinion joined in relevant part by Justices Stevens and Blackmun, relied on the concepts of substantive due process, "principles of institutional integrity," and "the rule of *stare decisis*"[5] to preserve the constitutional status of a woman's right to an abortion.[6] A different collection of Justices upheld states' rights to erect various barriers to the abortion right as long as they do not pose "substantial obstacle[s]."[7]

> a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.

Id.

Professor Sullivan called the decision not to overrule *Roe* one of "surprising moderation." *See* Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 27 (1992); *see also id.* at 24–25 ("In *Planned Parenthood v. Casey*, the Court spectacularly failed to overrule *Roe v. Wade*—although it did allow greater noncriminal regulation of abortion than it ever had before.") (footnotes omitted).

Opinions filed by Chief Justice Rehnquist and Justice Scalia both question whether the central holding of *Roe* has really been upheld, rather than refashioned. *See Casey*, 112 S. Ct. at 2860 (Rehnquist, C.J., concurring in part and dissenting in part) ("Whatever the 'central holding' of *Roe* that is left after the joint opinion finishes dissecting it is surely not the result of [the principle of *stare decisis*]. While purporting to adhere to precedent, the joint opinion instead revises it."); *id.* at 2876 (Scalia, J., concurring in part and dissenting in part) (stating that the joint opinion offers a "revised version" of *Roe*).

5. *Casey*, 112 S. Ct. at 2804 (opinion of O'Connor, Kennedy, and Souter, JJ.).

6. The trimester framework of *Roe* is supplanted by a pre- and post-viability distinction. *Id.* at 2816 ("We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy."). The authors of the joint opinion note that *Roe* presaged this application of the viability distinction. *See id.* at 2817 (citing *Roe*, 410 U.S. at 163). This observation offers some response to the claims of the dissenters that the central holding of *Roe* has been gutted. *See supra* note 4. In support of their claim, the joint authors state that "[t]he woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*." *Casey*, 112 S. Ct. at 2817.

A plurality applied an undue burden test to state regulation of abortion: "Only where state regulation imposes an undue burden on a woman's ability to make [an abortion] decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." *Id.* at 2819. Thus, the authors of the joint opinion argued that "it is an overstatement to describe [the right from *Roe*] as a right to decide whether to have an abortion 'without interference from the State.'" *Id.* (quoting Planned Parenthood v. Danforth, 428 U.S. 52, 61 (1976)).

7. *Casey*, 112 S. Ct. at 2820. The joint authors, through application of the undue burden test, and Chief Justice Rehnquist and Justices White, Scalia, and Thomas, through application of rationality review, upheld informed consent requirements, a waiting period requirement, a parental consent provision, and recordkeeping and reporting requirements.

Given the substantive importance of *Casey* and the rather novel and nuanced procedural avenue to its outcome, the case is interesting on numerous fronts—for its substantive due process implications,[8] for its significance for adolescents' and women's rights,[9] for its reinvigoration of *stare decisis*,[10] and for its glimpse into the relational dynamics of the Justices,[11] to name but a few. Most interesting for our purposes, however, is the Court's exposition and endorsement of legitimacy theory,[12] or in the Court's

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See id. at 2822–26, 2832–33; *id* at 2867 (Rehnquist, C.J., concurring in part and dissenting in part). A spousal notification requirement was struck down. *See id.* at 2826–31 (opinion of O'Connor, Kennedy, and Souter, JJ.).

8. *See id.* at 2804–08 (discussing the dimensions of personal liberty protected by the Due Process Clause of the Fourteenth Amendment).

9. *See, e.g.*, *The Supreme Court, 1991 Term—Leading Cases*, 106 HARV. L. REV. 163, 201 (1992) [hereinafter *Leading Cases*] ("Despite its calming rhetoric and express refusal to overrule *Roe*, *Casey* marks the most recent erosion of reproductive rights in a line of decisions that disproportionately affect the most vulnerable classes of women—adolescents and the poor.") (footnotes omitted).

10. *See* Earl M. Maltz, *Abortion, Precedent, and the Consititution: A Comment on* Planned Parenthood of Southeastern Pennsylvania v. Casey, 68 NOTRE DAME L. REV. 11 (1992).

> The doctrine of stare decisis has been of diminishing importance in constitutional adjudication for a number of years. . . .
>
> Given this background, the structure of the analysis in *Planned Parenthood of Southeastern Pennsylvania v. Casey* is surprising . . . [because] the majority opinion in *Casey* relied heavily on the doctrine of stare decisis in refusing to overrule *Roe v. Wade*. Moreover, there is every indication that for at least some of the Justices, the appeal to precedent was more than mere rhetoric, but actually had a substantive impact on their votes.

Id. at 11 (footnotes omitted). Professor Maltz argues, however, that "the Court's appeal to the concept of precedent is seriously misconceived." *Id.* at 32; *see also Leading Cases*, *supra* note 9, at 203 (questioning the Court's professed embrace of the doctrine of *stare decisis*); *cf.* Christopher E. Smith, *The Supreme Court in Transition: Assessing the Legitimacy of the Leading Legal Institution*, 79 KY. L.J. 317, 339–40 (1990–1991) (predicting that the Court would not be constrained by precedent in the realm of abortion rights).

11. Justice Scalia provided "a scathing critique of the joint opinion," *Leading Cases*, *supra* note 9, at 206, that at times lapsed into hyperbole. *See, e.g.*, *Casey*, 112 S. Ct. at 2876 (Scalia, J., concurring in part and dissenting in part) (stating that part of the joint opinion "is really more than one should have to bear"); *see also* Sullivan, *supra* note 4, at 74 (noting the style of the dissents). The opinions of today, even if "scathing" or riddled with exaggeration, likely fall well within the bounds of propriety. *See* Arnold C. Johnson, *Supreme Court Justices Take the Gloves Off*, TEX. LAW., Dec. 21, 1992, at 10; Arnold C. Johnsou, *Supreme Court Sound and Fury*, LEGAL TIMES, Dec. 14, 1992, at 30. It appears that only two of the Justices have ever engaged in a truly personal argument, namely, Justices Robert Jackson and Hugo Black. *See* Dennis J. Hutchinson, *The Black-Jackson Feud*, 1988 SUP. CT. REV. 203.

12. The term "legitimacy theory" is used to describe the loose conglomeration of theories that all, in some form, ascribe importance to authorities' adherence to democratic principles as a means of creating obedience to or acceptance of these authorities and

terms, "principles of institutional integrity," as support for the decision that *Roe* could not be overruled.

Essentially, the Court advances the proposition that unless its outcomes are viewed as principled, and not simply as the result of changes in Court personnel, its decisions will be viewed with skepticism by the public and will lose much of their obligatory force.[13] Although the "underlying substance" of the Court's legitimacy lies "in the Constitution and the lesser sources of legal principle on which the Court draws[,] . . . a decision without principled justification [is] no judicial act at all."[14] Thus, the perception of principled decisionmaking—and the avoidance of the perception of Court politics or political compromise—is the *sine qua non* of legitimate constitutional adjudication. The maintenance of such legitimacy is crucial because legitimacy is deemed necessary to the voluntary acceptance of Court decisions, voluntary acceptance being the only type of public acceptance of the decision on which the Court formally can rely.[15] The Justices further argue that the

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their directives. Professor Owen Fiss summarizes well a traditional view of legitimacy, what he calls "institutional virtue."

> [One] sense of authoritativeness, suggested by the works of . . . positivists, namely Herbert Hart and Hans Kelsen, stresses not the use of state power, but an ethical claim to obedience—a claim that an individual has a moral duty to obey a judicial interpretation, not because of its particular intellectual authority (i.e., because it is a correct interpretation), but because the judge is part of an authority structure that is good to preserve. This version of the claim of authoritativeness speaks to the individual's conscience and derives from institutional virtue, rather than institutional power. It is the most important version of the claim of authoritativeness, because no society can heavily depend on force to secure compliance; it is also the most tenuous one. It vitally depends on a recognition of the value of judicial interpretation. Denying the worth of the Constitution, the place of constitutional values in the American system, or the judiciary's capacity to interpret the Constitution dissolves this particular claim to authoritativeness.

Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 756 (1982). The research reported in this Article tests the argument that "institutional virtue" matters and, if so, explores what is necessary to maintain this virtue.

13. *See Casey*, 112 S. Ct. at 2814–16 (opinion of O'Connor, Kennedy, and Souter, JJ.). As the joint opinion notes,

> A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.

Id. at 2814 (quoting Mitchell v. W.T. Grant Co., 416 U.S. 600, 636 (1974) (Stewart, J., dissenting)).

14. *Id.* at 2814.

15. That is, although the Court has no explicit grant of coercive power, other government officials may experience great political pressure to accord with Court directives

legitimacy of the Court is especially at stake when confronting an "intensely divisive controversy" in which attention is great and stakes are high.[16] A prior decision in this controversial area should be overruled, the joint opinion argues, only for "the most compelling reason."[17]

> Why stand faster in such a case? Like Ulysses tying himself to the mast in anticipation of the sirens' song, the Court makes a "promise of constancy" in anticipation of coming "under fire." Why? To preserve the Court's legitimacy. People will not give the Court "credit for principle" if it abandons an intensely divisive decision; they will regard it instead as a "surrender to political pressure."
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> . . . .
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> And so, the joint opinion reinvents the method of the common law. Adherence to precedent is what makes the common law "law." As a source of authority that is exterior to the judge, precedent negates suspicion that discretion—that is, the interior, arbitrary, and subjective—is at work in judicial decisionmaking.[18]

Adherence to precedent provides one method for appearing principled and thus for maintaining legitimacy and obedience.

The Court's analysis is literally without citation (and, some would argue, without support[19]), yet it closely parallels traditional

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or to put coercive teeth into a Court directive.

Professor Sullivan similarly summarizes the view of the joint opinion in *Casey*.

> The general rule about overruling constitutional decisions is: don't. Why not? The Court is the least dangerous branch. It cannot tax, and it has no tanks. So why should people obey it? Because it has "legitimacy, a product of substance and perception." People "perceive" the Court as making "principled" decisions, not political "compromises."
>
> This does not mean that the Court can never overrule prior decisions; the people can "accept some correction of error without necessarily questioning the legitimacy of the Court." But they can't handle too much. Thus, "normal stare decisis analysis" allows for standard-like exceptions to the rule of "don't overrule": first, overrule if the old case proves too "unworkable"; second, overrule if people's "reliance" on the old case is not too great; third, overrule if the surrounding law changes too much; or fourth, overrule if the underlying facts change too much—as long as you do not do it too often.

Sullivan, *supra* note 4, at 71 (footnotes omitted).

16. *Casey*, 112 S. Ct. at 2815. Abortion is, of course, an area of intense divisiveness. For a sense of the range of feelings about abortion, see KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD (1984); LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990).

17. *Casey*, 112 S. Ct. at 2815.

18. Sullivan, *supra* note 4, at 73 (footnotes omitted).

19. *See, e.g.*, Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 395 n.31 ("In short, the hypothesis of an inherent tendency to obey

legal and social science theories of legitimacy. Thus, in light of the Court's theorizing on legitimacy, we present this Article with two goals in mind: (1) to undertake the review of legitimacy theory and research that the Court fails to provide in its decision; and (2) to subject to empirical test the Court's own theses that legitimacy matters in the eyes of the public and that "principled" decision-making is most important to the maintenance of this legitimacy.

In recent years, the concept of legitimacy has been under attack within the legal community. A 1983 critique by Professor Alan Hyde has been especially widely cited. Professor Hyde argues that "[w]hatever the index chosen for its measurement . . . legitimacy cannot be shown to be as significant in explaining obedience as rational calculation, including evaluation of self-interest and sanctions."[20] This argument has already been disproved in the case of everyday obedience to the law by studies showing that legitimacy not only influences obedience but that it has more influence on obedience than does "rational calculation."[21]

The present study expands the scope of these latter findings. Our study will show that, on a national level, in the case of the U.S. Supreme Court, institutional legitimacy relates significantly to empowerment. Further, that relationship is greater than any relationship between rational calculations and empowerment.[22] If it was true in 1983 that "there appear to be no reported studies showing any significant behavioral correlation to belief in legitimacy,"[23] it is certainly no longer the case in 1994. Beyond influencing everyday obedience to the law, legitimacy shapes important feelings of empowerment and entitlement.

In this Article, we first present a review of literature on the relation of authorities' legitimacy to public willingness to defer to the decisions of these authorities. The most widely cited prior

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the law because of a uniform attitude of 'legitimacy,' while perhaps provocative and exciting in the law reviews, turns out to be old hat, shopworn, and wrong in the political science and sociology journals.").

20. *Id.* at 426.

21. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 57–60 (1990) (presenting original data showing that legitimacy has more influence on obedience than deterrence and peer disapproval).

22. In the case of everyday obedience to the law, rational calculation is represented by the judgment that, if the law is broken, there was some probability of being caught and punished. *See id.* at 40. In this case, rational calculation suggests that people should support institutions that make decisions that accord with their own values.

23. Hyde, *supra* note 19, at 397.

review of this literature, Professor Hyde's 1983 article arguing for abandonment of the concept of legitimacy,[24] reached debatable conclusions and is now dated. Indeed, Professor Hyde's admonition notwithstanding, the concept of legitimacy and its role in the legal system is currently a topic of great debate.[25] Given the considerable research advances and attention paid to the concept of legitimacy in recent years,[26] and especially given the Supreme Court's exaltation of legitimacy as a rationale in *Casey*, a need exists for a new, thorough examination of this area.

Second, we present original data investigating the link between perceptions of legitimacy, Court decisions, and public acceptance of those decisions. This data was garnered through survey interviews of an ethnically and socioeconomically diverse sample of the public conducted just prior to the *Casey* decision. This empiri-

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24. *Id.* at 426 ("In short, we would be better off abandoning the concept of legitimation.").

25. Much of this debate is normative in content. It is concerned with whether the reasoning underlying legal decisions is truly neutral, or whether it instead represents disguised political interests, and with the moral justifications for submitting to an authority. This discussion, although important, is primarily focused on whether the law is legitimate when judged against criteria of fairness or morality. Our research, in contrast, is concerned with whether people in the general public *think* the Court is legitimate and, consequently, accept its decisions. Compare Professor Kress's distinction between philosophical and sociological notions of legitimacy, the latter notion being the type employed in this Article:

> The term "legitimate" [may be used as in] classical political philosophy: If a judicial decision is legitimate, it provides a prima facie moral obligation for citizens to obey the decision. This use of "legitimate" should be sharply differentiated from the sociological, Weberian notion of legitimation, or perceived legitimacy. The sociological notion of legitimation asks a causal question about how the legal system induces belief in its authority and compliance with its laws.

Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 285 (1989) (footnotes omitted). For a discussion of "philosophical legitimacy," see RONALD DWORKIN, LAW'S EMPIRE 190–216 (1986) (rejecting tacit consent, a duty to be just, and fair play as sufficient rationales for a moral obligation to obey the law but accepting "integrity"—consistency in principle and its application—combined with fraternity as forming a sufficient rationale); JOSEPH RAZ, THE MORALITY OF FREEDOM 70–105 (1986) [hereinafter RAZ, MORALITY OF FREEDOM] (reviewing arguments for the legitimacy of government and for an obligation to obey legitimate authorities); Kress, *supra*, at 290–95 (reviewing various versions of philosophical legitimacy). *See generally* JOSEPH RAZ, *Legitimate Authority*, *in* THE AUTHORITY OF LAW 1–27 (1979).

26. Critical Legal Studies scholars often invoke notions of legitimacy to argue that the American legal system lacks legitimacy. For example, these scholars argue that the law is indeterminate and thus "does not constrain judges sufficiently, raising the specter that judicial decisionmaking is often or always illegitimate." Kress, *supra* note 25, at 285 (discussing, and ultimately rejecting, this postulated relation between indeterminacy and illegitimacy).

cal analysis bolsters the conclusion of our literature review: legitimacy can be an effective tool of authorities and is largely premised, in the case of the Supreme Court, on perceptions of neutrality in decisionmaking.

We conclude by arguing that there is considerable support for the legitimacy model articulated in the *Casey* decision, yet we note that areas in need of further study do exist. We then place our findings in the context of jurisprudential writings (i.e., we contrast our empirical results with the theories of various legal scholars) and discuss the implications of legitimation for maintenance of the rule of law and the status quo.

In our examination of legitimacy theory, we will address three key questions. The first is whether the general legitimacy of the Supreme Court (i.e., the Court's institutional legitimacy) as an appropriate interpreter of the Constitution enhances the authoritativeness of the Supreme Court when it makes controversial decisions. In particular, are people more willing to empower the Court to make public policy in a controversial arena (here, abortion) if they regard the Court as a legitimate judicial institution? As noted above, we conclude that legitimacy is associated with empowerment, strongly supporting a basic premise of the joint opinion in *Casey*. The Court wisely attends to its legitimacy in the eyes of the public because the general institutional legitimacy of the Court is related to the public's willinguess to defer to the claim in *Roe* that abortion is an issue of "legal rights" properly falling within the Supreme Court's jurisdiction.

The second question addressed is the basis of the Court's legitimacy. This question is addressed by examining the psychology underlying public views of the Court as a legitimate institution with the right to interpret the Constitution. Professor Fiss has argued that "objectivity" is necessary to a legitimate functioning of judicial authority.[27] This argument is consistent with Weber's discussions of rational authority in the law:[28] to the extent the Court holds to certain "objective" standards or "disciplining rules" that constrain individual personal or political choices, the Court will be perceived as legitimate.[29] The exercise of rational authority by

27. *See* Fiss, *supra* note 12, at 757–58.

28. *See* David Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720; *see also* Hyde, *supra* note 19, at 380–85 (discussing and criticizing Weber's model of legitimacy).

29. For a discussion of disciplining rules, see Fiss, *supra* note 12, at 744–48. For a

judges with adherence to objective standards of interpretation involves the consistent application of clear legal rules by trained professionals who are unbiased, honest, and use facts and universal legal rules to make their decisions.[30]

We analyze the perception of authority on two levels. First, we distinguish between self-interest-based and justice-based evaluations (i.e., evaluations of authority with reference to how it impacts personal gain or loss versus evaluations of the procedural and distributive fairness of authority). The results of our literature review and our empirical analysis indicate that procedural justice in decisionmaking is the key factor underlying views of authority.

In addition, we go to a deeper level and consider the elements that underlie a perception of procedural fairness in authoritative decisionmaking, with emphasis on the neutrality and trustworthiness of the decisionmaker, the respect accorded the public by the decisionmaker, and the extent to which the public may have control over how the decisionmaker decides. The data analyzed support the argnment made by the Justices in *Casey* (as well as by legal scholars such as Fiss) that perceptions of political neutrality bear an important relationship to Court legitimacy. However, these findings suggest that this argument captures only part of what leads to legitimacy of the Court in the public's eye. In particular, the model of Court legitimacy articulated by social scientists is elaborated and compared to the model presented in the *Casey* decision, and the original survey data presented here are dissected as well, to yield a more detailed picture of the psychology underlying a view of the Supreme Court as a legitimate institution of government. The addition of empirical data to this picture is crucial because to date very little empirical investigation of the bases of Court legitimacy has been undertaken.

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discussion of objectivity in interpretation, see *id.* at 744. As Fiss notes,

> Objectivity in the law connotes standards. It implies that an interpretation can be measured against a set of norms that transcend the particular vantage point of the person offering the interpretation. Objectivity implies that the interpretation can be judged by something other than one's own notions of correctness. It imparts a notion of impersonality. The idea of an objective interpretation does not require that the interpretation be wholly determined by some source external to the judge, but only that it be constrained.

Id.

30. *See* CHARLES PERROW, COMPLEX ORGANIZATIONS: A CRITICAL ESSAY 2–6 (3d ed. 1986).

The final question to be addressed is whether public views about legitimacy are shaped by current controversies involving the Court. Specifically, how did the Senate hearings over the confirmation of Clarence Thomas impact the perceived legitimacy of the Court? The *Casey* Court stated that legitimacy is difficult to acquire but easy to lose. Our data suggest that the Thomas hearings did have significant negative influence on perceptions of the Court's legitimacy and that legitimacy may indeed be a volatile property.

I. LEGITIMACY THEORY

A. *The Court's Endorsement of the Concept of Legitimacy*

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court justifies its decision not to overrule *Roe v. Wade* by asserting that the "legitimacy" of the Court would be undermined by such an action.

> Our analysis would not be complete . . . without explaining why overruling *Roe*'s central holding would not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. To understand why this would be so it is necessary to understand the source of this Court's authority, the conditions necessary for its preservation, and its relationship to the country's understanding of itself as a constitutional Republic.
>
> The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.[31]

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31. *Planned Parenthood of S.E. Pa. v. Casey*, 112 S. Ct. 2791, 2814 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.). Justice Scalia, contrary to the joint authors, argues that the Court should resign itself to its essential powerlessness to enforce compliance and should be solely a judging institution. *See id.* at 2882 (Scalia, J., concurring in

This statement indicates the Court's belief that public acceptance of the Court's role as interpreter of the Constitution—that is, the public belief in the Court's institutional legitimacy—enhances public acceptance of controversial Court decisions. This legitimacy is purchased by "making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."[32] If the public views a decision as legitimate, the public will voluntarily obey it.

In addition to its concern about immediate acceptance of an opinion, the Court evinces concern for the effect of a current decision on its future perceived legitimacy: "To overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question."[33] This result would be harmful because, "[l]ike the character of an individual, the legitimacy of the Court must be earned over time."[34] Once diminished, "legitimacy may be restored, but only slowly."[35]

The Court's reasoning is interesting because it shows that the Justices regard public understanding as the basis of the Court's power and thus see that understanding as a key factor affecting their decisions. The decision explicitly states that Supreme Court decisions are made, at least in part or at least in this specific case, following a consideration of the impact of a decision on the Court's power. Further, that power is said to come from public acceptance of the judiciary as an appropriate interpreter of law. Hence, public views about the Court become an important concern in making and justifying Court decisions. Although social scientists, among others, have often noted that Court decisions are not made in a vacuum, devoid of attention to the views of the public,[36] the

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part and dissenting in part) ("The judiciary . . . has . . . no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment . . . .") (quoting THE FEDERALIST No. 78, at 393–94 (Alexander Hamilton) (Garry Wills ed., 1982)).

32. *Id.* at 2814 (opinion of O'Connor, Kennedy, and Souter, JJ.).

33. *Id.* at 2815.

34. *Id.* at 2816.

35. *Id.*

36. In fact, Thomas Marshall has explicitly tested the relationship between public support for Court decisions and the likelihood that the decision will be upheld. He found that support increases the likelihood that a Court decision will be upheld and concluded that "public opinion appears to affect the stability of Supreme Court decisions." THOMAS

Court has seldom acknowledged as central a concern with public reactions to Court decisions as it did in *Casey*.[37]

The decision reached in *Casey* is predicated on the assumption that it is important for the Supreme Court to have legitimacy in the eyes of the American public. The Justices suggest that legitimacy is important because they assume that it enhances the willingness of the American public to empower the Supreme Court to interpret the law in resolving controversial public policy issues such as abortion rights. This argument—although advanced doctrinally—poses interesting questions for empirical study: Does the institutional legitimacy of the Court in fact legitimize its decisions, enhancing the willingness of the public to accept voluntarily the right of the Supreme Court to make public policy decisions? If so, what is the basis of the Court's legitimacy, and how is this basis

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R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 181 (1989). Interestingly, however, he found that even unpopular rulings generally prevailed (63% of the time). *Id.* Thus, all one may be able to conclude safely is that the Court is generally hesitant to overrule its own precedents.

37. Again, this is not to say that the Court has not been influenced by public opinion. Professor Marshall states that "[w]here clear poll margins exist, three-fifths to two-thirds of Court rulings reflect the polls." *Id.* at 192. He argues that "the modern Court has reflected mass public opinion much more frequently than it has resisted it." *Id.*

It is one thing to say, however, that the Court reflected public opinion and another to say that the Court was controlled by it. Also, there is quite a difference between an argument that the Court *should* be influenced by public opinion and an argument that it might have been. Chief Justice Rehnquist argues in *Casey*, in fact, that attention to public acceptance of a decision is

> contrary to both the Court's historical practice and to the Court's traditional willingness to tolerate criticism of its opinions. Under [the joint opinion's approach], when the Court has ruled on a divisive issue, it is apparently prevented from overruling that decision for the sole reason that it was incorrect, *unless opposition to the original decision has died away.*

Casey, 112 S. Ct. at 2863 (Rehnquist, C.J., concurring in part and dissenting in part). Likewise, Justice Scalia bristled at the suggestion that the Court should be concerned with public acceptance.

> [W]hether it would "subvert the Court's legitimacy" or not, the notion that we would decide a case differently from the way we otherwise would have in order to show that we can stand firm against public disapproval is frightening. It is a bad enough idea, even in the head of someone like me, who believes that the text of the Constitution, and our traditions, say what they say and there is no fiddling with them. But when it is in the mind of a Court that believes the Constitution has an evolving meaning; that the Ninth Amendment's reference to "othe[r]" rights is not a disclaimer, but a charter for action; and that the function of this Court is to "speak before all others for [the people's] constitutional ideals" unrestrained by meaningful text or tradition—then the notion that the Court must adhere to a decision for as long as the decision faces "great opposition" and the Court is "under fire" acquires a character of almost czarist arrogance.

Id. at 2883–84 (Scalia, J., concurring in part and dissenting in part) (citations omitted).

affected by temporal events? Before proceeding to empirical analysis of these questions, the concepts at issue—legitimacy, empowerment and compliance—must be more fully discussed.

B. *Judicial Authoritativeness*

Discussions of judicial authority typically state that the first precondition for the effective functioning of judicial authorities is authoritativeness—the ability to secure public compliance with judicial decisions. Legal rules and the decisions of legal authorities are effective only when, for whatever reason, people follow them.[38] A judge's decision will not resolve a conflict if the parties to the dispute do not comply with it. "[T]he lawgiver must be able to anticipate that the citizenry as a whole will . . . generally observe the body of rules he has promulgated."[39] This observation is as true of a local judge issuing a child support order as it is of a Justice of the Supreme Court writing a majority opinion. The Court's comments in *Casey* acknowledge the importance of authoritativeness.[40]

Public compliance with laws and judicial decisions is not something that authorities can simply assume will occur. Research indicates that people do not automatically comply either with judges' decisions or with formal legal rules. Studies of legal authorities find that judges and police officers have difficulty securing compliance with a wide variety of laws and legal decisions.[41] Research on small claims courts, for example, reveals that judicial orders are frequently not accepted and obeyed.[42] Similarly, the Supreme Court has had difficulties securing compliance with a wide variety of decisions, including those on school desegregation, school prayer, and freedom of speech for extremist groups.[43]

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38. For a discussion of the reasons why people may follow the law, see TYLER, *supra* note 21, at 19–39.

39. Lon L. Fuller, *Human Interaction and the Law: The Interactional Foundations of Contract Law, in* THE RULE OF LAW 171, 201 (Robert P. Wolff ed., 1971); *see also* Fiss, *supra* note 12, at 745 ("Rules are not rules unless they are authoritative . . . .").

40. *See supra* note 31 and accompanying text.

41. *See* TYLER, *supra* note 21, at 19.

42. *See* Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11, 21 (1984). A survey conducted by the authors revealed a non-compliance rate of 45.3%. *Id.*

43. As Professor Fiss notes in the context of school desegregation,

> We also know, especially from the history of *Brown*, that a deeper and more intractable set of obstacles may confront the judge in his effort to give the

Two distinct aspects of authoritativeness are important. The first is having the power or authority to decide an outcome. A judicial authority must be empowered to make a controversial decision (i.e., the authority's legitimacy must be accepted voluntarily or coerced by force) if a directive is to be issued. The second aspect is actual, or behavioral, compliance with the directive (i.e., obedience).

Acknowledging an external authority's legitimacy to make a controversial decision (voluntary empowerment) facilitates behavioral compliance with that decision, although it may not ensure that compliance occurs. To the extent that people regard an authority's "right" to decide a controversial issue as legitimate, that authority has discretion to make whatever decisions on that issue it feels are appropriate. In such cases, there is a presumption that decisions resolving controversial questions—whatever the decisions are—ought to be obeyed. "[T]he 'legitimacy' of a social order is the effective belief in its binding or obligatory quality."[44] People believe that the directives of legitimate authorities ought to be obeyed, regardless of the authorities' coercive power. This dynamic is crucial "because no society can heavily depend on force to secure compliance."[45]

The Court, like any authority, needs a mandate entitling it to undertake the resolution of a controversial public policy issue. In the case of the Court, that mandate involves regarding the issue at hand as one involving "rights" guaranteed to individuals under the Constitution. The focus of this study is specifically on the voluntary empowerment of the Supreme Court by the public to make decisions in the area of abortion. Such empowerment is central to explaining reactions to policymaking authorities since "the boundaries separating constitutionally permissible and impermissible behavior are typically vague. Thus, important and controversial

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> value of racial equality a practical meaning: resistance by those who must cooperate in order for the meaning to become a reality—parents, children, teachers, administrators, citizens, and politicians. Collectively, and sometimes even individually, these people have the power to frustrate the remedial process. In ways that are both subtle and crude, they may refuse to recognize the authoritativeness of the judge's interpretation. They can boycott the schools, attack the minority students, withdraw from the public school system and flee to the suburbs or private schools, or refuse to appropriate money needed for buses.

Fiss, *supra* note 12, at 760.

44. Hyde, *supra* note 19, at 380–81.

45. Fiss, *supra* note 12, at 756. The Court acknowledges this fact. *See supra* note 31 and accompanying text.

government policies are likely to engender disputes not only about their merits but also about whether the government, or a particular set of officials, can legitimately undertake such a course of action."[46]

The abortion issue is typical of public policy questions in that many government authorities can potentially make decisions governing the issue. The question could be treated as a legislative issue to be resolved by Congress. It also could be treated as a state issue to be resolved by individual state legislatures. In addition, abortion could be treated as an issue to be handled by the executive branch, to be resolved by executive order. It further could be handled by a public referendum, like the initiatives found on the California ballot.[47] Finally, it could be treated as a judicial issue, an issue of rights to be resolved by the courts. In such a contest over claims about authority, why should the Court prevail?[48] In *Casey*, the Court links its ability to maintain its claim to jurisdiction over the abortion question established in *Roe v. Wade* to public views about who should be empowered to resolve this issue.

The Court intimates that public reactions are central to the acceptability of decisions made by any of the branches of government. Each branch could potentially claim authority to make decisions about this issue. If a claim were recognized and accepted, then the role of that authority would be legitimized. In the case of abortion, the Supreme Court claimed authority to make the abortion decision by issuing its opinion in *Roe v. Wade*. That decision defined whether women were allowed to have abortions as an is-

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46. Walter F. Murphy & Joseph Tanenhaus, *Public Opinion and the United States Supreme Court: A Preliminary Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, *in* FRONTIERS OF JUDICIAL RESEARCH 273, 274 (Joel B. Grossman & Joseph Tanenhaus eds., 1969).

47. Justice Scalia favors this approach: "The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting." Planned Parenthood of S.E. Pa. v. Casey, 112 S. Ct. 2791, 2873 (1992) (Scalia, J., concurring in part and dissenting in part).

48. All the sources of authority outlined involve differing forms of government authority. The conflict between different, and potentially contending, forms of authority, however, extends beyond the conflict among government institutions. It also can involve struggles between government and religious authority. In fact, recent authors have argued that it is the absence of moral authority from nongovernmental institutions in recent American history that is encouraging government to extend its authority. *See* ROBERT N. BELLAH ET AL., THE GOOD SOCIETY (1991); ROBERT N. BELLAH ET AL., HABITS OF THE HEART (1985).

sue of legal rights, properly decided by the Supreme Court. This claim of authority has not been uncontested, even by members of the Court,[49] but the authors of the joint opinion in *Casey* assume that this original claim should be accepted as legitimate and argue that this "legitimacy" should be maintained.

> A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe*'s original decision . . . .[50]

C. *Why Do People Comply?*

The *Casey* opinion not only addresses the importance of gaining public support for the Court's role in making public policy,[51] it also indicates that the Court must do so by maintaining legitimacy.[52] The Justices reject the possibility that the Court could gain support by offering people financial incentives or by threatening them with negative consequences for failure to support its

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49. *See, e.g.*, *Casey*, 112 S. Ct. at 2885 (Scalia, J., concurring in part and dissenting in part) ("We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.").

50. *Id.* at 2816 (opinion of O'Connor, Kennedy, and Souter, JJ.).

Another important issue, but peripheral to the central concern of this discussion, is the degree to which people can tolerate the existence of errors in judicial procedures and decisions. Professor Tribe suggests that the occurrence of errors in criminal trials (some of the guilty go free, some innocent people are convicted) should not be publicly acknowledged, lest the legal system lose its public legitimacy. *See* Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1370–77 (1971). A study of public views about criminal juries, in contrast, suggests that the legitimacy of the system is quite high, in spite of public recognition that many errors occur. *See* Robert MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury*, 12 LAW & HUM. BEHAV. 333 (1988). Moreover, Justice Scalia argues that failure to correct error will itself erode legitimacy: "Surely, if '[t]he Court's power lies . . . in its legitimacy, a product of substance and perception,' the 'substance' part of the equation demands that plain error be acknowledged and eliminated." *Casey*, 112 S. Ct. at 2875 (Scalia, J., concurring in part and dissenting in part) (quoting *id.* at 2814 (opinion of O'Connor, Kennedy, and Souter, JJ.) (alteration in original)).

51. *See Casey*, 112 S. Ct. at 2816 (opinion of O'Connor, Kennedy, & Souter, JJ.) ("[N]o Court that broke its faith with the people could sensibly expect credit for principle in the decision by which it did that.").

52. *See id.* ("The Court's concern with legitimacy is not for the sake of the Court but for the sake of the Nation to which it is responsible.").

decisions.[53] Rather, the Court must have institutional integrity to fulfill its role.

In other words, when stating their rationales for the *Casey* decision, the Justices focus not simply on whether people accept the Court's authority to make decisions regarding abortion rights but also on why they do so. The Justices contrast legitimacy to other possible bases of authority, including purchasing or physically coercing obedience. They argue that the Court's authority rests heavily on legitimacy because the Court lacks the ability to be authoritative in other ways. The Justices' argument resonates with the work of political scientists, who also have emphasized the limited power of the Supreme Court to enforce its decisions. "In a political system ostensibly based on consent, the Court's legitimacy—indeed, the Constitution's—must ultimately spring from public acceptance . . . of its various roles."[54]

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53. *See id.* at 2814 ("[T]he Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees."). Similarly, Professor Fiss argues that "no society can heavily depend on force to secure compliance." Fiss, *supra* note 12, at 756. This argument is consistent with the general suggestion that the state must have an ethical claim to secure obedience, a claim suggested perhaps most notably by H.L.A. Hart and Hans Kelsen. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW (1961); HANS KELSEN, GENERAL THEORY OF LAW AND STATE (1945). For a more recent statement along these lines, see RAZ, MORALITY OF FREEDOM, *supra* note 25.

54. Walter F. Murphy & Joseph Tanenhaus, *Publicity, Public Opinion, and the Court*, 84 NW. U. L. REV. 985, 992 (1990) (citations omitted). For an earlier discussion of this issue, see WALTER F. MURPHY ET AL., PUBLIC EVALUATIONS OF CONSTITUTIONAL COURTS (1973).

Like the Justices, social scientists have identified various possible reasons people might have for following authorities. Those reasons are generally divided into two types of motivation: externally and internally based. External forces are pressures in the environment—promised rewards and threatened punishments—that shape overt behavior. Internal forces are the feelings people have that influence what they want to do (their attitudes) or how they feel they should behave (their normative or moral feelings). Internal forces are especially important because they promote *voluntary* acceptance of decisions or rules (i.e., no external monitoring is required because compliance is intrinsically motivated).

This distinction between internal and external forces has been made by a number of social scientists. Bertram Raven and John French describe "reward power" and "coercive power," in which obedience is contingent on positive and negative outcomes, and distinguish both of these types of power from "legitimate power," in which obedience flows from judgments about the authority. With legitimate power, people take the obligation to obey on themselves, voluntarily following group rules and the decisions made by an authority. *See* John R.P. French, Jr. & Bertram H. Raven, *The Bases of Social Power*, *in* STUDIES IN SOCIAL POWER 150, 156–61 (Dorwin Cartwright ed., 1959); *see also* Barry E. Collins & Bertram H. Raven, *Group Structure: Attraction, Coalitions, Communication,*

Legitimacy is important to all political institutions. It is especially important, however, to judicial authorities like the U.S. Supreme Court because, as the Justices themselves note, the Court has only limited coercive power and can do little to reward those who comply with its directives.[55] As Gregory Caldeira and James Gibson observe, the Court "is an uncommonly vulnerable institution. The Court lacks an electoral connection to provide legitimacy, is sometimes obligated to stand against the winds of public opinion, operates in an environment often intolerant of those in need of defense, and has none of the standard political levers over people and institutions."[56] If the legitimacy thesis is correct, then the directives of the Supreme Court may still carry considerable obligatory force, even in controversial realms. Historical research suggests that Americans have traditionally been more willing to accept unpopular public policy decisions if the Supreme Court legitimizes those decisions.[57] This legitimizing ability—the legitimacy-

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and Power, *in* 4 THE HANDBOOK OF SOCIAL PSYCHOLOGY 102, 166–68 (Gardner Lindzey & Elliot Aronson eds., 2d ed. 1969); Bertram H. Raven & John R.P. French, Jr., *Group Support, Legitimate Power, and Social Influence*, 26 J. PERSONALITY 400 (1958). Similarly, Professor Herbert Kelman distinguishes between "compliance," which involves the direct provision of material outcomes in return for obedience, "identification," which involves obedience because the authority is held in high esteem, and "internalization," which involves obedience because the values of the authority are accepted. *See* Herbert C. Kelman, *Compliance, Identification, and Internalization: Three Processes of Attitude Change*, 2 J. CONFLICT RESOL. 51, 53 (1958); *see also* HERBERT C. KELMAN & V. LEE HAMILTON, CRIMES OF OBEDIENCE 104–09 (1989). In this typology, either identification or internalization can provide an authority with legitimacy, leading to voluntary acceptance of the authority's directives.

Although acceptance can be obtained, at least in the short term, by external threats and rewards, there is much evidence (beginning with the 1958 work of Raven and French) that achieving acceptance through the use of reward and coercive power is unwieldy, costly, and time-consuming and that it ultimately fails to control behavior because it cannot eliminate private disobedience. Legitimacy-based obligation is thus necessary for the effective exercise of authority in settings in which external monitoring of all behavior is impossible.

55. *See supra* note 53 and accompanying text.

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

57. *See* MARSHALL, *supra* note 36, at 131–56 (discussing different versions of the legitimacy thesis).

conferring hypothesis[58]—is central to theories about the basis for the Court's effectiveness.[59]

The general legitimacy of the Court as an institution of government may have aided acceptance of a wide variety of unpopular decisions, including banning school prayer, mandating school desegregation, and limiting criminal prosecutions through the exclusionary rule.[60] That is, the Court's institutional legitimacy may have increased the willingness of the public to empower the Court to settle these issues and then to accept the decisions willingly and compliantly. "The general theory is that the procedures, rituals, ideology, and substantive decisions of legal institutions, particularly judicial institutions, measurably shape American popular beliefs in the legitimacy of government and the American sense of obligation and loyalty to the nation."[61]

Hence, the argument in *Casey*—that institutional legitimacy enhances both the legitimacy of Court decisions about controversial issues and the willingness of people to accept those decisions voluntarily—is consistent with a large body of social theory. In-

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58. For discussions of this hypothesis, see ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 29–33 (1962); CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY (1963); WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION (1986); David Adamany, *Legitimacy, Realigning Elections, and the Supreme Court*, 1973 WIS. L. REV. 790; Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 293–94 (1957); Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795 (1975).

59. For examples of efforts to test the relationship between legitimacy and compliance, see KENNETH M. DOLBEARE & PHILLIP E. HAMMOND, THE SCHOOL PRAYER DECISIONS: FROM COURT POLICY TO LOCAL PRACTICE (1971); LAWRENCE M. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE (1975); STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY AND POLITICAL CHANGE 34–35 (1974); Richard M. Johnson, *Compliance and Supreme Court Decision-Making*, 1967 WIS. L. REV. 170; Murphy & Tanenhaus, *supra* note 46; Michael J. Petrick, *The Supreme Court and Authority Acceptance*, 21 W. POL. Q. 5 (1968); Joseph Tanenhaus & Walter F. Murphy, *Patterns of Public Support for the Supreme Court: A Panel Study*, 43 J. POL. 24 (1981).

60. The joint opinion cites Brown v. Board of Educ., 347 U.S. 483 (1954), as an example of a situation in which the Court had to draw on its reserve of legitimacy for acceptance of an unpopular decision. *See* Planned Parenthood of S.E. Pa. v. Casey, 112 S. Ct. 2791, 2815 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.) ("[W]hen the Court does act in [an unpopular] way, its decision requires an equally rare precedential force to connter the inevitable efforts to overturn it and to thwart its inplementation."). Of course, even with institutional legitimacy, the Court has had difficulty gaining compliance with many of its more controversial decisions. *See supra* note 43 and accompanying text.

61. Hyde, *supra* note 19, at 383.

deed, social theorists have widely argued that legitimacy enhances the effectiveness not only of legal authorities but also of political, managerial, and religious authorities.[62] Having legitimacy, it is suggested, helps authorities to be authoritative and therefore effective, in their roles.

1. *Empirical Studies of Empowerment.* Despite the importance of legitimacy as a concept, particularly in the legal realm, there have been few empirical tests of the relationship between the legitimacy of legal authorities and the voluntary acceptance of judicial decisions. Richard Schwartz argues that the impact of legitimacy on law has "not yet [been] subjected to rigorous test,"[63] while Craig McEwen and Richard Maiman note the virtual "absence of empirical examination of legitimacy."[64] One of the authors adds, "Instead of testing the role of legitimacy in compliance, scholars have simply assumed that it is important, and as a result the value of the concept of legitimate authority has not been established."[65] This absence of empirical studies led Alan Hyde to challenge social scientists to demonstrate that legitimacy promotes compliance, saying that "there appear to be no reported studies showing any significant behavioral correlation to belief in legitimacy."[66] Similar skepticism was expressed by David Adamany, who noted that "none who bottom their arguments on the

62. For discussions of the importance of legitimacy, see DAVID EASTON, A SYSTEMS ANALYSIS OF POLITICAL LIFE (1965); WILLIAM A. GAMSON, POWER AND DISCONTENT (1968); SEYMOUR M. LIPSET, POLITICAL MAN (1960); TALCOTT PARSONS, SOCIOLOGICAL THEORY AND MODERN SOCIETY (1967); MAX WEBER, ECONOMY AND SOCIETY (1968); David Easton, *A Re-Assessment of the Concept of Political Support*, 5 BRIT. J. POL. SCI. 435 (1975); David Easton, *Political Science*, *in* 12 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 282 (David L. Sills ed., 1968) [hereinafter Easton, *Political Science*]; Richard L. Engstrom & Michael W. Giles, *Expectations and Images: A Note on Diffuse Support for Legal Institutions*, 6 LAW & SOC'Y REV. 631 (1972); Herbert C. Kelman, *Patterns of Personal Involvement in the National System: A Social-Psychological Analysis of Political Legitimacy*, *in* INTERNATIONAL POLITICS AND FOREIGN POLICY 276 (James N. Rosenau ed., 1969); Talcott Parsons, *On the Concept of Influence*, 27 PUB. OPINION Q. 37 (1963); Austin Sarat, *Support for the Legal System: An Analysis of Knowledge, Attitudes, and Behavior*, 3 AM. POL. Q. 3 (1975). For a review of much of this literature, see TYLER, *supra* note 21, at 19–39.

63. Richard D. Schwartz, *Moral Order and Sociology of Law: Trends, Problems, and Prospects*, 4 ANN. REV. SOC. 577, 588 (1978).

64. Craig McEwen & Richard Maiman, *In Search of Legitimacy: Toward an Empirical Analysis*, 8 LAW & POL'Y 257, 258 (1986).

65. TYLER, *supra* note 21, at 27.

66. Hyde, *supra* note 19, at 397.

Court's legitimacy-conferring capacity offer the slightest empirical basis for its reality."[67]

A recent empirical study, however, found some support for the Court's thesis;[68] unfortunately, it is of only limited value given its methodology. This study tested the citizens' willingness to permit an unpopular group (such as Nazis or Communists) to engage in political activities (such as a march) in the citizens' community. People were more willing to accept the right of a disliked group to march in their community if the Supreme Court had endorsed that right.[69] This analysis was based on interviews of a random sample of 1267 citizens.[70] Of this group, "[n]early one-half of those initially inclined to do something to block the demonstration report[ed] being less so inclined after a decision [allowing the demonstration] by the Supreme Court."[71] Hence, perceptions of institutional legitimacy, in this case the right of the Court to issue judgments about the meaning of free speech (i.e., empowerment to decide free speech issues), increased acceptance of the controversial outcome.[72]

Although provocative, these findings must be viewed with caution[73] because the respondents were asked to engage in several levels of hypothetical judgment.[74] First, they were asked to

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67. Adamany, *supra* note 58, at 807. For an elaboration of this argument, see David Adamany & Joel B. Grossman, *Support for the Supreme Court as a National Policymaker*, 5 LAW & POL'Y Q. 405 (1983).

68. *See* James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 LAW & SOC'Y REV. 469 (1989).

69. *Id.* at 477–83.

70. *Id.* at 494.

71. *Id.* at 481.

72. *See also* Murphy & Tanenhaus, *supra* note 54, at 1008 (using a similar approach to reach a conclusion of minimal influence).

73. For a critique and reanalysis of the Gibson study, see Tom R. Tyler & Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 LAW & SOC'Y REV. 621 (1991).

74. Social psychologists distinguish between several types of suspect judgments. One type is judgments about what one might do. Although people can speculate about what they might do, such speculations are not always related to what they actually do under the possible circumstances identified. People are more likely to be able to predict what they will do if they are asked to imagine circumstances with which they are familiar. They are also better at predicting their behavior in situations without strong situational forces and typically underestimate the effect of situational forces on their actions. *See* Lee Ross, *The Intuitive Psychologist and His Shortcomings*, 10 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 173 (1977) (discussing this "fundamental attribution error"). As a result, any situation without such forces is preferable.

consider what they would do if a political group they disliked decided to march in their community. They were then asked further to consider what they would do if the Supreme Court ruled that this march was legal. The key dependent variable was the difference between these two hypothetical judgments: How would legitimation of the march by the Court affect predicted behavior? Such an approach is necessary because the researcher was not able either to (1) interview people actually facing such an unpleasant march, or (2) create a plausible fictitious event of this type. Although a reasonable response to the problem being studied, these efforts, nonetheless, must be viewed with considerable skepticism given the levels of hypothetical reasoning involved.[75]

Another set of studies also using hypothetical judgments found no support for the legitimacy thesis. In three studies, Larry Bass and Dan Thomas presented undergraduate students with policy positions (e.g., busing school children to achieve racial balance) either attributed to the Court or to no source ("it has been proposed that" versus "the Supreme Court has ruled that").[76] Respondents were then asked to express their own agreement or disagreement with each policy option. Bass and Thomas found no evidence that Court rulings influenced individual support for policies and argued that this result suggests that the legitimacy-conferring hypothesis is invalid.[77] However, they noted that their study did not test people's willingness to accept and comply with Court decisions, only the ability of the Court to change people's attitudes.[78] Hence, these studies, although suggestive, do not directly address the issue of empowerment of concern in this Article.

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75. Another type of suspect judgment is people's assessments of why they have made a judgment or engaged in a behavior. Social psychologists have found that people are poor judges of the causes of their own behavior. *See, e.g.*, Richard E. Nisbett & Timothy D. Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231 (1977) (discussing the limitations of self-report measures of mental phenomena). Alan Hyde is properly critical of studies that rely on self-reports about why people obey the law. *See* Hyde, *supra* note 19, at 392–95 & n.28. However, a different type of judgment is less suspect. In our study, respondents were asked to rate institutions along several dimensions—fairness, honesty, etc. These ratings were then related to other judgments using correlational analysis. Hence, people were not asked why they engage in behaviors (e.g., "Do you accept a decision because the institution is legitimate?"), avoiding the more suspect self-reports.

76. *See* Larry R. Bass & Dan Thomas, *The Supreme Court and Policy Legitimation*, 12 AM. POL. Q. 335 (1984).

77. *See id.* at 351–55.

78. *See id.* at 354–55.

Moreover, these studies suffer from the same problems of hypothetical reasoning as the Gibson study.

As this review suggests, currently available evidence suffers from a number of conceptual and methodological flaws and does not serve as a clear indicator of the correctness of the *Casey* Court's statements about legitimacy. Thus, further study along the lines reported here is needed to clarify the relationship between the Supreme Court's power and its legitimacy in the eyes of the public.

2. *Empirical Studies of Compliance.* It is important to recognize that the issue of empowerment is only one aspect of the hypothesized consequences of legitimacy. Legitimacy also should lead to behavioral compliance. Although both issues are of equal importance, behavioral compliance is difficult to study empirically in the case of the Supreme Court. As Thomas Marshall notes,

> Few Americans are ever faced with a decision of whether or not to comply with a Supreme Court decision, per se. Instead, average Americans typically confront Supreme Court decisions only as those decisions are interpreted, implemented, and enforced by lower-level courts and by other public officials or agencies. As a result, it is almost impossible to determine why most Americans comply with Supreme Court decisions—even if it can be determined that, in fact, they actually do comply.[79]

One approach that can be taken to studying compliance with Court decisions is to explore hypothetical views about behavior: "If there were a demonstration against abortion clinics, would you join it?"; "If you were pregnant, and abortion were illegal, would you have one anyway?"; and so on. Such hypotheticals acknowledge the reality that most citizens are infrequently confronted directly by the problem, say, of abortion, have no recent experience with illegal abortion, and seldom engage in political activities, such as demonstrations, connected with abortion. The limits of the hypothetical approach have already been outlined in discussing Gibson's 1989 study.[80]

A second approach to studying compliance with Court decisions is to focus on extremist groups, who might actually engage in

79. MARSHALL, *supra* note 36, at 135–36.

80. *See supra* notes 73–75 and accompanying text.

demonstrations or other legal or illegal political behaviors. Although such an approach would yield valid behavioral data, a focus on extreme groups moves away from the important issue of legitimacy among the general population. If the population generally accepts Court decisions and complies with those decisions, then the actions of a small group of extremists are of little political importance. It is only widespread disobedience that threatens the institutional legitimacy of the Supreme Court.

Legitimacy as a compliance facilitator has been studied more directly, but at the local, rather than national, level. Tom Tyler, for instance, tested the importance of legitimacy in promoting compliance with law in everyday life.[81] He examined the antecedents of obedience to the law in a sample of 1575 citizens of the city of Chicago.[82] In that study, Tyler tested whether people obey the law because (1) they feared being caught and punished for lawbreaking, and/or (2) they felt that obeying the law was the ethically appropriate thing to do because legal authorities were legitimate and ought to be obeyed.[83] The results indicated that people's behavior was more strongly influenced by legitimacy than by outcome-based concerns. People were found to obey the law more because they thought legal authorities were legitimate than because they feared being caught and punished for breaking the law.[84]

Tyler argued that his findings have important implications for legal authorities attempting to regulate behaviors ranging from drug use to income tax payment.[85] Officials who want people to obey a law need to create a climate of legitimacy that supports their rules and decisions. This argument supports the hypotheses articulated in *Casey*; however, it deals with reactions to local legal authorities and compliance with everyday laws. It does not examine controversial issues of national legal policy.

Thus, although supportive of the general line of the Supreme Court's argument, the findings of Tyler's 1990 study do not directly address the issues raised in *Casey*. The arguments made by the Justices were focused on the legitimacy of the U.S. Supreme

81. *See* TYLER, *supra* note 21.

82. *See id.* at 8.

83. *See id.* at 3 ("The first goal of this book is to contrast the instrumental and normative perspectives on why people follow the law.").

84. *See id.* at 161–69, 178.

85. *See id.* at 22, 25–26.

Court, not on local level legal authorities such as police officers or local judges. There are a number of differences between the two cases. Most obviously, the Supreme Court is a national level institution. Hence, (1) it has a clear mandate, derived from the Constitution, to interpret that Constitution and confer rights on those with valid constitutional claims. Also, (2) it makes decisions with national implications, the effects of which are not confined to the immediate parties. Further, (3) unlike the situation with local legal authorities (e.g., police officers), most Americans have no personal experience with the Court or its Justices. Due to these differences, it is unclear whether the findings of Tyler's research support the Supreme Court's recent suggestions that its institutional legitimacy is important and enhances its empowerment by the American public.

Because of the difficulties of studying behavioral compliance with Supreme Court decisions, the empirical side of this study will focus on the issue of empowerment. If the public is willing to empower the Court on the issue of abortion, deferring to the Court's judgments about what abortion policy should be, then the Court is using its institutional legitimacy to confer legitimacy on a particular policy that it has enacted.

It should not be assumed that the public will defer to the Court on controversial issues, any more than it should be assumed that the public will comply with Court decisions. Richard Johnson, for example, explored public acceptance of the Supreme Court's right to make decisions about prayer in school.[86] In interviews conducted after the Court's decisions banning school prayers,[87] only 36% of those who disagreed with the Court's decision acknowledged the Court's right to make decisions about school prayer, which they had a duty to accept (91% of those who agreed with the decision acknowledged the Court's right to resolve the controversy).[88] What is striking about the interviews is the unwillingness of those who opposed the decisions to acknowledge the authority of the Court to make binding decisions in that area.

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86. *See* Johnson, *supra* note 59.

87. The cases of relevance to the Johnson study included Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963), Engel v. Vitale, 370 U.S. 421 (1962), Zorach v. Clauson, 343 U.S. 306 (1952), Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948), and Everson v. Board of Educ., 330 U.S. 1 (1947), with *Schempp* and *Engel* being of primary importance. *See* Johnson, *supra* note 59, at 170 & n.1, 172.

88. Johnson, *supra* note 59, at 173–74.

In the situation Johnson studied, the interviews were conducted following the Court's decisions on school prayer. Hence, respondents were not making an evaluation of the Court prior to its hearing of the case. That situation is analogous to evaluating a trial judge after a verdict has already been rendered. In the study to be presented here, the interviews were conducted prior to the *Casey* decision, at a time when those interviewed were uncertain about how the Court might rule on future abortion issues. Hence, people's empowerment judgments should have been less strongly linked to the Court's ultimate decision. That is, the Court's actual decision did not contaminate the results. People responded to a real contingency, namely, should the Court be empowered to act in the near future with respect to abortion rights?

Although our study explores empowerment prior to the making of a decision, it is also important to acknowledge the importance of post-decision legitimacy. Empowerment prior to decisions is important because it focuses on the legitimacy of the Court as a forum for resolving disputes. If people respect the Court as a neutral arbiter of disputes, they are more likely to accept its decisions after they are made. However, it is important to recognize that the ultimate concern must be with the willingness to acquiesce to unpopular decisions after they are made. If people reject the Court's decisions, opposing their implementation and refusing to obey them, then the Court is not able effectively to legitimize its decisions (i.e., it is unable to transfer its institutional legitimacy onto particular decisions). Ultimately, research needs to examine both pre-decision empowerment—in which the public authorizes the Court to resolve a controversial issue without knowing what the Court will do—and post-decision compliance—in which members of the public acquiesce to decisions that the Court has made, even if they disagree with them.

The approach we take acknowledges that one key aspect of the effective exercise of legal authority is the ability to gain public acquiescence to the definition of questions as legal issues that are properly decided by judicial authorities. This empowerment to define issues gives an authority power to create "categories and frameworks through which the world is interpreted,"[89] and these categories or frameworks may "justify a decision to handle a case in a particular way."[90] As Barbara Yngvesson notes,"[L]aw cre-

89. SALLY E. MERRY, GETTING JUSTICE AND GETTING EVEN 8 (1990).

90. Barbara Yngvesson, *Making Law at the Doorway: The Clerk, the Court, and the*

ates the social world by 'naming' it; legal professionals are empowered by their capacity to reveal rights and define wrongs, to construct the meaning of everyday events . . . and thus to shape cultural understandings of fairness, of justice, and of morality."[91] If people accept legal authority, they are placing the resolution of an issue under the control of the judge's analysis of the issues.[92] This control can transform the dispute, shaping the issue to be considered and the rules by which the issue will be resolved.[93] Thus, to the extent legitimacy leads to empowerment to decide issues, legitimacy yields a powerful commodity: control over the definition of the issue. For example, in *Roe v. Wade*, the Court defined abortion as a legal right protected by the Constitution. This definitional power is in addition to the voluntary behavioral compliance that perceived legitimacy is hypothesized to engender.

D. *Institutional Legitimacy*

Empowering the Court to resolve the abortion issue is also important because it may be related to the Court's general authority as an institution of government. In deciding a controversial issue such as abortion, the Court is not only concerned with whether people accept that particular decision. It is also concerned with the effect of the decision on the public's respect for the constitutional system as a whole. If the Court produced an "unprincipled" decision, overall beliefs about whether our government is ruled by constitutional ideals would be damaged, with possible widespread negative effects for the courts and government in general. If a Court decision is viewed as legitimate, however, the integrity of the Court is reaffirmed, regardless of whether people immediately comply with the decision. Thus, legitimacy is important for general system maintenance, as well as for securing specific compliance.

Construction of Community in a New England Town, 22 LAW & SOC'Y REV. 409, 410 (1988).

91. Barbara Yngvesson, *Inventing Law in Local Settings: Rethinking Popular Legal Culture*, 98 YALE L.J. 1689, 1691 (1989).

92. Austin Sarat, *Authority, Anxiety, and Procedural Justice*, 28 LAW & SOC'Y REV. (forthcoming March 1994).

93. *See* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 269–95 (1987) (discussing how traditional legal analysis suppresses counterhegemonic thoughts).

Studies of public reaction to political authority show that people are unlikely to reject the legitimacy of legal authority in the absence of an alternative model of authority that is "at least equal in status to the one issuing the demand."[94] Even when people disagree with a decision, they typically regard that decision as entitled to be obeyed and do so unless a compelling reason justifies disobedience. This aspect of authority is captured by Professor Mark Kelman, who states that

> people may experience unpopular opinions, such as the busing decisions, as both ones they are morally bound to obey *and*, more significantly, as decisions that are relatively fixed and difficult to alter precisely because they respect the legitimacy of the judicial process. Even if the norm is not utterly embraced, it is rendered serious, worthy of a certain respect until it is overhauled in a rather elaborate way.[95]

A government institution in a system such as ours must be attuned to its level of legitimacy given the myriad other institutions that might usurp authority over a given issue. As noted above, with respect to the issue of abortion, there are numerous possible decisionmakers.[96] The Supreme Court must be particularly sensitive to this condition because Congress can unilaterally act to take control of issues,[97] a possibility that likely increases as the general respect for the Court decreases. Whether the Court is or should be sensitive to public opinion, Congress certainly is, and if the Court is deemed the inappropriate arbiter of abortion rights, the situation could be remedied with a little concerted effort. Thus, Congress can be proactive. The Supreme Court can be only reactive. It is left to work within the confines of the case or controversy presented to it.[98] The Court enjoys much of its scope of

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94. KELMAN & HAMILTON, *supra* note 54, at 139.

95. KELMAN, *supra* note 93, at 264.

96. *See supra* notes 47–48 and accompanying text.

97. As can the executive. Consider, for instance, the "gag order" promulgated by the Department of Health and Human Services during the Bush Administration that was at issue in Rust v. Sullivan, 111 S. Ct. 1759 (1991) (upholding regulations prohibiting the use of certain government funds for abortion-related activities because the regulations were based on permissible statutory construction and did not violate the Constitution).

98. *See* U.S. CONST. art. III, § 2. Certainly, the Court exerts considerable discretion in the issues it decides through its denial and grant of *certiorari*, *see* GERALD GUNTHER, CONSTITUTIONAL LAW 60–64 (12th ed. 1991), but even then, the Court remains confined to reaction to a limited set of topics in a limited format. The extent to which the Court acts "legislatively" within these confines is of course a topic of continuing debate, but

authority at the pleasure of Congress and the executive branch, and the Court's degree of institutional legitimacy can bolster or undercut the willingness of these other branches to suffer their relinquishment of authority.

To summarize, the *Casey* Court argues for the importance of acting in ways that maintain the Court's legitimacy in the eyes of the public and, through that legitimacy, the Court's authoritativeness. Its argument accords with treatments of Court authoritativeness by legal scholars, who emphasize the importance of public support for the empowerment of the Court to resolve controversial issues. As an institution without the resources needed to govern through rewards or coercion, the Court is said to be primarily dependent on public willingness to defer voluntarily to Court authority. Hence, the Court regards public legitimacy as central to its effectiveness. But is this claim supported empirically? The purpose of the study reported here is to test whether, in fact, the Court's and legal scholars' arguments are correct.

II. PSYCHOLOGICAL UNDERPINNINGS OF AUTHORITATIVENESS

It is not enough to demonstrate that legitimacy matters. It is also important to demonstrate that the psychology of legitimacy is such that it can function to enhance deference and obligation. If, for example, people regard authorities as legitimate only when those authorities make decisions with which they agree, as is suggested by public choice models of legitimacy, then legitimacy does not serve as an effective basis of governance. In that case, both sides to any dispute would not simultaneously regard the Court as legitimate. To be effective, legitimacy must also be shown to be distinct from considerations of short-term agreement or disagreement with the Court's decisions. Thus, we proceed to an examination of the psychological underpinnings of legitimacy.

A. *The Psychology of Legitimacy*

The psychological literature on dispute resolution identifies three aspects of outcomes that are potential influences on perceptions of legitimacy. Each is hypothesized by some social science models to have an important influence on reactions to authorities.

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doubtless the Court is less legislative and proactive than Congress or the executive.

Those three aspects are: (1) the nature of the outcome, indexed by agreement or disagreement with decisions made (social exchange, or public choice, models); (2) the substantive fairness of the outcome (distributive justice models); and (3) the procedural fairness of the outcome (procedural justice models). Thus, people may draw their judgments of the legitimacy of a specific outcome from the favorability of the outcome, the justice of the outcome, the justice of the procedure used to yield the outcome, or some combination of these factors.

1. *Social Exchange, or Public Choice, Models.* Social exchange theories view people as motivated by narrow self-interest in their interactions with others. People enter and leave relationships depending on the benefits and costs of remaining in those relationships relative to taking other possible actions; people evaluate interactions with others in terms of rewards and costs; people evaluate and react to third parties, like judges and police officers, to third-party decisions, and to institutions such as the courts and the law, by assessing what they gain and lose from accepting or rejecting them.

Certain psychological theories on the evaluation of legal authorities reflect the social exchange perspective by arguing that the ability of authorities to provide favorable outcomes determines the extent to which they will be regarded as authoritative.[99] The social exchange model posits that reactions to legal authorities, in the final analysis, are instrumentally based, developing out of expected or achieved gains and losses. Simply put, under these models, if judges make decisions that people agree with, they will receive the approval and support of the people.

2. *Justice Models.* A central contribution of the social sciences following World War II was the thesis that people do not react to authorities primarily in terms of the absolute or relative favorability of the outcomes the authorities provide. This argument was first made in the literature on relative deprivation, which

99. *See, e.g.*, Edwin P. Hollander, *Leadership and Social Exchange Processes*, *in* SOCIAL EXCHANGE 103 (Kenneth J. Gergen et al. eds., 1980); Edwin P. Hollander & James W. Julian, *Studies in Leader Legitimacy, Influence, and Innovation*, *in* GROUP PROCESSES 115 (Leonard Berkowitz ed., 1978).

linked political and social unrest to judgments of deprivation relative to standards of deservedness.[100]

In contrast to social exchange models, justice models, like the model of relative deprivation, predict that people react to legal authorities and outcomes not by evaluating whether these outcomes accord with their self-interest but by assessing whether the outcomes are fair.

There are two categories of justice theories: those emphasizing distributive, or outcome, fairness and those emphasizing procedural fairness. Both models predict that the factors that shape how people react to their experiences are linked to their judgments about the justice or injustice of their experiences.

a. Distributive justice. One alternative to the social exchange model is a set of psychological models that emphasize people's concerns with outcome fairness. This view is represented most prominently in psychology by equity theories.[101] These the-

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100. *See* FAYE J. CROSBY, RELATIVE DEPRIVATION AND WORKING WOMEN (1982); JOHN C. MASTERS & WILLIAM P. SMITH, SOCIAL COMPARISON, SOCIAL JUSTICE, AND RELATIVE DEPRIVATION (1987); 1 SAMUEL A. STOUFFER ET AL., THE AMERICAN SOLDIER (1949); Faye Crosby, *A Model of Egoistical Relative Deprivation*, 83 PSYCHOL. REV. 85 (1976); Faye Crosby, *Relative Deprivation in Organizational Settings*, *in* 6 RESEARCH IN ORGANIZATIONAL BEHAVIOR 51 (Barry M. Staw & L.L. Cummings eds., 1984); Joanne Martin, *The Tolerance of Injustice*, *in* RELATIVE DEPRIVATION AND SOCIAL COMPARISON 217 (James M. Olson et al. eds., 1986); Robert K. Merton & A.S. Kitt, *Contributions to the Theory of Reference Group Behavior*, *in* 4 CONTINUITIES IN SOCIAL RESEARCH: STUDIES IN THE SCOPE AND METHOD OF "THE AMERICAN SOLDIER" 40 (Robert K. Merton & Paul F. Lazersfeld eds., 1950); Thomas F. Pettigrew, *Three Issues in Ethnicity: Boundaries, Deprivations, and Perceptions*, *in* MAJOR SOCIAL ISSUES: A MULTIDISCIPLINARY VIEW 25 (J. Milton Yinger & Stephen J. Cutler eds., 1978); *cf.* Joanne Martin, *Relative Deprivation: A Theory of Distributive Injustice for an Era of Shrinking Resources*, *in* 3 RESEARCH IN ORGANIZATIONAL BEHAVIOR 53 (Barry M. Staw & L.L. Cummings eds., 1981).

101. *See, e.g.*, ELAINE WALSTER ET AL., EQUITY: THEORY AND RESEARCH (1978); J. Stacy Adams, *Inequity in Social Exchange*, *in* 2 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 267 (1965); Elaine Walster et al., *New Directions in Equity Research*, 25 J. PERSONALITY SOC. PSYCHOL. 151 (1973); Elaine Walster & G. William Walster, *Equity and Social Justice*, 31 J. SOC. ISSUES 21 (1975).

Demonstrating that people evaluate outcomes, rules, or authorities in terms of justice does not demonstrate that the use of such justice judgments is not itself based on a concern with self-interest. In fact, distributive justice theories originally developed within the context of social exchange theory. Distributive justice theories are important to our research because they suggest a factor that might shape reactions to experience: outcome fairness. That factor differs from the factor that social exchange theories suggest should be most central to such reactions: outcome favorability.

ories hypothesize that people evaluate authorities and their decisions by comparing the outcomes they obtain to principles describing fair distributions.

The proposition that distributive justice matters in reactions to authorities is supported both by the research literature on relative deprivation, which links perceived injustice to political unrest,[102] and by the equity literature, which links perceived unfairness to unhappiness in work settings.[103] This research demonstrates that people have a sense of what an appropriate or fair outcome is in a dispute or allocation.[104] If people receive this outcome, they are satisfied with the allocation and with the allocator. As evidence of the power of fairness concerns, interestingly, people are less satisfied when they receive more than they deserve than when they receive a "fair" settlement.[105]

b. Procedural justice. People's reactions to third parties and their decisions also have been linked to judgments about the fairness of the procedures used to make these decisions. Such procedural theories predict that people will focus on how decisions are made, not on the decisions themselves, when making evaluations of fairness.[106]

Since the publication of *Procedural Justice* by John Thibaut and Laurens Walker in 1975,[107] a substantial body of research has been conducted on issues of procedural justice.[108] The findings of the initial Thibaut and Walker research illustrating the

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102. *See, e.g.*, CROSBY, *supra* note 100; MASTERS & SMITH, *supra* note 100; STOUFFER ET AL., *supra* note 100.

103. *See, e.g.*, WALSTER ET AL., *supra* note 101; Walster et al, *supra* note 101; Walster & Walster, *supra* note 101.

104. In work settings, for example, an equity rule (e.g., outcomes should be proportional to inputs) often predominates. *See, e.g.*, WALSTER ET AL., *supra* note 101, at 114–42. This rule is distinct from a simple self-interest approach, which would favor the greatest outcome possible regardless of inputs.

105. *See, e.g.*, Adams, *supra* note 101, at 283–96.

106. *See, e.g.*, E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975); Gerald S. Leventhal, *Fairness in Social Relationships, in* CONTEMPORARY TOPICS IN SOCIAL PSYCHOLOGY 211 (John Thibaut et al. eds., 1976); George S. Leventhal, *What Should Be Done with Equity Theory?: New Approaches to the Study of Fairness in Social Relationships, in* SOCIAL EXCHANGE 27 (Kenneth J. Gergen et al. eds., 1980).

107. *See* THIBAUT & WALKER, *supra* note 106.

108. For a review of this literature, see LIND & TYLER, *supra* note 106.

importance of procedure have been widely confirmed in subsequent studies of legal trial procedures,[109] in studies of nontrial procedures used to resolve legal disputes, including plea bargaining[110] and mediation,[111] and in studies of police officers' dealings with citizens.[112]

Procedural concerns have emerged as especially important in studies examining the antecedents of the legitimacy of legal authorities and institutions.[113] Interestingly, these studies show both

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109. *See, e.g.*, E. Allan Lind et al., *Procedure and Outcome Effects on Reactions to Adjudicated Resolution of Conflicts of Interest*, 39 J. PERSONALITY & SOC. PSYCHOL. 643 (1980).

110. *See, e.g.*, Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483 (1988); Pauline Houlden, *Impact of Procedural Modifications on Evaluations of Plea Bargaining*, 15 LAW & SOC'Y REV. 267 (1980–1981).

111. *See, e.g.*, JANE W. ADLER ET AL., SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM (1983); E. ALLAN LIND ET AL., THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES (1989); ROBERT J. MACCOUN ET AL., ALTERNATIVE ADJUDICATION: AN EVALUATION OF THE NEW JERSEY AUTOMOBILE ARBITRATION PROGRAM (1988).

112. *See, e.g.*, TYLER, *supra* note 21; Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103 (1988); Tom R. Tyler & Robert Folger, *Distributional and Procedural Aspects of Satisfaction with Citizen-Police Encounters*, 1 BASIC & APPLIED SOC. PSYCHOL. 281 (1980).

In addition to the findings stated above, *see* text accompanying notes 109–12, researchers have found that concerns about procedural justice extend to organizational settings, *see* Robert Folger & Jerald Greenberg, *Procedural Justice: An Interpretive Analysis of Personnel Systems*, *in* 3 RESEARCH IN PERSONNEL AND HUMAN RESOURCES MANAGEMENT 141 (Kendrith M. Rowland & Gerald R. Ferris eds., 1985); Jerald Greenberg & Robert Folger, *Procedural Justice, Participation, and the Fair Process Effect in Groups and Organizations*, *in* BASIC GROUP PROCESSES 235 (Paul B. Paulus ed., 1983); Blair H. Sheppard, *Third Party Conflict Intervention: A Procedural Framework*, *in* 6 RESEARCH IN ORGANIZATIONAL BEHAVIOR, *supra* note 100, at 141; political settings, *see* Tom R. Tyler & Andrew Caine, *The Influence of Outcomes and Procedures on Satisfaction with Formal Leaders*, 41 J. PERSONALITY & SOC. PSYCHOL. 642 (1981); interpersonal settings, *see* Edith Barrett-Howard & Tom R. Tyler, *Procedural Justice as a Criterion in Allocation Decisions*, 50 J. PERSONALITY & SOC. PSYCHOL. 296 (1986); and educational settings, *see* Tyler & Caine, *supra*. In fact, wherever procedural justice issues have been studied, they have emerged as important concerns. For possible limits to the procedural justice effect, see Tom R. Tyler & E. Allan Lind, *Intrinsic Versus Community-Based Justice Models: When Does Group Membership Matter?*, 46 J. SOC. ISSUES 83 (1990).

113. *See* TYLER, *supra* note 21; Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of their Courtroom Experience*, 18 LAW & SOC'Y REV. 51 (1984).

Similar results have been obtained in studies of political authorities, *see* Tyler & Caine, *supra* note 112; Tom R. Tyler et al., *The Influence of Perceived Injustice on the Endorsement of Political Leaders*, 15 J. APPLIED SOC. PSYCHOL. 700 (1985), and managerial authorities, Sheldon Alexander & Marian Ruderman, *The Role of Procedural and Distributive Justice in Organizational Behavior*, 1 SOC. JUST. RES. 177 (1987); Robert

that procedural fairness does shape legitimacy and that outcome favorability has little or no independent influence on evaluations of legitimacy (i.e., outcome and legitimacy evaluations are largely independent).

B. *Empirical Comparisons of the Models*

The three models outlined above all dictate specific hypotheses concerning what characteristics of their experience people use when evaluating the authorities with whom they deal, the decisions these authorities make, and the organizations these authorities represent. These respective aspects of experience likewise may explain people's behavioral responses to decisions and rules.

The key empirical question for our inquiry is how these three aspects of decisionmaking—outcome favorability, distributive fairness, and procedural fairness—affect people's reactions to legal authorities and legal rules. The argument we advance is that the primary factor affecting the perceived legitimacy of authorities is procedural fairness.

Two types of studies have been conducted to examine the validity of these theoretical models: those examining personal experiences with authorities (e.g., "When I was stopped by a police officer last month, I received a ticket.") and those exploring overall judgments about authorities' behavior (e.g., "The judge generally makes decisions following fair procedures.").

There are two basic ways in which to measure responses to these authorities. First, relevant attitudes may be assessed. As already noted, attitudes about the legitimacy of legal authorities, law, and legal institutions are key antecedents of voluntary compliance behavior.[114] Hence, these attitudes are crucially important to system maintenance. Second, behavioral reactions to legal decisions and legal rules, in particular the willingness to accept them voluntarily, may be directly studied.[115]

Folger & Mary A. Konovsky, *Effects of Procedural and Distributive Justice on Reactions to Pay Raise Decisions*, 32 ACADEMY MGMT. J. 115 (1989). For a full review of the literature on procedural justice and legitimacy as they relate to acceptance of authority, see Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 115 (1992).

114. *See supra* Section I(C).

115. We will not examine the large body of literature on the antecedents of personal reactions to decisions (i.e., satisfaction with outcomes and affective reactions to experience, e.g., "I won my case, so I am happy."). For such a review, see LIND & TYLER,

1. *Attitudes About Legal Authority.* Tom Tyler studied the effects of people's judgments about the outcome favorability, distributive fairness, and procedural fairness of their recent personal experiences in small claims court on their attitudes about the legitimacy of legal authorities.[116] He found that procedural fairness had a significant independent impact on such views, as did distributive fairness.[117] Outcome favorability had no significant effect.[118] This finding was replicated in a second study of experiences with legal authorities, which included experiences with both judges and police officers.[119] The respondents' views about the legitimacy of legal authority were influenced by the procedural justice of their recent experiences and by the distributive justice of the outcomes of those experiences but were less affected by the favorability of the outcome.[120]

In yet another study, Tyler, together with Johnathan Casper and Bonnie Fisher, examined the influence of experience on attitudes about the legitimacy of law and government using a sample of 329 defendants on trial for felonies in criminal court. The defendants were interviewed both prior to and following their encounters with the court.[121] The results indicated that procedural justice judgments influenced attitudes about the legitimacy of legal authorities, law, and government, but neither distributive justice judgments nor the favorability of sentences had any direct impact on attitudes about authorities.[122]

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supra note 106, at 61–202. If people receive unfavorable outcomes, they may be personally dissatisfied and unhappy. We are only concerned with such feelings to the extent that they generalize to views about authorities, rules, and institutions.

116. *See* Tyler, *supra* note 113.

117. *Id.* at 69–70.

118. *Id.*

119. *See* TYLER, *supra* note 21, at 8–10.

120. *Id.* at 98–104.

121. *See* Tom R. Tyler et al., *Maintaining Allegiance Toward Political Authorities: The Role of Prior Attitudes and the Use of Fair Procedures*, 33 AM. J. POL. SCI. 629 (1989).

122. *Id.* at 640–41. These findings are not limited to legal authority. Several studies have examined the factors that influence commitment to work organizations (a positive attitude toward the organization that seems similar to legitimacy). Sheldon Alexander and Marian Ruderman examined the influence of distributive and procedural fairness on trust in management among 2800 federal employees. Employees were interviewed about various aspects of the job environment, including the fairness of decisionmaking procedures. Their judgments about the job environment were then used to predict their trust in management. Trust in management was influenced both by employee assessments of the fairness of outcomes (unique variance explained = 5%) and by their evaluations of the fair-

Although procedural justice is clearly important, it is also

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ness of decisionmaking procedures within their work setting (unique variance explained = 11%). *See* Alexander & Ruderman, *supra* note 113, at 188–92. The phrase "unique variance explained" describes the percentage of a variance in outcomes that can be attributed to one factor.

Similarly, Robert Folger and Mary Konovsky examined the influence of judgments about the distributive and procedural fairness of pay raises on the organizational commitment of manufacturing employees. They found that procedural justice explained significant variance in organizational commitment (zero-order r = .43), as did distributive justice (r = .33). Again, the actual amount of raises had no impact (r = .11, not significant). *See* Folger & Konovsky, *supra* note 113, at 122–24.

Correlation (r) indexes the strength of the association between two variables. If the variables are totally unrelated, the correlation is 0.00. If the two variables are totally identical, the correlation is 1.00. In general, the higher the correlation, the stronger the association. However, it is important to recognize that the magnitude of correlations is nonlinear (i.e., a correlation of .20 is not one-half as strong as a correlation of .40). Instead, the magnitude of correlations should be compared by examining their exponential value. The square of the correlation .20 is .04; the square of the correlation .40 is .16. A .40 correlation indicates that one variable explains 16% of the variance in another variable; a .20 correlation indicates that one variable explains 4% of the variance in another.

To test whether a correlation actually exists, a statistical test is used to assess the possibility that an association of the strength observed would occur by chance if no true association existed. Typically, social scientists say that a relationship exists if the likelihood of finding the observed correlation by chance is less than 5 in 100. In other words, the probability of a chance relationship is less than 5% ($p < .05$). All the correlations reported in this study are significant at this level or greater unless they are followed by the note "not significant." Nonsignificant correlations should be treated as indicating the lack of a relationship.

Tom Tyler and Regina Schuller studied organizational commitment and trust of supervisors in work settings. A random sample of 409 workers in the Chicago area were interviewed about their recent personal experiences with their supervisors. Attitudinal reactions to those experiences with authorities were found to be dominated by procedural justice judgments. *See* Tom R. Tyler & Regina Schuller, A Relational Model of Authority in Work Organizations: The Psychology of Procedural Justice (1990) (unpublished manuscript, on file with authors).

In addition, several studies of political authority have reported like results. Tom Tyler and Andrew Caine used both experimental and correlational methods to examine influences on the evaluation of political leaders. In their experimental study, they manipulated the fairness of the procedure through which a political leader made a decision. They also manipulated the favorability of that decision. Their results indicate that both factors influenced evaluations of the political leader. In their correlational study, they asked respondents about the fairness of the political decisionmaking process, as well as about the favorability and fairness of political decisions. Their results indicate that procedural judgments always significantly influenced evaluations of political leaders and institutions, whereas outcome judgments had a lesser, and often insignificant, influence on such judgments. *See* Tyler & Caine, *supra* note 112, at 652–54.

Finally, Tom Tyler, Kenneth Rasinski, and Kathleen McGraw conducted two studies examining the influence of outcome favorability, distributive fairness, and procedural fairness on trust in the national government. They found that procedural justice was the most important influence on trust, with absolute ontcomes and distributive fairness exerting lesser influences. *See* Tyler et al., *supra* note 113, at 711–15.

important not to overstate the case. In both the Tyler 1990 and the Tyler, Casper, and Fisher 1989 studies, outcome factors did have an influence on fairness judgments (i.e., those who won were more likely to think that the process was fair). Through this influence on fairness judgments, outcome factors had an indirect influence on attitudes about authorities and rule-related behavior. Thus, outcomes do matter, but not solely, and typically not as much as fairness concerns.

2. *Behavioral Responses to Legal Authority.* Several studies illustrate that procedural justice effects extend beyond attitudes and influence behavior. Robert MacCoun and colleagues studied litigants in cases involving automobile claims in New Jersey and found that considerations of procedural fairness[123] and outcome favorability[124] had an influence on intention to accept or reject the court award. Similarly, Dean Pruitt and colleagues found that the acceptance of mediation outcomes was linked to judgments that the hearing procedure was fair.[125] Finally, Allan Lind and colleagues found that the acceptance of arbitration awards was influenced by judgments of procedural justice and distributive justice, but not by outcome favorability.[126]

Fair procedures also have been linked to general obedience to rules and laws. In an experimental study, in which the fairness of the rule-creating process was manipulated, Nehemia Friedland, John Thibaut, and Laurens Walker found that rules made in an unfair manner were more likely to be violated,[127] a finding later replicated.[128]

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123. *See* MACCOUN ET AL., *supra* note 111, at 60–62.

124. *Id.* at 61. The correlation between outcome favorability (the "win/lose" index) and intention to accept or reject the award was r = .30.

125. *See* Dean G. Pruitt et al., Long-Term Success in Mediation (1989) (unpublished manuscript, on file with authors).

126. *See* E. Allan Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224, 226–29 (1993).

Conversely, lack of procedural justice also has been found to be the precursor of unwillingness to accept decisions. Workers who received unfavorable decisions within a work setting were inclined to file lawsuits against their company primarily if they felt that those decisions were made through unfair procedures. Robert J. Bies & Tom R. Tyler, *The "Litigation Mentality" in Organizations: A Test of Alternative Psychological Explanations*, 4 ORG. SCI. 352, 354–55 (1993).

127. *See* Nehemia Friedland et al., *Some Determinants of the Violation of Rules*, 3 J. APPLIED SOC. PSYCHOL. 103, 114–17 (1973).

128. *See* John Thibaut et al., *Compliance with Rules: Some Social Determinants*, 30 J.

Tom Tyler's 1990 study found that outcome favorability had little influence on either evaluations of legal authorities or compliance with the law.[129] Judgments of fairness, however, did influence attitudes and behaviors.[130] Procedural justice judgments influenced views about the legitimacy of legal authorities. Such views, in turn, influenced rule-following behavior. In addition, distributive justice judgments had a direct influence on rule-following behavior.[131]

PERSONALITY & SOC. PSYCHOL. 792, 801 (1974) (finding that the positive correlation of "fairness" and compliance is heightened when rules benefit both the rulemaker and the individual, as opposed to merely the rulemaker).

129. *See* TYLER, *supra* note 21, at 96–97, 102–03.

130. *Id.*

131. *See id.* Behavioral influences also can be explored in work settings. Several studies show that procedural justice effects on behaviors are related to legitimacy in work settings. An experimental demonstration of the behavioral effects of unfair procedures in work settings was found in a 1989 study by Jerald Greenberg. *See* Jerald Greenberg, *Reactions to Procedural Injustice in Payment Distributions*, 72 J. APPLIED PSYCHOL. 55 (1989). In that study, college students in a work experiment experienced either fair or unfair procedures of work evaluation. Following that experience, participants were placed in a room in which was displayed a poster with telephone numbers for reporting unfair treatment to an "ethical responsibility board." Greenberg found that experiencing an unfair procedure led participants to take slips of paper with the telephone number attached, suggesting an intention to report that unfair procedure to the appropriate authorities. *Id.* at 58–59. The results indicated that procedure interacts with outcomes, with both unfair procedure and an unfairly negative outcome required for protest behavior to occur.

Christopher Earley and Allan Lind examined the influence of varying the procedural justice of task selection processes on people's adherence to task rules in an experimental and a field setting. *See* P. Christopher Earley & E. Allan Lind, *Procedural Justice and Participation in Task Selection*, 52 J. PERSONALITY & SOC. PSYCHOL. 1148 (1987). They found that procedural justice judgments directly affected rule-following behavior in the laboratory study, bnt not in the field study. In the field study, however, rule-following behavior was affected by manipulations of voice and choice, two dimensions typically associated with procedural justice. *Id.* at 1155.

Procedural justice judgments also infiuence legitimacy-linked political behaviors. Kenneth Rasinski and Tom Tyler conducted two studies exploring the influence of procedural justice judgments on political behavior in the 1984 presidential election. *See* Kenneth Rasinski & Tom R. Tyler, *Fairness and Vote Choice in the 1984 Presidential Election*, 16 AM. POL. Q. 5 (1987). In each study, it was found that citizens' vote choices were influenced by their judgments about the relative procedural fairness associated with the two presidential candidates, Ronald Reagan and Walter Mondale. Judgments about past benefits and costs also influenced vote choice. *Id.* at 16–19.

Rasinski examined the influence of justice concerns on political behaviors using a sample of 398 Chicago residents. *See* Kenneth Rasinski, *Economic Justice, Political Behavior, and American Political Values*, 2 SOC. JUST. RES. 61 (1988). He considered the antecedents of general political activity—working on a political campaign, displaying campaign buttons, etc.—and of activisn related to government benefits and services—contacting a political official about benefits and services, demonstrating for benefits and services, etc. Both types of behavior were responsive to procedural justice judgments. *Id.* at 71. The

C. *Socialization of Legitimacy Views and the Obligation to Obey*

In addition to the above outlined psychological antecedents, views about legitimacy, empowerment, and obligation also have demographic correlates. Religious and political orientation, as well as racial and ethnic background, may be important influences on legitimacy beliefs and feelings of obligation. People's initial views about legal institutions may develop most strongly from childhood socialization,[132] the process that accounts for many of our moral and political values and social beliefs.[133] Professor Gibson argues, for example, that childhood socialization likely plays a larger role in the creation of legitimacy beliefs than perceptions of specific decisionmaking instances.[134]

It appears that two distinct processes occur during childhood. First, considerable respect and confidence in the general political and legal system of government arise.[135] Second, considerable feelings of obligation to abide by the dictates of this system of government develop. This process of socialization thus may lead to the type of legitimation and obligation that Professor Hart saw as expedient to authoritativeness: people accept statements by authorities as "peremptory" and "content-independent" reasons for obedience, meaning that the very fact that an authority has issued a directive creates an unquestioned reason for obedience irrespective of the content of the directive.[136] An authority that can rely on

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strongest effect was found with benefit-related and service-related activities. A weaker effect was found with general political activity. Benefit and service activities were also influenced by self-interest but not by distributive fairness. General political activity was influenced by neither self-interest nor distributive fairness. *See id.*

132. *See, e.g.*, DAVID EASTON & JACK DENNIS, CHILDREN IN THE POLITICAL SYSTEM: ORIGIN OF POLITICAL LEGITIMACY 73–91 (1969).

133. For discussions of legal socialization, see FRED I. GREENSTEIN, CHILDREN AND POLITICS (1965); John M. Darley & Thomas R. Shultz, *Moral Judgments: Their Content and Acquisition*, 41 ANN. REV. PSYCHOL. 525 (1990); Martin L. Hoffman, *Moral Internalization: Current Theory and Research*, 10 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 85 (1977); David O. Sears, *Political Socialization*, *in* 2 HANDBOOK OF POLITICAL SCIENCE: MICROPOLITICAL THEORY 93 (Fred I. Greenstein & Nelson W. Polsby eds., 1975).

134. James L. Gibson, *Institutional Legitimacy, Procedural Justice, and Compliance with Supreme Court Decisions: A Question of Causality*, 25 LAW & SOC'Y REV. 631, 633 (1991) ("I consider it far more likely that views on the legitimacy of an institution reflect childhood socialization experiences and fundamental political values as well as accumulated satisfaction or dissatisfaction with the institution's policy outputs.").

135. *See* EASTON & DENNIS, *supra* note 132.

136. *See* H.L.A. Hart, *Commands and Authoritative Legal Reasons*, *in* AUTHORITY 92, 100–02 (Joseph Raz ed., 1990). This view appears to be empirically true.

such obedience can function more efficiently and confidently than one that must exert greater efforts to justify and enforce its decisions. Professor Hart does not claim, however, that such peremptory reasons are sufficient for system maintenance—they must be bolstered by secondary reasons "in the form of threats to do something unpleasant to the hearer in the event of disobedience."[137] These are "secondary provisions for a breakdown in case the primary intended peremptory reasons are not accepted as such."[138] Supportive attitudes, however, always facilitate acceptance.

It is unclear to what extent temporal events in adulthood can alter the feelings of obligation and legitimacy instilled during childhood. Generally, processes of adult socialization and socialization of adult attitudes about legal authorities[139] have been understudied.[140] Tyler did demonstrate that personal experiences with legal authorities shape the legitimacy perceptions of local legal authorities,[141] but this finding does not generalize to a national legal authority such as the U.S. Supreme Court because of the dearth of personal contacts with the Court.

So if personal experience cannot be a significant influence on legitimacy perceptions of national legal authorities, what does affect these views? We offer in Section IV(E) an empirical analysis of one possible influence: media events involving the U.S. Supreme Court. Specifically, we test how the Clarence Thomas confirmation hearings were related to judgments of legitimacy. Court confirmations in recent years, beginning primarily with the Robert

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> Although people may decide to follow legal rules either from fear of punishment . . . or as a result of reasoning about the purpose of rules . . . , most adults do not do so. Instead, they have learned the value of following rules for their own sake . . . . The majority of adults express the strong belief that obeying rules has value in itself.

TYLER, *supra* note 21, at 177.

137. Hart, *supra* note 136, at 101.

138. *Id.* Given Hart's treatment of threats as secondary reasons and his conception of the motives underlying adherence to the primary, peremptory and content-independent reasons as normative in nature, *see id.* at 103, his analysis accords with our research, which indicates a greater place in obedience for normative, rather than instrumental, factors, *see supra* subsection II(B)(2).

139. *Cf.* TYLER, *supra* note 21, at 177 ("In the area of law the content of socialization is less clear [than in the area of politics].").

140. *See* Karen K. Dion, *Socialization in Adulthood, in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 54, at 123 ("In comparison with childhood socialization, adult socialization has received less attention from psychologists.").

141. *See* TYLER, *supra* note 21, at 94–112.

Bork hearings, have been significant media events that have made the Court a more salient entity.[142] Combine this increased salience with the portrayal of the Justices as players in a political game and the potential for impact on perceptions of legitimacy becomes apparent. The Court acknowledges as much in *Planned Parenthood of Southeastern Pennsylvania v. Casey* when it argues that the Court will lose legitimacy to the extent it is viewed simply as another of the political branches.[143] This effect need not simply be assumed, however, because we subject it to empirical testing. It may be that, for all the clamoring in the media (and by at least one of the objects of the hearings[144] and one current Justice[145]), people are relatively unconcerned with such events.[146] Whether they should be concerned is addressed elsewhere;[147] we simply look for the presence of influence.[148]

Understanding why legitimacy evaluations shift is of considerable interest to authorities. Knowing how to instill a reserve of legitimacy during childhood is important, but if an authority pays no attention to the maintenance of its legitimacy, the reserve will eventually be depleted. We outlined above what aspects of specific decisions may be important to legitimacy—outcome favorability, distributive fairness, and procedural fairness—and then we broke

142. *See* Al Kamen, *Nominees of Past Endured Personal, Political Attacks*, WASH. POST, Oct. 16, 1991, at A22.

143. *See* Planned Parenthood of S.E. Pa. v. Casey, 112 S. Ct. 2791, 2814 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.) (quoting Mitchell v. W.T. Grant Co., 416 U.S. 600, 636 (1974) (Stewart, J., dissenting)).

144. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA (1990).

145. *See Nomination Hearings Described as 'Crazy,'* N.Y. TIMES, Mar. 28, 1993, § 1, at 24 (quoting Justice Scalia).

146. For an argument that people are not unconcerned, or at least that some segment of the population was not unconcerned in the Bork case, see Stephen L. Carter, *Bork Redux, or How the Tempting of America Led the People to Rise and Battle for Justice*, 69 TEX. L. REV. 759 (1991).

147. *See* David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491 (1992) (arguing for an overhaul of the confirmation process). For a debate, set off by the foregoing article, on the "proper" confirmation process, see John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEX. L. REV. 633 (1993); John O. McGinnis, *Reply: A Further Word Against Consensus*, 71 TEX. L. REV. 675 (1993); David A. Strauss & Cass R. Sunstein, *On Truisms and Constitutional Obligations: A Response*, 71 TEX. L. REV. 669 (1993).

148. Of course, it is an open question just how many people would have to exhibit what level of concern before a serious threat to legitimacy might arise. We can only determine whether there is a possible influence; the existence of such influence would suggest the need to further study its dimensions.

down the components of procedural fairness. We have thus already considered a number of the factors within an authority's control that may be crucial to institutional legitimacy. By examining how current events also may affect legitimacy, we expand the analysis to factors largely beyond the control of the authority and located in the broader social system.

D. *Summary of Empirical Studies of Responses to Authorities*

As stated above, research indicates that the key factor affecting the perceived legitimacy of authorities is procedural fairness. Procedural judgments have been found to be more important than either outcome favorability—whether the person won or lost—or judgments about outcome fairness. In many studies, procedural justice is the most important determinant of commitment and loyalty to authorities and institutions.[149] In addition, procedural justice influences obedience and other legitimacy-related behavior. In short, the use of fair procedures facilitates the effective exercise of authority.[150] Thus, our review of authorities indicates that legitimacy has a procedural base. If we want to understand the dynamics of legitimacy, we must explore the psychology of procedural justice.

Of course, it is important to distinguish attitudes about legitimate governance from personal satisfaction. We are not saying that people are happy if they receive unfavorable outcomes through a fair procedure. We are saying, however, that, to the extent a decision is viewed as legitimate, people are more likely to accept it and are less likely to blame the authorities or institutions

149. *See, e.g.*, Tyler & Lind, *supra* note 112 (comparing influences on loyalty).

150. This conclusion is directly contrary to Professor Hyde's conclusion from his review of the legitimacy literature: "Whatever the index chosen for its measurement, however, legitimacy cannot be shown to be as significant in explaining obedience as rational calculation, including evaluation of self-interest and sanctions." Hyde, *supra* note 19, at 426.

Professor Hyde too quickly collapses all motives into an undifferentiated "self-interest." Demonstration of a truly selfless act may well be impossible, but there are certainly varied forms of self-interested behavior, and to ignore this fact is itself erroneous because it diverts attention from the variety of more and less socially desirable ways that exist to motivate this self-interested behavior. *See* BEYOND SELF-INTEREST (Jane J. Mansbridge ed., 1990) (collecting works that discuss levels and types of interest); Gregory Mitchell, In Search of Selflessness: Social-Psychological Critiques of *Homo Economicus* (1993) (unpublished manuscript, on file with authors) (examining the altruism/egoism debate in economics, political science, psychology, and sociology).

with which they have dealt. Consequently, they are more likely to follow the organizational rules promulgated.

It is also important to reiterate a limit to the studies reviewed here. Their primary focus was on local level legal authorities, such as police officers and trial judges. National level political institutions like the U.S. Supreme Court have been studied little. People do not have the same type of experiences with national legal authorities as they have with local authorities and may have considerably different types and levels of information about the two types of authorities. It is therefore perilous to generalize evaluations from the local level to the national level.[151]

III. THE MEANING OF PROCEDURAL FAIRNESS

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Justices O'Connor, Kennedy, and Souter state that "the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."[152] Professor Fiss speaks of the principled character of judicial decisions in terms of judicial "objectivity."[153] He states that objectivity "implies that an interpretation [of a law by a judge] can be measured against a set of norms that transcend the particular vantage point of the person

151. Two recent studies have focused on the psychological basis for the legitimacy of the U.S. Supreme Court. These studies have reached opposing conclusions. James Gibson examined the Supreme Court's ability to legitimize the right of an unpopular group to march and was unable to conclude that the Court's legitimizing power was related to judgments about the fairness of its decisionmaking procedures. *See* Gibson, *supra* note 68, at 485. Tom Tyler and Kenneth Rasinski reanalyzed Gibson's data and argued that procedural justice judgments did influence the Court's legitimizing power. *See* Tyler & Rasinski, *supra* note 73, at 626. This reanalysis revealed that notions of procedural justice had an indirect effect on decision acceptance, an effect mediated by judgments of institutional legitimacy. *See id.* Gibson and Tyler and Rasinski all agreed, however, that in the dataset they examined this effect was small in magnitude. *See* Gibson, *supra* note 134, at 632 n.2; Tyler & Rasinski, *supra* note 73, at 626 n.2.

Thus, what little previous research there is on the basis of Supreme Court legitimacy is ambiguous. Procedural judgments may be crucial to this legitimacy, but the question remains open. A primary goal of the present study, therefore, was to further explore whether procedural fairness forms the basis of Court legitimacy, a question we take up in more detail in the next Part, as well as in the empirical analysis reported later.

152. Planned Parenthood of S.E. Pa. v. Casey, 112 S. Ct. 2791, 2814 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.).

153. *See* Fiss, *supra* note 12, at 744–46.

offering the interpretation."[154] In other words, legal rules constrain the judge in interpreting the law. They do so by constraining "the relevance and weight to be assigned to the material," by "defin[ing] basic concepts" that are relevant to the decision, and by "establish[ing] the procedural circumstances under which the interpretation must occur."[155]

The emphasis in *Casey*'s joint opinion on making decisions "in a legally principled" way and Professor Fiss's emphasis on objectivity are quite consistent with the spirit of the procedural justice model. These approaches suggest a focus on justifying decisions through reference to the manner in which those decisions are made, rather than through their substance.[156] The Court points out that such justifications are especially important when the issues involved are controversial because many people will disagree with the Court's decision regardless of the outcome and may potentially regard it as unfair.[157]

The general validity of the Court's claim notwithstanding, the Court's reference to "legally principled decisions" is fairly undifferentiated, lumping together many potentially relevant dimensions

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154. *Id.* at 744.

155. *Id.*

156. Professor Dworkin's "integrity"-based explanation for legitimacy likewise accords with procedural justice models because his notion of legal integrity refers to "a commitment to consistency in principle valued for its own sake" and emphasizes respect for parties. DWORKIN, *supra* note 25, at 167. Integrity to Dworkin is an elaboration on the "catch phrase that we must treat like cases alike." *Id.* at 165; *cf.* HART, *supra* note 53, at 155 ("[J]ustice is traditionally thought of as maintaining or restoring a *balance* or *proportion*, and its leading precept is often formulated as 'Treat like cases alike'; though we need to add to the latter 'and treat different cases differently.'"). "Treat like cases alike," however, may imply both a procedural and a substantive equality requirement; thus, this approach could be considered not solely procedural in nature. *Cf.* DWORKIN, *supra* note 25, at 165 ("[Integrity] requires government to speak with one voice, to act in a principled and coherent manner toward all its citizens, to extend to everyone the substantive standards of justice or fairness it uses for some.").

157. The Court analogizes the degree of controversy it faces in *Casey* to that facing the Court in Brown v. Board of Educ., 347 U.S. 483 (1954), arguing that the Court serves a reconciliatory function in such cases.

> Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.

Planned Parenthood of S.E. Pa. v. Casey, 112 S. Ct. 2791, 2815 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.).

of decisionmaking procedures. In this Part, we disentangle those possible dimensions.

The Court's suggestion that people focus on "legally principled decisions" is based on the "rational" conception of legal authority that dominates much doctrinal legal discourse. The perspective the Court articulates emphasizes that "Justices are viewed as fair, neutral, and evenhanded."[158] Further, Justices "do not simply impose their own values in reaching decisions, but merely 'discover' the Constitution's intended meaning."[159] This view of Court decisionmaking has been criticized by legal scholars[160] who argue that it is of dubious jurisprudential merit. That debate concerns the actual quality of judicial reasoning, whereas our concern is with whether the public bases its support for the Court on its beliefs about whether the Court makes decisions in "neutral" ways. It cannot be assumed that neutrality is the basis of Court legitimacy, but the question can be tested empirically.

The model articulated by the *Casey* Court emphasizes factors that may be labelled "traditional" or "rational-legal" decisionmaking criteria. These criteria include: (1) equal treatment for all involved; (2) honesty and neutrality on the part of the decisionmaker; (3) gathering information before decisionmaking and comparing that information to clear standards using expertise; (4) making principled, or rule-based, decisions instead of political decisions.[161] We group these factors under the heading of *neutrality*.

The Court's model may be compared to two other models that identify different characteristics that also may be important to

158. MARSHALL, *supra* note 36, at 133.

159. *Id.* Studies indicate that these beliefs about the Court are widespread among the American public. *See* Gregory Casey, *The Supreme Court and Myth: An Empirical Investigation*, 8 LAW & SOC'Y REV. 385 (1974); *cf.* Murphy & Tanenhaus, *supra* note 46, at 290 (finding 37% of respondents manifested high levels of diffuse support for the Court).

160. Skepticism about "formalistic" or "rational" models of constitutional interpretation abounds among legal scholars. *See, e.g.*, HART, *supra* note 53, at 120–50 (discussing "Formalism and Rule-Scepticism"); MARK TUSHNET, RED, WHITE, AND BLUE (1988); Thomas Morawetz, *The Epistemology of Judging: Wittgenstein and Deliberative Practices*, *in* WITTGENSTEIN AND LEGAL THEORY 3, 5 (Dennis M. Patterson ed., 1992) (noting the "failure of any purely formalistic account of decision-making"); James G. Wilson, *The Morality of Formalism*, 33 UCLA L. REV. 431, 431 (1985) ("Many modern legal scholars . . . condemn[] or reluctantly accept[] formalism as an antiquated concept implying rigidity, immutability, conservatism, and even naiveté.").

161. *Cf.* PERROW, *supra* note 30, at 4 (applying rational-legal criteria to a manufacturing entity).

people when evaluating the Court's legitimacy. The first alternative emphasizes influence (i.e., control over decisions), and the second emphasizes relational concerns (particularly benevolence and respect from authorities).

One alternative model of procedural evaluation is the control model articulated by John Thibaut and Laurens Walker in their work concerning people's preferences for adversarial or inquisitorial dispute resolution procedures.[162] Thibaut and Walker theorized that people's preferences are driven by their desire to have influence or control over outcomes that affect them. Under this model, people prefer to maintain, if possible, direct control over decisions. They do so through negotiation, staving off third-party intervention as long as possible.

If people find that they cannot resolve problems directly, they will then give up some decisionmaking authority to a mediator, judge, or other third party. If people must give up direct control over decisions to resolve disputes, they seek to maintain indirect control over how their case is presented to the third party. Through this control they hope to make a powerful case that influences the third party to rule in their favor. This indirect control has been called "process control" (control over the process of evidence presentation).[163] In either case—direct or indirect control—people are primarily concerned with the degree to which a procedure allows them to influence decisions.

A second alternative to the model articulated by the Justices in *Casey* is the relational model developed by Tom Tyler and Allan Lind,[164] who argue that people are mainly concerned about their position within society and that the treatment persons receive from authorities communicates information about that position. In particular, people are concerned about the *trustworthiness* of the authorities' motives (i.e. whether the authorities seem concerned about their welfare) and about the *respect* they are accorded in the legal process.

In studies of personal experiences with authorities—legal and managerial—trustworthiness is found to be the primary criteria against which people judge the justice of decisionmaking proce-

162. *See* THIBAUT & WALKER, *supra* note 106.
163. *Id.* at 117–24.
164. *See* LIND & TYLER, *supra* note 106.

dures.[165] This particularistic concern is reflected in the belief that authorities are trying to be fair to individuals, trying to consider their arguments, trying to care about their concerns.

People are concerned with the respect with which they are treated by authorities, a concern legal authorities acknowledge. In *Goldberg v. Kelly*,[166] for instance, the Supreme Court averred that legal procedures should be designed with an eye toward fostering "the dignity and well-being" of citizens.[167] One way that legal procedures can foster personal dignity is by giving people opportunities to feel that legal authorities listen to and consider their concerns. Thus, participation and voice can enhance personal dignity.[168]

Of course, in settings that allow participation, people are reacting to direct experiences with authorities. They have actually had personal contact with a judge or manager, creating a social bond with that authority. In contrast, citizens typically have no personal contact with the Supreme Court and often have little knowledge of or interest in the workings of the Court.[169] Hence, it would not be surprising if the relational concerns that dominate reactions to local legal authorities are not central to dealings with national level officials like Supreme Court Justices.

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165. *Id.* at 150.

166. 397 U.S. 254 (1970).

167. *Id.* at 264–65.

168. These concerns have been extended into a "dignitary" theory of administrative due process by Jerry Mashaw. *See* JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE (1985); *see also* Robert E. Lane, *Procedural Goods in a Democracy: How One Is Treated Versus What One Gets*, 2 SOC. JUST. RES. 177 (1988). It is possible for a person to experience all of the "rituals of due process" yet feel that her dignity and importance has not been affirmed. *See* Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990). Studies of participation in legal hearings support the suggestion that participation only enhances legitimacy when those participating feel that their concerns are actually considered by the legal authorities with which they are dealing. That is, simply allowing people to speak is not enough; they must believe that their concerns (and, by extension, they themselves) are being respected by those with whom they deal. *See* Tom R. Tyler, *Conditions Leading to Value Expressive Effects in Judgments of Procedural Justice: A Test of Four Models*, 52 J. PERSONALITY & SOC. PSYCHOL. 333 (1989); Tom R. Tyler & Robert J. Bies, *Beyond Formal Procedures: The Interpersonal Context of Procedural Justice*, *in* APPLIED SOCIAL PSYCHOLOGY IN ORGANIZATIONAL SETTINGS 77 (John S. Carroll ed., 1990).

169. *See* Hyde, *supra* note 19, at 409; S. Sidney Ulmer, *The Discriminant Function and a Theoretical Context for its Use in Estimating the Votes of Judges*, *in* FRONTIERS OF JUDICIAL RESEARCH, *supra* note 46, at 335, 366 tbl. 11.2.

IV. EMPIRICAL ANALYSIS OF *CASEY*'S LEGITIMACY THESIS

A. *Characteristics of the Survey*

As noted at various points above, several gaps in the study of Supreme Court legitimacy exist. Accordingly, we conducted an empirical study to attempt to close some of these gaps. We gathered original data on public attitudes concerning the legitimacy of the Supreme Court, the basis of this legitimacy, and the sensitivity of legitimacy perceptions to current events using a survey interview approach. Specifically, a random sample of 502 citizens in the San Francisco Bay area were interviewed, using standard sampling and interviewing techniques, about the Supreme Court and its handling of the abortion issue.[170] The interviews were conducted

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170. For the background characteristics of those interviewed, see Appendix A. The sample was generated using standard sampling techniques for survey research. For general discussions of survey sampling, see EARL BABBIE, SURVEY RESEARCH METHODS (1973); CHARLES H. BACKSTROM & GERALD HURSH-CÉSAR, SURVEY RESEARCH (2d ed. 1963).

The sample was generated using a new, stratified two-phase procedure that produced a high proportion of households in the sample. *See* Robert J. Casady & James M. Lepkowski, *Optimal Allocation for Stratified Telephone Survey Designs*, 1991 PROCEEDINGS OF THE SECTION ON SURVEY RESEARCH METHODS 111. The target area for this sample was defined as the five-county San Francisco Bay area (all telephone prefixes within the 415 and 510 area codes), plus Santa Clara County (most prefixes in the 408 area code). To generate complete telephone numbers for the sample, four-digit random numbers were appended to each area code and prefix combination corresponding to the target area.

The first stage of the sampling identified a random set of telephone numbers. The goal was to maximize access to all English-speaking adults (age 18 or over) in the San Francisco Bay area. The second stage of the sampling process selected among the residents of homes contacted by telephone. One adult was selected at random from each selected household and designated as the respondent. No substitutions were allowed. Each home was called at least 18 times in an effort to reach that person. *Cf.* Howard Schuman & Graham Kalton, *Survey Methods*, *in* 1 THE HANDBOOK OF SOCIAL PSYCHOLOGY 635, 677 (Gardner Lindzey & Elliott Aronson eds., 3d ed. 1985) (recommending that at least four callbacks be made). Of those eligible for interviews, a completed interview was obtained with 74% of the designated respondents.

The unweighted sample represented by the 502 people interviewed was adjusted statistically to compensate for differences in the probability that each respondent would be selected. This weight was based on three components:

(1) Respondents living in different stratum of telephone listings were selected with different sampling fractions so that people in some areas were less likely to be called. This likelihood was accounted for in the weighting process.

(2) The number of telephone lines that ring within a single household influences the likelihood that that household will be reached during the sampling process. A person who can be reached on two telephone numbers has twice the chance of being selected as a person with only one telephone number, for example; this possibility was taken into account.

over the telephone by the Survey Research Center of the University of California at Berkeley.[171] Interviews occurred from January 15, 1992 to June 21, 1992; thus, all interviews were conducted following completion of the confirmation hearings for Justice Clarence Thomas but prior to the announcement of the *Casey* decision. The response rate and composition of the respondent pool compared very favorably with standards of acceptable representativeness.[172]

B. *Public Views About the Legitimacy of the Supreme Court: Is the Court a Legitimate Legal Institution?*

The decision in *Casey* not to overrule *Roe v. Wade* is predicated on the assumption that the Court currently has institutional legitimacy in the eyes of the American public, a legitimacy that protects the Court's right to make decisions about abortion but a legitimacy that could be lost through an ill-considered decision reversing *Roe*. To test this assumption, it was first necessary to assess public views of Court legitimacy. Perceptions of the Court were assessed in two ways. First, people were asked to indicate their feelings about the Supreme Court as an institution of govern-

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(3) The number of adults living at a home reached through one telephone line also affects the likelihood that a person will be interviewed. People living in large groups are less likely to be chosen. We corrected for this factor.

In summary, a two-stage sampling process was used to find the respondents. The first stage identified telephone numbers; the second stage identified people within households at the numbers called. This sampling produced an unweighted sample of 502 adults. Each respondent's views were then weighted to reflect the likelihood that they would be interviewed, so that the aggregate numbers presented in this Article represent the views of a "true" random sample of the adults within the Bay area. *See* Schuman & Kalton, *supra*, at 660–73 (discussing sampling and weighting processes).

171. For the wording of the questions used and the complete percentages of respondents making each possible response, see Appendix B. The percentages reported are for the weighted sample. The questions, however, are grouped according to subject matter and are not reported in the exact order in which they were asked.

172. The nonresponse rate was only 26%, *see supra* note 170, and the sample was quite diverse, *see* Appendix A, as a result of the use of established sampling methods, *see supra* note 170. This nonresponse rate is below typical nonresponse rates for phone surveys. For information on general survey standards, see, for example, Schuman & Kalton, *supra* note 170, at 677 ("Nonresponse rates for straightforward, national face-to-face surveys conducted by nongovernment survey organizations run nowadays at about 25–30 percent . . . ."); *id.* at 679 ("[T]elephone nonresponse rates are generally a few percentage points higher than those for face-to-face interviewing . . . ."); *id.* at 661–73 (describing techniques for ensuring a representative sample, as were undertaken in our study).

ment. Second, they were asked to evaluate the general institutional legitimacy of the Supreme Court's role within government.[173]

Specifically, respondents were first asked to evaluate the Court on a "feeling" scale ranging from zero to ten, with higher numbers indicating "warmer or more favorable" feelings.[174] Respondents were told that neutral feelings ("neither warm nor cold") should be rated a five. Fifty-one percent of respondents rated the Court warmly (six to ten), and 23% were neutral (five). Similarly, 48% of respondents indicated having "a great deal" of respect for the Court, and an additional 38% had "some" respect.

Overall, these results illustrate that Americans regard the Court favorably.[175] Of course, the public perception is not uniformly positive. It was, however, higher than public respect for Congress and higher than respect for government in general.[176] Only 26% rated Congress warmly, with 31% neutral. Also, 39% said that they were not proud of the American form of government.

Respondents were next asked a series of questions about the institutional role of the Supreme Court. These questions were modeled after the approach taken by Gregory Caldeira and James Gibson,[177] an approach that defines legitimacy as "diffuse" system support. Thus, general support for the Court and its maintenance were measured independent of support for any of the Court's specific decisions. Responses to the nine items measuring the Court's legitimacy were found to be highly interrelated,[178] so

173. For the text of all relevant questions and responses, see Appendix B.

174. This is a standard technique for assessing attitudes. *See* Robyn M. Dawes & Tom L. Smith, *Attitude and Opinion Measurement*, *in* 1 THE HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 170, at 509, 534–36 (discussing rating scales such as the one used in our study); *id.* at 534 ("[Rating] scales are ubiquitous in social psychology, particularly in attitude measurement."). For a detailed discussion of scale construction and evaluation, see ROBYN DAWES, FUNDAMENTALS OF ATTITUDE MEASUREMENT (1972); STUART OSKAMP, ATTITUDES AND OPINIONS 21–48 (1977). For a discussion of problems related to survey research, see A.N. OPPENHEIM, QUESTIONNAIRE DESIGN AND ATTITUDE MEASUREMENT (1966).

175. This conclusion is consistent with that reached by Walter Murphy and Joseph Tanenhaus in their comparison of public opinion data on views about the Court and Congress. *See* Murphy & Tanenhaus, *supra* note 46, at 287.

176. This conclnsion is directly contrary to Professor Hyde's conclusion. *See* Hyde, *supra* note 19, at 409 ("[T]he Supreme Court typically gets less support than Congress or the President.").

177. *See* Caldeira & Gibson, *supra* note 56.

178. The mean correlation across the ten items is r = .34, and the alpha is 0.82. Alpha is one approach to measuring the reliability of a multi-item index. It indexes the

a single index of institutional legitimacy was formed (i.e., because the items were judged to be measuring the same concept, responses to these measures were combined to avoid duplicative results).

Responses indicated that Americans generally endorse the institutional legitimacy of the Court, supporting its right to interpret the Constitution. For example, 97% indicated that we should *not* get rid of the Court, and only 24% said the Court should be abolished if it makes decisions with which people disagree. Conversely, 80% said the Court "does its job well," 68% said that it should be allowed to declare acts of Congress unconstitutional, 75% said that it can be trusted to make the right decisions, and 71% said that our rights are well protected by the Court. Overall, these responses are quite favorable and show a generally positive view of the institutional legitimacy of the Supreme Court.

Responses to one of the questions suggest, however, that the legitimacy the Court enjoys is not uncritical. A majority of respondents (53%) indicated that the Constitution gives the Court "too much power."[179] Hence, although people generally think the Court fills its role well, they are suspicious of the scope of this role. Interestingly, this dissatisfaction is on the point most directly relevant to the current investigation—the breadth of the Court's authority.[180]

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internal consistency of the items. For example, a scale of liberalism would be internally consistent if people who opposed abortion rights also opposed homosexual rights. Cronbach's alpha measures internal consistency. *See* CHARLES M. JUDD ET AL., RESEARCH METHODS IN SOCIAL RELATIONS 52 (6th ed. 1991). An alpha of zero indicates that the items have no joint correlation (mean r = 0.00; there is no internal consistency). An alpha of one indicates that the items are perfectly correlated (mean r = 1.00; responses to the items are identical). Within that range, higher values indicate a more consistent scale.

179. For discussions of how the Court has expanded its scope of authority since World War II, see CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY (1990) (discussing the development of administrative authority); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE (1990) (examining the growth of legal rights).

180. It is interesting to compare this sample to the national sample of citizens interviewed by Caldeira and Gibson during 1987. *See* Caldeira & Gibson, *supra* note 56. Among the national sample, 71% of whites and 58% of blacks indicated that the Court should be allowed to declare acts of Congress unconstitutional. Forty-nine percent of whites and 40% of blacks thought that Congress should limit the Court's power. Also, 74% of whites and 55% of blacks indicated that it would not make much difference if the Constitution were rewritten to reduce the powers of the Court. Finally, 15% of whites and 21% of blacks in the national sample thought that people should do anything they could to defeat any proposal to abolish the Court. Hence, institutional legitimacy in

Thomas Marshall also reports a generally positive yet critical public view of the Court, noting that "available polls do not indicate overwhelmingly positive views toward the Court . . . . [O]nly a third to a half of Americans have held clearly favorable views of the Court. The remainder either have held mixed or negative opinions, or have seemed disinterested and indifferent."[181]

Unlike the people in the polls Marshall considered, few of those interviewed in this study were indifferent or uninterested in the Court—there were very few "don't know" responses to the questions.[182] That does not mean that people's views were thoughtfully conceived and complexly structured. Other studies examining people's knowledge about the Court suggest that most Americans have at best a superficial understanding of the Court.[183] The important point from our data, however, is that people do have views—respondents did not simply retreat to "don't know" answers, although they were free to do so. Thus, people appear to base their attitudes or behavior on their views about the Court despite their generally superficial understanding of it.[184]

1. *Attitudes Toward Abortion.* The survey also indexed public views about the issue of abortion. First, respondents were asked to consider abortion as a moral issue—that is, as an issue of right or wrong. Their views differed depending on the circumstances surrounding the abortion, with more people supporting abortion in special cases such as those involving rape.[185] In particular, the public is divided on the issue of whether women should be free to choose to have an abortion "for any reason." Only 58% of our respondents approved of a woman having an abortion "for any

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the Bay area in 1992 is generally comparable to national level institutional legitimacy in 1987.

181. MARSHALL, *supra* note 36, at 141.

182. *See* Appendix B.

183. *See, e.g.*, Murphy & Tanenhaus, *supra* note 46, at 276–80. There is extensive literature in the political science field debating the "sophistication" of public attitudes about political and legal authority. *See* Philip E. Converse, *The Nature of Belief Systems in Mass Publics*, *in* IDEOLOGY AND DISCONTENT 206 (David Apter ed., 1964).

184. *Cf.* Hyde, *supra* note 19, at 409 ("[I]f people have generally favorable views of courts as compared with other institutions of government, courts with low salience still might legitimate an order."). *But cf. id.* (noting that, whereas low salience may not bar order legitimation, it makes "[n]orm legitimation . . . implausible").

185. *See* Sullivan, *supra* note 4, at 32 (reporting similar findings from other surveys).

reason." On the other hand, 87% approved of abortion when the woman's life was in danger, 85% if the woman became pregnant as a result of rape, and 72% if there was a "strong chance" the baby would have a serious birth defect.

Second, respondents considered abortion as a legal issue—that is, as an issue of what the law should be. They were asked not about their personal moral views but about their views of what the law should be for everyone. This question allowed them to distinguish their views about what they would do themselves from their views about what should be legal or illegal. When asked what the law should be, 70% of those interviewed indicated that the law should allow women to have an abortion "for any reason," 97% if her life was in danger; 92% if the pregnancy was due to rape; and 86% if there was a strong chance the baby would have defects. In other words, people were more likely to think abortion should be legal than to think that it was moral.

Thus, some respondents thought abortion was morally wrong but felt people should have the legal right to have abortions "for any reason." This corresponds to the American ideal of freedom and value pluralism: people's personal decisions are private and should not be dictated by the state. In many areas of personal life (e.g., premarital sex, homosexuality) people feel that others should have the right to engage in actions that they themselves find immoral. This belief is equally true with respect to abortion.

Respondents also were asked whether they favored or opposed the Supreme Court's decision in *Roe v. Wade*. Eighteen percent opposed that decision (with 9% disagreeing "strongly"). Further, 21% indicated that they would favor ending federal aid to hospitals allowing abortions (9% strongly favored an end to such aid). Overall, therefore, approximately 15–20% of those interviewed opposed the right to an abortion.

As would be expected, the three judgments people made about the morality of abortion, the legality of abortion, and the desirability of the Court's decision on abortion were related. Most of those who thought abortion is immoral also thought it should be illegal.[186] Similarly, those who thought abortion is immoral thought the Supreme Court's decision legalizing abortion was wrong.[187] Finally, those who thought abortion should not be legal

186. The correlation is r = .71.
187. r = .62.

thought the Supreme Court's decisions on the subject of abortion were wrong.[188]

Who supports and who opposes abortion? Table 1 presents the results of a series of regression analyses[189] examining the influence of demographic characteristics on: (1) attitudes about the morality of abortion; (2) attitudes about whether abortion should be legal; and (3) agreement or disagreement with the *Roe v. Wade* decision.

188. r = .65.

189. A regression analysis tests the degree to which a set of variables (the independent variables) predict a variable of interest (the dependent variable). The beta weights shown in the table reflect the relative importance of each independent variable in influencing the dependent variable.

It is important to recognize that beta weights index the statistically independent contribution of each independent variable in the equation, controlling for the influence of all other independent variables in that equation. In other words, beta weights indicate how much about the dependent variable is explained by an independent variable separately from whatever can be explained by other variables under consideration. If two independent variables are correlated with each other, some of the contribution of each to the dependent variable will be joint, with either variable potentially causing that influence. Regression analysis removes this joint influence.

The R-squared term reflects the percentage of the variance in the dependent variable explained by all the independent variables combined. The R-squared terms presented are adjusted to correct for the number of independent variables in the equation.

TABLE 1
Position on Abortion

	Abortion as a Moral Issue	Abortion as a Legal Issue	Agreement with *Roe v. Wade*
Conservative/ Liberal	.13*	.13*	.11*
Republican/ Democrat	.03	.00	.01
Sex	.04	-.03	.01
Income	-.08	-.18*	.11*
Education	-.04	.04	-.04
Age	.03	.06	.13*
Race (white/ non-white)	-.07	-.15*	-.18*
Protestant (v. none)	.16*	.05	.09
Catholic (v. none)	.21*	.05	.17*
Other Religion (v. none)	.13*	.00	.07
R-squared	8%*	7%*	10%*

Entries are beta weights when all terms are entered simultaneously.
Starred entries are statistically different from zero ($p<.05$ or less). High scores indicate feeling that abortion is not moral, that it should not be legal, and opposition to the *Roe* decision. High scores also indicate: being conservative; being Republican; being female; having high income and education; being old; being white; and being Protestant, Catholic, or another religion (each in comparison to those with no religious affiliation). There were 502 people in the survey.

The results shown in Table 1 indicate that political ideology and religion predict views about abortion. Those who are more conservative or more religious were more likely to think that abor-

tion is immoral.[190] Whether abortion should be illegal was related to ideology, income, and race. Finally, agreement with the Court's decisions was related to ideology, religion, age, income, and race.

These findings are not surprising given our earlier discussion of value socialization.[191] They suggest that personal views about abortion flow from people's ideological beliefs and social backgrounds. In particular, people are affected by their religion, which typically expresses strong views about the morality and appropriateness of abortion. Whether people identify with a religion, and which religion it is, strongly influences people's views about the morality of abortion.

From a value pluralism perspective, these findings strongly support the argument that people's private spheres of life, their individual political ideologies and individual religious orientations, create difficulties for the political and legal authorities who need to articulate a common public policy about abortion. Any political or legal authority seeking to make policy decisions in this arena must make decisions contrary to the political and religious views of some subset of citizens.[192] Hence, for that authority to overcome such dissension and be effective, its claim to legitimacy must be strong.

2. *Empowerment of the Supreme Court.* The key political question regarding abortion is who should be empowered to make the decision about its legality. As noted previously, a wide variety of possibilities can be imagined, including a public referendum, executive orders, a decision by Congress, decisions by state legislatures, and a decision by the Supreme Court.[193] Our survey examined public views about the desirability of allowing the Supreme Court to make this policy decision.

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190. Religion is entered into the equation as a series of dummy variables. When a categorical variable such as religion (Protestant, Catholic, Jewish, none) is to be considered in a regression analysis, it must be entered as a series of comparisons. In this case, those who indicated a religious affiliation were compared to those who indicated that they had none. Three religious groups—Protestants, Catholics, and those with some other religion—were separately compared to those with no religious affiliation.

191. *See supra* Section II(C).

192. *See, e.g.*, LUKER, *supra* note 16 (discussing the divisiveness of the abortion issue); TRIBE, *supra* note 16 (same).

193. *See supra* text accompanying notes 47–48.

The survey results indicate a widespread public view that the Supreme Court should *not* be empowered to make abortion decisions. Only 36% of those interviewed believed that the power to make abortion decisions should remain with the Court, while 59% indicated that the power of the Supreme Court to make abortion decisions should be reduced.

These results indicate that the Court's identification in *Roe* of abortion as an issue over which it should have discretionary authority does not enjoy widespread public support. Further, these findings support the cautions introduced by the Court into its *Casey* decision. The Court does need to be sensitive to the nature of its public mandate in the arena of abortion rights because many members of the public feel that the Court exceeded that mandate in deciding *Roe*.

The survey also examined more general feelings of obligation toward federal government authority. These questions were not directed specifically at the Supreme Court. Instead, they assessed general judgments of the rules made by federal government authorities (the executive, legislative, and judicial branches). People's responses suggest considerable willingness to disobey government rules and the decisions of government authorities. For example, only 38% felt they "should accept the decisions made by government leaders" when they disagree with those decisions. Forty-eight percent said there are times when it is all right to disobey the government, and 66% indicated that they can think of situations in which they would stop supporting government policies.

Overall, feelings of obligation to government authority were weak. Interestingly, general feelings of obligation to obey government authorities were only weakly related to support for empowering the Court to make abortion decisions.[194] Feelings of obligation were much more strongly linked to the Court's institutional legitimacy.[195]

The finding that the public is very willing to disobey federal government rules and the decisions of federal government authorities differs strikingly from Tom Tyler's recent findings about public views of local laws.[196] Among a sample of citizens of Chicago, Tyler found very strong feelings of obligation to obey legal rules.

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194. r = .08, not significant.

195. r = .22. The correlation between legitimacy and empowerment is r = .36.

196. *See* TYLER, *supra* note 21.

For example, 82% indicated that "[p]eople should obey the law even if it goes against what they think is right;" 79% indicated that "[d]isobeying the law is seldom justified."[197] When asked whether a person should stop doing something she believed was legal if told to do so by a policeman, 84% said yes.[198] Similarly, 74% indicated that one should follow the order of a judge, even if one thinks it is wrong.[199] In other words, local legal authorities are supported by much stronger presumptions of obligation to obey than are federal authorities. This result may occur because the type of laws local authorities enforce, ranging from stopping speeders to arresting drunk drivers and shoplifters to enforcing parking regulations, typically have widespread public support. There are few alternative ideological or moral frameworks through which people might view parking regulations.

The key question of concern in this analysis is why the Supreme Court is more or less strongly empowered by citizens to make abortion policy. In this situation (i.e., pre-*Casey*) all citizens have some cause for concern. Those who support *Roe* fear that the Court might overturn it. Those who oppose *Roe* fear that the Court might sustain it.[200]

Regression analysis was again used, this time to examine whether perceptions of Court legitimacy affected willingness to empower the Court to resolve this controversial question. The results are shown in Table 2.

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197. *Id.* at 45 tbl. 4.3.

198. *Id.*

199. *Id.*

200. The relationship between general agreement with Court decisions and willingness to empower the Court was examined on two levels. The first was general agreement with Court decisions. The second was agreement with decisions made during the past Term. The correlation was r = .20 for general decisions, and r = .25 for recent decisions. If empowerment was driven by a belief that the Court might reverse itself, then we would expect that agreement with recent decisions would strongly predict empowerment. A similar finding emerges with legitimacy: agreement with general decisions is linked to legitimacy (r = .48), as is agreement with recent decisions (r = .54). Again, views about recent decisions, which predict the likely reversal of *Roe*, are not significantly better as a predictor than is general agreement.

TABLE 2

Antecedents of Empowerment and Obligation

	Empower Supreme Court to Make Abortion Decision	Feel a General Obligation to Obey Government Decisions
Legitimacy	.29*	.23*
Agreement with Past Abortion Decision	.12	.00
Is Abortion Moral?	.13*	-.13*
Should Abortion be Legal?	.04	.20*
Conservative/Liberal	.04	.07
Republican/Democrat	-.03	.06
Sex	-.08	.03
Income	.06	.05
Education	.06	-.14*
Age	.02	.05
Race (white/non-white)	.00	-.24*
Protestant (v. none)	-.02	.04
Catholic (v. none)	.01	.02
Other Religion (v. none)	-.06	-.02
R-squared	18%*	14%*

Entries are beta weights when all terms are entered simultaneously.
Starred entries are statistically different from zero ($p<.05$ or less). High scores indicate supporting the empowerment of the Court and feeling an obligation to obey laws. High scores also indicate: high levels of institutional legitimacy; agreement with past abortion decisions of the Court; feeling abortion is moral and should be legal; being conservative; being Republican; being female; having high income and education; being old; being white; and being Protestant, Catholic, or another religion (each in comparison to those with no religious affiliation).
There were 502 people in the survey.

The findings reported in Table 2 strongly support the argument—the Court's own argument—that the institutional legitimacy of the Court is related to citizens' willingness to empower the Court to make decisions about the legality of abortion. This influence occurs even after controlling for the effects of attitudes about abortion and background characteristics. In other words, the relationship remains when the influence of these other factors is statistically eliminated.

If the Court enjoys general legitimacy for its institutional role, people say it should be empowered to make abortion decisions. Interestingly, agreement with the Court's decisions on abortion had *no* independent influence on support for Court empowerment to settle the abortion question. Judgments about the morality of abortion did have an influence, but it was less strong than the effect of evaluations of the Court's general institutional legitimacy.[201]

Legitimacy also was related to respondents' general feelings about whether they have an obligation to accept government decisions. Those who thought that the Court is a legitimate institution believed that they should accept decisions made by government authorities. Again, this relationship remained when the effect of other factors was controlled.[202]

These findings support the Supreme Court's arguments in *Casey*. Those people who regard the institutional role of the Supreme Court as legitimate are more likely to defer to the Court in the controversial case of abortion rights, thereby empowering the Court to make this policy decision. These findings support Tyler's local level findings[203] in suggesting an important role for institu-

201. The zero-order correlation between legitimacy and empowerment is r = .36. The correlation with agreement is r= -.23, with morality, r = -.23, and with legality, r = -.21.

In interpreting the correlations between agreement, morality, legality, and empowerment it is important to recognize the ambiguity of the outcome information people had available. Agreement with past decisions is not a perfect indicator of future decisions. Similarly, views about the morality of abortion can be applied to the Court only when future decisions are clear. Hence, a post-*Casey* study might find more striking agreement effects. After the Court has ruled, its future views are clear and people who hoped for an overruling of *Roe* might react strongly based on their disagreement with *Casey*. Nothing in the findings of this study suggests that agreement would become the dominant factor in Court evaluations, but the limitations of this study make it impossible to rule out that possibility.

202. The zero-order correlation between legitimacy and obligation to obey is r = .22.

203. *See* TYLER, *supra* note 21.

tional legitimacy in shaping public willingness to defer to legal authorities and to comply with their decisions.[204]

C. *The Psychology of Legitimacy and Empowerment*

The present study examined the psychological underpinnings of legitimacy by examining public views about the three aspects of Supreme Court decisionmaking behavior set forth earlier: (1) outcome favorability, indexed by agreement with Court decisions; (2) outcome fairness; and (3) procedural fairness.

To explore the impact of these factors on perceptions of legitimacy, respondents were asked about Court decisionmaking from three different perspectives. The first assessed people's general views about the nature of Court decisionmaking. The second asked people about recent decisionmaking (i.e., during the last year). The third asked people to imagine that an issue they "cared about was being heard by the Supreme Court" and they "joined a group that wanted to present its views to the Court." In the last case, respondents were asked to imagine how the Court would make decisions under those circumstances.

People regarded the Court favorably from each of the perspectives, although none of the ratings was tremendously positive. Along each dimension, about 80–90% of respondents were favorable. Seventy-seven percent agreed that the Court generally makes decisions in fair ways, 46% said that Court decisions are usually fair, and 32% indicated that they usually agree with Court decisions. When asked about recent decisions, 80% said the decisions were made fairly, and 78% said that the decisions themselves were fair. Sixty-one percent indicated that they agreed with "all," "most," or "some" of the Court's decisions. When respondents were asked what would happen if they personally went before the Court, responses also were positive. Most respondents (84%) thought it likely that they would agree with the decision made.

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204. Although Tyler was concerned about the legitimacy of legal authorities, he did not operationalize legitimacy in the same way as it was operationalized in this study. Tyler operationalized legitimacy as support for authorities—believing they are honest and competent—and perceived obligation to obey those authorities. *See id.* This approach builds on the approach to legitimacy developed by David Easton and Jack Dennis. *See* EASTON & DENNIS, *supra* note 132. More recently, Gregory Caldeira and James Gibson measured institutional legitimacy using items that tap willingness to change the institutional structure of the legal institution. *See* Caldeira & Gibson, *supra* note 56. These items, which are more appropriate for national level institutions, were used in this study.

Similarly, 74% thought the decision would be fair (i.e., the outcome would be fair), and 85% thought the decision would be made fairly (i.e., the procedures would be fair).[205]

Our questions examined agreement with Court decisions generally and with recent Court decisions. They did not examine agreement with expected future decisions. This omission is especially relevant, because during the period of this study there was widespread speculation about whether the Supreme Court would overrule *Roe v. Wade* (although the interviews did not prime any thoughts along that line). At that time, neither the result nor the reasoning of the *Casey* decision were anticipated. From the perspective of this study, the situation was an ideal one because, in a sense, respondents made judgments about the Court from behind a Rawlsian "veil of ignorance."[206] Rather than have reactions to a specific decision color judgments, we asked only whether the Court should be empowered to make abortion decisions, hoping to gain information on how the Court should operate, rather than reactions to how the Court does operate. Respondents did not know whether their position on the issue would be upheld or overruled (thus the veil of ignorance), so a respondent's decision to empower or not represents, it may be argned, a faith or lack thereof in the fairness of the imminent outcome. Alternatively, a response to empower or not represents an expectation that the Court would or would not rule in accordance with one's position.

It is important to note that respondents were intentionally not asked about expected future Court decisions. The decision to refrain from such questions involved a trade-off. On the one hand, we did not want to prime respondents to a future orientation and encourage a type of preemptive response (e.g., "I believe the Court will act this way, which I dislike, so I'm going to vote against the Court as the appropriate arbiter.") but rather wanted "raw" judgments of empowerment (i.e., judgments as unmediated as possible). On the other hand, failing to include these questions prevents us from examining how expectations are related to empowerment. Obviously, we chose to weight the first concern more

205. The three frames of reference (past, recent, if you went before the Court) were found to be highly related in each of the three types of judgment (alpha = .75 for agreement with decisions; alpha = .76 for outcome fairness; alpha = .73 for procedural fairness). Hence, three overall indices were created.

206. *See* JOHN RAWLS, A THEORY OF JUSTICE 12, 19 (1971) (defining the veil of ignorance).

heavily. Thus, it is not possible to test directly the relationship between expectations and empowerment. A separate analysis of recent decisions (i.e., decisions by the current Justices), however, did not show a strong relationship between agreement and empowerment.

Regression analysis was used to determine whether judgments about Court decisionmaking influence judgments about the institutional legitimacy of the Supreme Court, the willingness to empower the Supreme Court to make abortion decisions, and the general perceived obligation to accept federal government decisions. Three types of variables were included in the equations: (1) judgments about Court decisionmaking (agreement with decisions, fairness of decisions, and fairness of the decisionmaking process); (2) attitudes about abortion (agreement with past Court decisions and views about abortion); and (3) demographic characteristics. The results of the analysis are shown in Table 3.

In the case of legitimacy, the findings strongly support the hypothesis that judgments about Court decisionmaking influence judgments about Court legitimacy, even with controls on attitudes toward abortion and demographic characteristics. In fact, if judgments about decisionmaking are included alone in the equation, they explain 62% of the variance in citizens' judgments about Court legitimacy, as much as is explained by the entire equation shown in Table 3. Abortion attitudes and demographic characteristics exerted much less influence on legitimacy than did decisionmaking factors.

All three judgments about decisionmaking are related to legitimacy. The effects include influences from agreement with Court decisions, judgments about the fairness of Court decisions, and judgments about the fairness of Court decisionmaking procedures.

TABLE 3
Legitimacy and Empowerment

	Empower Supreme Court to Make Abortion Decision	Feel a General Obligation to Obey Government Decisions	Legitimacy
DECISIONMAKING			
Agreement with Decisions	.16*	.03	.04
Distributive Fairness	.26*	-.03	.08
Procedural Fairness	.43*	.31*	.13*
ATTITUDES			
Morality	.08	-.16*	.11
Legality	-.11	-.02	-.17*
Agreement with Abortion Decision	.05	-.13*	-.01
DEMOGRAPHICS			
Conservative/Liberal	.00	-.04	-.06
Republican/ Democrat	.04	.03	-.06
Sex	-.05	.08	-.02
Income	.02	-.05	.03
Education	.10*	-.07	.12*
Age	.00	-.01	-.04
Race (white/ nonwhite)	-.01	-.01	-.04
Protestant (v. none)	.03	.01	-.04

Catholic (v. none)	.03	-.03	.02
Other Religion (v. none)	.02	.04	.02
Overall R-squared	62%*	18%*	13%*

Entries are beta weights when all terms are entered simultaneously.
Starred entries are statistically different from zero ($p<.05$ or less). High scores indicate high levels of legitimacy; supporting the empowerment of the Court; and feeling an obligation to obey laws. High scores also indicate agreement with Court decisions; the view that Court decisions are fair; the feeling that Court procedures are fair; agreement with past abortion decisions of the Court; feeling abortion is moral and should be legal; being conservative; being Republican; being female; having high income and education; being old; being white; and being Protestant, Catholic, or another religion (each in comparison to those with no religious affiliation). There were 502 people in the survey.

It has already been noted that the legitimacy of the Court is not influenced by people's views about abortion or by their agreement or disagreement with *Roe v. Wade*.[207] Together, these judgments explain 0% of the variance in legitimacy. Thus, the Court did not lose legitimacy among those who oppose abortion by deciding *Roe* in a way contrary to their opinions.

However, as Table 3 indicates, those people who indicate general disagreement with Court decisions view the Court as less legitimate.[208] Nevertheless, the influence of judgments about distributive justice and procedural justice is much greater. Indeed, judgments about the fairness of decisionmaking procedures bear the primary relationship to legitimacy.

Next, consider the antecedents of empowerment—the factors that influence willingness to allow the Court to determine whether abortion is a legal "right." Together, all issues in the equation explain 18% of the variance in judgments about empowerment. If

207. *See supra* tbl. 2.

208. Nevertheless, like Caldeira and Gibson's findings of no significant relationship between agreement with decisions and institutional legitimacy, *see* Caldeira & Gibson, *supra* note 56, at 636, this finding suggests that agreement is, at most, a minor influence.

judgments about decisionmaking are considered alone, they explain 12% of the variance in judgments about empowerment.

Evaluations of Court decisionmaking are also important in the case of judgments about whether the Supreme Court should be empowered to make abortion decisions, even after controlling for attitudes about abortion and demographic characteristics. The influence of procedural justice was especially potent with regard to empowerment of the Supreme Court to make abortion decisions. In fact, only procedural fairness evaluations were significantly related to empowerment. People's views about whether the Court should be empowered to make abortion decisions were not related either to general agreement or disagreement with Court decisions or to judgments about the general fairness of Court decisions; rather, procedural fairness concerns predominated in judgments of whether the Court should be empowered to make abortion decisions.

Interestingly, views about abortion (whether it is moral and whether it should be legal) had only a minor effect on judgments of empowerment. Even more strikingly, agreement with past Court decisions had only a minor effect on empowerment. Together, these judgments explained only 6% of the variance in empowerment, compared to the 12% explained by decisionmaking characteristics. Thus, general views of the Court had more influence on judgments concerning empowerment in the particular case of abortion than did evaluations of past Court efforts to deal with the abortion issue.

Finally, consider the antecedents of feelings of obligation to obey government rules. Perceived obligation was most strongly predicted by demographic characteristics such as level of education and race. Evaluations of Court decisionmaking overall had less of an influence on whether people felt an obligation to obey government decisions than they had on legitimacy and empowerment. Accordingly, procedural justice—although the only significant decisionmaking predictor of perceived obligation—had a less dominant effect in this instance. Nonetheless, procedural justice had more influence than attitudes about abortion, which explained only 3% of the variance when considered alone.

The most striking finding outlined above is the consistent influence of procedural justice on judgments of legitimacy, empowerment, and even obligation. In each case, decisionmaking charac-

teristics influence judgments, and the most influential decision-making characteristic is the fairness of decisionmaking procedures.

1. *Subgroup Analysis.* To better examine the linkage between procedural justice and empowerment, we examined that relationship among different subgroups of citizens. Respondents were divided into groups along two dimensions: (1) whether they agreed or disagreed with past Court abortion decisions; and (2) whether they had high or low respect for the Court as an institution of government. Table 4 presents regression analyses from within each of the four subgroups of citizens created by the division of the sample along these two dimensions.

TABLE 4

Antecedents of Empowerment in the Case of Abortion: Subgroup Analysis

	Agree with past abortion decisions		**Disagree with past abortion decisions**	
	Respect for Supreme Court			
	High	Low	High	Low
Agreement with decisions	-.05	-.02	.02	.08
Distributive fairness	.08	.03	.04	.00
Procedural fairness	.27*	.33*	.34*	.28*
R-squared	7%*	11%*	11%*	9%*
n	134	164	99	84

Entries are beta weights when all terms are entered simultaneously. Starred entries are statistically different from zero ($p<.05$ or less).

The results shown in Table 4 reinforce those already reported in suggesting the importance of procedural justice in legitimizing Supreme Court authority in a controversial arena. Among all four

subgroups, the procedural justice of Court decisionmaking was always the key antecedent of empowerment. In fact, agreement with decisions and decision fairness had no effect on empowerment decisions among any of the respondents.

Consider the most problematic group from an outcome perspective. This is the subgroup of eighty-four citizens who did not generally respect the Court as an institution and who did not agree with the Court's decision in *Roe v. Wade*. What aspects of Court decisionmaking does this group consider when determining whether or not to endorse the Court's authority? Not the general nature of the decisions made by the Court but rather the fairness of the procedures by which the Court makes decisions.

In snm, these findings support the Court's argnment that the willingness of the public to empower the Court to make controversial decisions such as *Casey* is related to public perceptions of how Court decisions are made.[209]

2. *Hypothetical Willingness to Accept Decisions.* Although the focus of this study is not on hypothetical willingness to accept decisions, respondents were asked to consider a hypothetical situation in which Congress passed a law concerning federal aid to hospitals that allow abortions to be performed. Respondents were presented with vignettes that were experimentally varied to present different outcomes and procedures for enacting the law. The law passed either allowed or ended federal funding for abortions. These variations were combined with the respondent's attitudes to create conditions in which the decision corresponded to or contradicted the respondent's opinion. The procedures of enactment varied in neutrality (all points of view were represented versus the congressional committee was made up of people mostly on one side of the issue) and voice (in the hearings everyone could present their views versus the hearings were held behind closed doors).

Respondents were asked to react to their vignette by judging the fairness of the committee's actions, expressing satisfaction or dissatisfaction with the committee, and indicating how likely it was that they would vote for a congressional candidate who supported

209. *See* Planned Parenthood of S.E. Pa. v. Casey, 112 S. Ct. 2791, 2814–16 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.).

the committee's decision. Fairness and satisfaction were found to be related,[210] so a single evaluation index was created.

An analysis of variance was conducted to compare the effects of neutrality, voice, and agreement with decisions on reactions to the hypothetical scenario.[211] In the case of personal evaluation of the committee, all three variations on the vignettes were found to have a significant influence. Evaluations were affected by the neutrality of the committee, by the presence or absence of voice, and by the respondent's agreement or disagreement with the decision.[212] Process and outcomes clearly influenced personal reactions. Political reactions—willingness to vote for candidates—were also influenced by all three variables. Again, neutrality, the presence or absence of voice, and agreement or disagreement with the decision all influenced political reactions.

These findings confirm earlier findings about the importance of the influence of procedural justice on authoritativeness. When the empowerment and obligation issues examined with regard to the Court are extended to a hypothetical behavioral action—voting for one's member of Congress—effects of procedural justice factors are found.

D. *The Psychology of Procedural Justice*

Just as the basis of legitimacy and empowerment may be dissected, revealing mainly a procedural base, so may this procedural foundation be further scrutinized. In so doing, three aspects

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210. $r = .49$.

211. Analysis of variance ("ANOVA") is a statistical test used to determine whether experimental means (i.e., the mean scores of responses from individuals subjected to different experimental manipulations—in our study, the vignette manipulations) differ significantly. As with correlational analysis, if the probability that two means differ to the degree they do due to chance is less than 5%, then the experimental manipulation is said to have had a significant effect. Consider, for example, a researcher who is interested in how amount of sleep affects task performance. The researcher administers some task to two groups, one sleep-deprived and the other having received a normal amount of sleep prior to the task. If the mean performances on the task by the two groups significantly differs (i.e., the difference is of such a magnitude that there is less than a 5% likelihood it is due to chance), then the sleep manipulation is said to have a significant effect on performance. ANOVA tests the experimental means to assess whether the manipulation had a causal effect.

212. For a discussion of these experimental findings, see Tom R. Tyler, Governing Amid Diversity: Can Fair Decision-making Procedures Bridge Across Competing Public Interests and Values? (1993) (unpublished manuscript, on file with the Dept. of Psychology, University of California, Berkeley).

of Court decisionmaking procedures may be distinguished: concerns about control; concerns about neutrality; and relational concerns (e.g., trustworthiness, respect). Recall that the *Casey* Court identified neutrality as the key element in authoritativeness.[213] In addition to the neutrality model of procedural justice, we tested the control and relational models.

Table 5 directly compares the ability of these models to explain judgments about the procedural justice of Supreme Court decisionmaking, views about the legitimacy of the Court, willingness to empower the Court to make abortion decisions, and perceived obligation to obey government decisions.

213. *See supra* notes 152–61 and accompanying text.

TABLE 5
Aspects of Decisionmaking: Regression Analysis

	Procedural Justice	Legitimacy	Empower-ment	Obligation
Neutrality (honesty; lack of bias; decisions on facts; not influenced by political pressures)	.48*	.63*	.17*	-.18*
Control (opportunity to present evidence; influence over decision)	-.13	-.07	.02	-.05
Trustworthiness of motives (motivated to be fair; consider arguments; care)	.34*	.13*	.22*	.03
Standing (respect)	.10	.07	-.02	-.07
R-squared	60%*	56%*	12%*	5%*

Entries are beta weights. Starred entries are statistically significant.

The Court's thesis is that its legitimacy is based on public beliefs that the Court is neutral. The analysis presented in Table 5 supports this idea. The key antecedent of legitimacy is the belief

that the Court is neutral,[214] with trustworthiness having a lesser influence.[215] Neither control judgments nor evaluations of standing influenced legitimacy. On the question of procedural justice, both neutrality[216] and trustworthiness[217] were important.

Similarly, willingness to empower the Court to make abortion decisions was associated with both judgments of neutrality and motive inferences about trustworthiness. In this case, however, an important change occurs. Neutrality no longer dominates influence with respect to empowerment. In the case of empowerment, trustworthiness is the primary influence, with neutrality also important. In other words, neutrality concerns are not universally dominant. Trustworthiness is especially important because empowerment is the central concern of this Article. It is striking that, although issues of procedural justice and legitimacy are strongly shaped by neutrality judgments, when the crucial issue of giving the Court authority to make a controversial decision is raised, people's views about the motives of the Justices become central.

It is also possible to examine the independent influence of each aspect of the constructs discussed. An examination of the items underlying the concepts (see Table 6) indicates that neutrality effects are primarily related to judgments about honesty and about whether information (not personal opinion) is used to make decisions. Equality of treatment and the influence of political considerations were less important. Trustworthiness was primarily linked to the inference that authorities were "trying to be fair."

214. Beta = .63.
215. Beta = .13.
216. Beta = .48.
217. Beta = .34.

TABLE 6

What Leads a Procedure to be Evaluated as Fair?

CONTROL	
Evidence presentation	.34*
Control over decision	.27*
NEUTRALITY	
Honest	.74*
Give everyone equal treatment	.53*
Use information to make decisions	.65*
Consider political issues	.37*
TRUST	
Consider people's opinions	.55*
Try to be fair	.69*
Care about your concerns	.48*
STANDING	
Concerned about your rights	.68*

Note: Entries are Pearson correlations. Starred entries are statistically significant.

The findings of this study provide no support for suggestions that people are concerned about their influence or control over Court decisions. In general, people showed little concern either for their own influence over Court decisions or for their opportunities to present their concerns to the Court. This result is likely nothing more than a realistic response to the improbability that people could control Court decisionmaking. The chance of ever being before the Court is infinitesimal for the general population, and even for those who do appear before the Court, given the established procedures, it is unlikely they will exert much control over case presentation (beyond the quality of argument). Even the promulgation of Court procedural rules is largely beyond general pub-

lic control given the obscurity of much of the legislative action in this realm (not to mention the likely capture of such action by certain interest groups) and the fact that the Court itself promulgates many of these rules.[218]

Two patterns of effects emerge from this analysis. The first is consistent with the psychological model articulated by the *Casey* Court: perceptions of Court neutrality primarily shape judgments of legitimacy and obligation. The second goes beyond the Court's thesis to show that judgments of empowerment in the abortion domain are responsive both to issues of neutrality and to inferences about the motives of the Justices. Thus, although the Justices are partly right about the psychological underpinnings of legitimacy, a fuller model is possible. That model better describes the psychology of empowerment.

E. *Impact of the Thomas Hearings on Court Legitimacy*

What is the impact of adult socialization on people's perceptions of Court legitimacy? Are people's attitudes toward authority frozen into place in childhood and unchangeable thereafter, or will a scandal hurt the legitimacy of an authority? Our study of the impact of the Thomas hearings shows that current events may have an effect on adults' attitudes toward an otherwise legitimate authority like the Supreme Court.

Respondents were asked several questions designed to assess the impact of the Thomas confirmation hearings on attitudes toward the Supreme Court; the interviews occurred after Justice Thomas's confirmation. Respondents were specifically asked how much time they had spent watching the hearings, how much they knew about the issues raised during the hearings, and whether they agreed with the Senate committee's decision to confirm Clarence Thomas to a seat on the Court. The influence of these variables was examined directly and with controls placed on the demographic characteristics of those interviewed. The results of each type of regression analysis are shown in Table 7.

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218. *See generally* Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673 (1975) (arguing that the Court is better suited than the Congress to obtain meaningful reform, in part because the Court is less likely to be influenced by special interest lobbyists).

TABLE 7

The Socializing Effects of the Thomas Hearings

	Legitimacy of the Court	Empowerment to make abortion decision	General obligation to obey rules
No Controls			
Time spent watching	-.11*	.07	.00
Knowledge about issues	.16*	.02	.14*
Agreement with committee's decision	.37*	.16*	-.22*
R-squared	13%	3%	7%
Including controls for demographic characteristics			
Time spent watching	-.11*	.07	.04
Knowledge about issues	.07	-.03	.10*
Agreement with committee's decision	.34*	.11*	-.14*
R-squared	26%*	7%	12%*

Entries are beta weights for all terms entered simultaneously. All starred terms are statistically significant.

The primary influence of the Thomas hearings came not directly through viewing those hearings but through disagreement with the committee's decision. Those who disagreed with the decision regarded the Court as less legitimate, were less likely to feel that it should be empowered to resolve abortion questions, and felt less obligation to obey government rules. Of course, it is difficult to determine whether disagreement lessens legitimacy or

whether prior low legitimacy encourages disagreement with the committee's decision. No doubt both are true to some extent.

To isolate the impact of prior opinions from the impact of the hearings, we would need to have interviewed people prior to and following the hearings. Since this study involved a single interview, it cannot resolve the causal question. However, some sense of the influence of prior views can be gained by controlling for demographic and attitudinal differences, differences that likely conditioned people's reactions to the hearings. When such controls are introduced, the influence of agreement is diminished, as would be expected. Yet a significant influence remains, suggesting that the hearings in fact diminished the legitimacy of the Court. More generally, it provides empirical support for the suggestion that current events do influence the legitimacy accorded the Supreme Court and for the broader suggestion that adult socialization of legitimacy attitudes is worthy of further study.[219]

V. DISCUSSION OF SURVEY RESULTS

A. *Legitimacy and Empowerment*

The findings of this study support other public opinion research in suggesting that the public generally regards the Supreme Court as a legitimate political institution.[220] This legitimacy is clear, but not unqualified. The attitudes found are somewhat ambivalent, with many people feeling that the Court, although a legitimate institution, has taken on too much power.[221]

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219. The study that forms the basis for this Article was not primarily designed to explore the impact of the Clarence Thomas hearings. As a consequence, it did not examine the impact of the hearings in great detail. In particular, it did not compare judgments about the hearing process and the hearing outcome. As we know from the literature reviewed in this Article, as well as from the findings of our study, judgments about process primarily drive legitimacy judgments. Hence, the impact of the Thomas hearings would probably have been found to be much greater if people's reactions to the hearing process had been assessed.

The study of the Thomas hearings also is complicated by the possibility that the public would blame Congress, not the Court, for any *political* (i.e., non-neutral) decisionmaking that occurred.

220. *See, e.g.*, MARSHALL, *supra* note 36, at 138–41 (citing a series of polls in which respondents consistently reported greater confidence in the Court than in Congress and the executive branch).

221. Of course, the public is not unique in this perspective on the Court. Many legal scholars have questioned the growth in Court power over a wide variety of social issues and public policy questions during the post-World War II era. *See* EDLEY, *supra* note

The belief that the Court has taken on too much power is strongly endorsed in the case of abortion rights. A majority of respondents indicated that the Supreme Court should have less authority to determine public policy over the abortion issue. The Court is wise to be concerned about its public mandate. Much of the public is not supportive of the *Roe v. Wade* decision because the public believes that the availability of abortion is not an issue that the Supreme Court should handle.

Strikingly, neither agreement with past Court decisions about abortion nor views about the desirability of legalizing abortion influences attitudes about empowerment. People are not deciding whether to empower the Court to resolve the abortion question by evaluating whether they agree with past Court decisions. Instead, they are evaluating the processes by which the Court makes decisions (i.e., a more general attitude toward the Court, not attitudes about the Court's handling of specific cases, appears to have determined empowerment decisions).

This result accords with Gregory Caldeira and James Gibson's finding that institutional legitimacy was generally unrelated to support for Court decisions.[222] They asked respondents whether the Court was "too liberal," "too conservative," or "about right" in its decisions. In this national sample, 58% indicated that Court decisions were "about right."[223] Support for Court decisions was only weakly related to evaluations of institutional legitimacy.[224]

The degree to which legitimacy influences the empowerment of legal authorities and compliance with legal rules has broad and important implications for our understanding of the nature of civic behavior. Rather than focus on the rewards and threats that are prominent under economic models of authority, legitimacy-based models direct attention to the justifications offered for authority and the manner in which this authority is carried out. Resources may be better spent maintaining perceptions of legitimacy than monitoring and sanctioning behavior.

Legitimacy can shape judgments about empowerment. Therefore, if legitimacy exists, it facilitates effective governance. Our test of the legitimacy thesis, however, was conducted with a highly le-

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179; MASHAW, *supra* note 168; SUNSTEIN, *supra* note 179.

222. Caldeira & Gibson, *supra* note 56, at 658.

223. *Id.* at 642.

224. *Id.*

gitimate institution: the U.S. Supreme Court. Both past discussions of the Court and the findings of this survey suggest that the Court is an institution that the public views in an unusually positive light. In this study, the Court was more highly respected than either Congress or government in general.

It is not clear whether other institutions can legitimize their decisions as effectively as does the Court. If an institution lacks legitimacy, it may have to rely solely on the purse and the sword. As previously noted, these instrumental bases of governing are less effective.[225] Legitimacy is a comparatively inexpensive route to the effective exercise of authority.

The importance of supportive attitudes about the law and legal authorities points out the need for heightened attention to the civic culture within which law exists. Legitimacy is something that legal institutions have by virtue of the general culture within which they exist. It cannot be easily created by changes in short-term instrumentalities (as the *Casey* Court recognizes[226]), and our data concerning the Thomas hearings suggest it may be easy to lose. If there is a reservoir of good will toward authorities, it will facilitate all their actions. If, however, that reservoir of legitimacy is diminished, then people feel less strongly obligated to accept government decisions. Finding the key to this support within culture may bestow great power, either to those who want to maintain power or to the dissidents who seek to alter the status quo.

The need to focus on citizens' values and the civic culture that creates them brings our attention to the socialization of attitudes toward law and legal authorities. It is during the childhood socialization process that initial orientations toward the law and legal obligation develop. These orientations are primarily linked to family and school influences.[227] Hence, the process of building nor-

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225. *See supra* note 54.

226. *See* Planned Parenthood of S.E. Pa. v. Casey, 112 S. Ct. 2791, 2816 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.) ("[D]iminished legitimacy may be restored, but only slowly . . . . Like the character of an individual, the legitimacy of the Court must be earned over time.").

227. For examples of empirical research on this topic, see EASTON & DENNIS, *supra* note 132; GREENSTEIN, *supra* note 133; ROBERT HESS & JUDITH TORNEY, THE DEVELOPMENT OF POLITICAL ATTITUDES IN CHILDREN (1967); JUNE L. TAPP & FELICE J. LEVINE, LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY (1977); COMPLIANCE AND THE LAW (Samuel Krislov et al. eds., 1972); Richard M. Merelman, *The Development of Political Ideology: A Framework for the Analysis of Political Socialization*, 63 AM. POL. SCI. REV. 750 (1969); June L. Tapp & Felice J. Levine, *Legal Socialization: Strategies for an*

mative support for the legal order must be viewed as a long-term task. An example of the long-term development of normative support for laws is provided by the efforts of schools to develop anti-drug education programs. Through classes and efforts to influence children's peer groups, an effort has been made to develop anti-drug use values among the young. This long-term educational effort is intended to encourage voluntary law-abiding behavior.

B. *Psychological Basis of Supreme Court Legitimacy*

In addition to arguing that the Court's power lies not in coercion but rather in legitimacy, the authors of the joint opinion in *Casey* articulate a theory of the basis of Court legitimacy. That is, the Justices address the question of what underlies any institutional integrity that the Court currently has. The Justices aver that Court legitimacy is rooted in the belief among members of the public that the Court makes legally principled, not politically motivated, decisions.[228]

The underlying question of whether legitimacy matters has been examined in an extensive body of literature on the legitimacy of legal authorities, in particular the Supreme Court.[229] The basis of Court legitimacy, however, has received little empirical study. The thrust of this Article is that authorities may legitimize their actions through decisionmaking procedures that are regarded as fair and impartial. The data presented extend this conclusion to the Supreme Court: how decisions are made tends to be more important to Court legitimacy than what decisions are made. "People who believe specific decisions are wrong, even wrongheaded, and individual judges unworthy of their office [will continue to accept decisions as impartial and competent] if they respect the [C]ourt as an institution that is generally impartial, just, and competent."[230]

It is ironic that the legitimacy of authorities has been widely supported in empirical studies of local legal authority because most

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Ethical Legality, 27 STAN. L. REV. 1 (1974). For a recent examination in this area, perhaps most notable for its singularity, see ELLEN COHN & SUSAN WHITE, LEGAL SOCIALIZATION (1990).

228. *See supra* notes 13–17 and accompanying text.

229. *See e.g.*, BICKEL, *supra* note 58; BLACK, *supra* note 58; MURPHY ET AL., *supra* note 58; Adamany, *supra* note 58; Dahl, *supra* note 58; Funston, *supra* note 58.

230. Murphy & Tanenhaus, *supra* note 46, at 275.

theories of legitimacy were developed as explanations of the effectiveness of national government institutions.[231] Both theorists[232] and researchers[233] have questioned the applicability of the procedural basis of legitimacy for national authorities, yet our findings strongly support the hypothesis that the legitimacy of the Supreme Court rests on a procedural justice base. It seems likely that people decide whether to empower the Court to resolve controversial public policy issues primarily by judging *how* the Court makes decisions, not by judging *what* its decisions are.

The importance of procedural justice emerges when legitimacy, empowerment, and obligation are considered. The findings concerning willingness to empower the Supreme Court to make abortion decisions are especially striking. Willingness to empower the Court is related only to judgments about how the Court makes decisions, not to either agreement with its past decisions about abortion or general agreement with its decisions. Those who regard abortion as immoral, however, are less willing to allow the Court to make abortion policy decisions: outcome influences, although small, are statistically significant.[234]

Subgroup analysis demonstrates the robustness of procedural justice effects. Respondents' views about empowering the Court to resolve the abortion question are primarily responsive to procedural concerns, irrespective of agreement with *Roe v. Wade* or respect for the Court as an institution. The most problematic subgroup of the public involves those people who neither respect the Court as an institution nor agree with *Roe v. Wade.* Yet procedural concerns still had an effect for this group. In this study, empowerment judgments were primarily associated with considerations of procedural justice.

C. *The Procedural Model and Systems Theories*

The procedural model of legitimacy is based on the systems theories of David Easton and others.[235] Such theories treat society as a homeostatic system, much like a living organism, that

231. *See, e.g.*, EASTON, *supra* note 62, at 249; Murphy & Tanenhaus, *supra* note 46, at 273–74.

232. *See, e.g.*, Hyde, *supra* note 19, at 426.

233. *See, e.g.*, Gibson, *supra* note 68, at 469.

234. *See supra* subsection IV(B)(2).

235. *See, e.g.*, EASTON, *supra* note 62.

seeks to maintain itself.[236] Conflicts are regarded as systemic problems that must be dealt with by agencies like the courts. Within this model, the function of legal institutions is to remove irritants to the system by resolving disputes, maintaining the system's smooth functioning. Supportive public attitudes toward authorities are regarded as an important source of continuity in the social system. "Any relatively stable polity must possess means for converting many if not most demands made on political authorities into satisfying outputs, whether material or symbolic."[237]

Easton distinguishes between "diffuse" and "specific" support for a system of government. Diffuse support is support for the institutions and procedures (i.e., norms) by which the institution makes decisions.[238] Specific support is support for the incumbent decisioumakers and/or agreement with their policies.[239]

Easton contends that diffuse support is the basis of institutional legitimacy. He argues that institutions cannot survive if they must rely primarily on satisfaction with their decisions because controversial decisions typically leave some group within the polity dissatisfied. To be successful, institutions must have some form of legitimacy that is distinct from policies or incumbents, a "reservoir" of good feeling. If they do, then citizens can disagree with government decisions but continue to support institutions of government. As Easton notes, diffuse support (i.e., institutional legitimacy) is a "reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed or the effect of which they see as damaging to their wants."[240] That reservoir of support is linked to support for the "rules of the game," the procedures by which the institution makes decisions.

The core of the argument for diffuse support is that, when making controversial decisions, authorities typically cannot give all parties everything they want or feel that they deserve. Hence, some other basis besides policy agreement or satisfaction with

236. For a recent view of the legal system as part of a larger cybernetic system (society), wherein resilience (ability to resolve disputes) rather than stability (status quo preservation) is the goal, see Alicia Juarrero-Roqué, *Fail-Safe Versus Safe-Fail: Suggestions Toward an Evolutionary Model of Justice*, 69 TEX. L. REV. 1745 (1991).

237. Murphy & Tanenhaus, *supra* note 46, at 273.

238. *See* EASTON, *supra* note 62, at 273.

239. *Id.* at 249.

240. *Id.* at 273.

outcomes must be found for continued support. Drawing on Easton's framework, Tyler links such support to judgments that the decisions, whether favorable or unfavorable, were made using procedures that are competent, reasonable, and fair.[241] If perceptions of procedural justice are engendered, losers in a specific outcome can justify this outcome as fair and can expect a fair outcome in the future. Rather than feel at the whim of government leaders, people can expect constancy and fairness in their treatment. The merits of an argument, not the identities of the parties, will determine the outcome.

What is it specifically that leads to a sense of procedural justice? The most significant component of judgments of procedural justice with regard to the Supreme Court involves perceptions of neutrality. Justices who are viewed as honest, impartial, and deliberative, basing their decisions on case-relevant information, rather than as driven by political pressures and personal opinion, are performing legitimately in the eyes of the public. Moreover, to the degree the Justices are viewed as respecting citizens' rights in general, they are viewed more positively. As with neutrality concerns, a perception of respect for people's rights denotes a confidence that the Court will act in good faith to resolve any dispute it hears. Under this theory, personal views and political agendas are irrelevant—the validity of legal claims predominates.

In this concern for neutrality and respect, citizens' views reflect the more impersonal nature of evaluations of national level authorities; people have greater direct contact with local level authorities, a fact represented in the more relational character of legitimacy evaluations at this level. Interestingly however, neutrality and general respect for rights do not provide a complete explanation for national level evaluations. People also are affected by the more relational concern of how Justices will treat them personally. Whether the Justices are seen as caring about personal concerns and likely to consider individuals' opinions when deciding a case is related to legitimacy.[242] Thus, even in the context of the Supreme Court, people are still concerned with their personal relationship to the Court and its Justices.

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241. *See* TYLER, *supra* note 21; *see also* EASTON, *supra* note 62, at 203–04 (discussing the importance of "regime norms").

242. *See* Tyler & Lind, *supra* note 113, at 137–43.

These findings fit well into the framework of prior studies on legitimacy.[243] The largely impersonal nature of the Court, with its exalted, removed, and even mysterious status, helps explain why neutrality was the most significant determinant of procedural justice judgments and, through them, judgments about the legitimacy of authority. These findings accord with the general focus on "rational" legal authority articulated by legal scholars.[244] The honest, evenhanded application of universal legal rules legitimizes the exercise of legal authority.

The findings, however, also suggest support for a broader model of legal authoritativeness. In studies of legal, political, and managerial authorities with whom people have everyday contact, relational models of procedural justice receive strong support.[245] These models indicate that people are strongly influenced by the nature of the social bond that arises between themselves and authorities.[246] In the case of the U.S. Supreme Court, however, relational concerns—although present—are secondary. People do not have the opportunity to bond emotionally with the Court and so relational concerns do not dominate in this context; instead more general, context-independent, systemic concerns predominate. Apparently, people want to think of the Court as an objective decisionmaker doling out fair outcomes.[247]

Although secondary, relational concerns are clearly important. That importance is most strikingly demonstrated by examining empowerment. Trust in the motives of the Justices was the key predictor of willingness to defer to legal authorities on the abortion issue.[248] In fact, it was equal to neutrality in importance. Empowerment is of central concern because it represents the willingness to defer to legal authorities. Although evaluations of legitimacy were based on neutrality concerns,[249] the key issue of empowerment had an important component of trust.

Although these findings support the emphasis on neutrality found in legal writings on authority, it is important to distinguish

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243. *See* TYLER, *supra* note 21, at 19.
244. *See* Fiss, *supra* note 12.
245. Tyler & Lind, *supra* note 113, at 149.
246. *Id.* at 137–43.
247. *Cf.* MELVIN J. LERNER, BELIEF IN A JUST WORLD (1980) (discussing the need to see outcomes as deserved).
248. *See supra* tbl. 5.
249. *Id.*

the neutrality concerns evinced here from those discussed by some legal scholars. "Neutrality" in jurisprudence often has a special meaning, namely, adherence to neutral principles in constitutional interpretation. This neutrality has been described more specifically by Judge Robert Bork as requiring as close an adherence to the textual and historical meaning of the Constitution as is possible[250] and more generally by Professor Herbert Wechsler as requiring decisions that rest on reasons with respect to all the issues in a case, reasons that in their generality and their neutrality transcend any immediate result.[251] This more specific conception of neutrality is distinct from that which we studied in that people were not asked their views on the propriety of any specific theory of constitutional interpretation. The more general conception, however, is similar in that it draws attention to the impartial conduct of adjudication, rather than to the specifics of any case. Moreover, all the authors arguing for neutrality in its various forms share at least one concern with our sample of Americans: that the law, not personal values and opinions, should drive outcomes. The degree to which this result is possible is debatable,[252] nevertheless, the power of the perception of neutrality is great. A faith in neutrality "is deeply rooted in our history and in our shared principles of political legitimacy."[253] The Justices in *Casey* thus appropriately seize on a conception of neutrality as crucial to the maintenance of Court legitimacy.[254]

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250. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971) ("The judge must stick close to the text and the history, and their fair implications, and not construct new rights."). Justice Black was perhaps the staunchest advocate of this view on the Court. *See* Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 703 (1975).

251. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

252. *See* Morawetz, *supra* note 160, at 4 & n.8.

253. Grey, *supra* note 250, at 705.

254. It is at least slightly ironic that the decision that could not be overruled for fear of losing this perception of neutrality and legitimacy—*Roe v. Wade*—has been criticized as one of the most illegitimate Court decisions in terms of neutral decision principles. *See, e.g.*, John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973); Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159.

D. *The Potential Benefits of a Procedural Justice Focus*

The findings of this study are important because they address a core problem within any society or organized group: How can a common public policy be formulated when people have different views about what is right? Authorities are typically responsible for trying to formulate and implement such policies. How can they do so?

Our findings suggest that procedural consensus is one basis for effective governance. If people are able to agree about a common procedure for resolving conflict, they are more willing to accept outcomes with which they disagree. Hence, institutions which follow fair procedures are more authoritative.

Because American society has a long history of social and political stability, concerns about the effectiveness of government institutions seem remote. It is difficult to imagine the United States engaged in serious social conflict, because a common governmental authority cannot influence all social groups. Hence, the problems of Bosnia or the former Soviet Union seem "foreign" to American society.[255] There is evidence, however, suggesting that these issues may be of increasing centrality in the future.

One concern is with increasing social and financial inequality among Americans. Predictions for the future suggest increasing individual, as well as ethnic, disparities in wealth.[256] Such disparities are at the root of judgments of relative deprivation that can lead to feelings of government illegitimacy and collective disorder, as in the recent Los Angeles riots. America is increasingly becoming an economically polarized society, and this polarization will heighten social conflict. Another concern is with the increasingly multiethnic nature of American society. Demographic projections suggest that American society will become increasingly heterogeneous, leading to increased value divergence among social groups.[257] This increasing ethnic and cultural diversity also will intensify conflict over what social policy should be. Finally, the political and social institutions that have traditionally mediated

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255. Of course, such problems are not unknown in American history, the Civil War being the prime example.

256. *See* Lynn Karoly, *The Widening Income and Wage Gap Between Rich and Poor*, *in* URBAN AMERICA 55 (James Steinberg et al. eds., 1992).

257. *See* WILLIAM B. JOHNSTON & ARNOLD PACKER, WORKFARE 2000: WORK & WORKERS FOR THE 21ST CENTURY 89–94 (1987).

conflicts among American citizens are generally declining in their legitimacy. Not only political authorities but business and religious authorities as well have become less respected and are less likely to be deferred to when value conflicts must be resolved.[258]

How can increasingly intense social conflicts be resolved by increasingly illegitimate legal and political authorities? The findings of this study provide support for one mechanism: the identification and development of institutional procedures for governing that are generally regarded as fair. In other words, these findings point to a mechanism—procedural fairness—that works even in the face of the emotional divisiveness of an issue like abortion.

E. *The Potential Danger of a Procedural Justice Focus: The Seduction of Process?*

The focus on procedure within the polity is also a potential cause for concern. To the extent those holding authority are interested in their own welfare to the detriment of people subject to their authority, a public focus on procedure facilitates the authorities' ability to beguile. Craig Haney, for example, argues that the Supreme Court acts to "render[] decisions that appear fair but do not go too far in their redistributional or restructuring effect."[259] The Court uses a "focus on procedures . . . to divert attention from the fairness of outcomes," thereby obscuring its failures to provide needed rights and resources.[260] Echoing Haney's point, Dennis Fox suggests that there is a "procedural justice trap," in which the "essential method used by authorities to blunt calls for significant social change [is] to focus attention on procedural justice and narrow legal technicality in order to deflect attention from more far-reaching calls for substantive justice and fundamental fairness."[261]

Such a negative view of procedure is not new. In the 1970s Stuart Scheingold pointed out the potential harms of an overemphasis on legal redress of distributive injustice. He called the belief

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258. *See* SEYMOUR M. LIPSET & WILLIAM SCHNEIDER, THE CONFIDENCE GAP: BUSINESS, LABOR, AND GOVERNMENT IN THE PUBLIC MIND (1983).

259. Craig Haney, *The Fourteenth Amendment and Symbolic Legality: Let Them Eat Due Process*, 15 LAW & HUM. BEHAV. 183, 201 (1991).

260. *Id.* at 195.

261. Dennis R. Fox, *Psychological Jurisprudence and Radical Social Change*, 48 AM. PSYCHOLOGIST 234, 237 (1993).

that legal claims can secure social change a belief in "the myth of rights."[262] His own belief was that "litigation is regularly used by, or on behalf of, a great diversity of groups seeking change: environmentalists, welfare mothers, prisoners, women, and so forth. The continued vitality of litigation may be read as a triumph of myth over reality—as a lesson in false consciousness."[263]

This possibility of exploitation through a procedural focus has been verified in studies of business management. The management literature shows that procedural justice may be utilized as a technique of "impression management:" managers can maximize acceptance of their decisions by presenting them as having been fairly made.[264] For example, managers making unpopular decisions receive greater acceptance if they state that, following "due" consideration, external circumstances prevent them from granting worker requests.[265]

The key to an effective impression management strategy is a willingness by the audience to feel subjectively satisfied with objectively disadvantageous outcomes. In other words, it is based on an assumption that people will be satisfied at receiving "fair" process, even if that fair process leads to an "unfair" outcome. Such a willingness may be a considered a variant of a "false consciousness" hypothesis.[266]

Since much procedural justice research involves people who have had real-life experiences with legal authorities and is based on the self-reports of these people, procedural justice studies lack any way to evaluate the relationship between the subjective and the objective. In other words, it is not possible to determine whether the outcomes people received were unreasonable or undesirable. After all, a person may lose because her case is without merit. This would not be an example of a negative outcome that the person "ought" to object to, or one that ought to trouble scholars.

Laboratory studies that manipulate the fairness of outcomes show that people typically retain their belief that a procedure is

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262. *See* SCHEINGOLD, *supra* note 59, at 5.

263. *Id.* at 95.

264. *See* Greenberg, *supra* note 131, at 56–60.

265. *See id.*

266. *See* LIND & TYLER, *supra* note 106, at 201; Tom R. Tyler & Kathleen M. McGraw, *Ideology and the Interpretation of Personal Experience: Procedural Justice and Political Quiescence*, 42 J. SOC. ISSUES, Summer 1986, at 115, 122.

fair even after it has delivered an unfair outcome. For example, John Thibaut and Laurens Walker found that innocent litigants rated the adversarial system to be a fairer form of adjudication after they were falsely convicted by it than they did an inquisitorial system after they were found innocent.[267] Of course, there are limits to this effect. One limit is that the procedure must be enacted fairly. When a procedure is enacted in an obviously biased way, people react negatively to an unfavorable verdict. However, when decisionmakers are judged to be acting in good faith, they appear able to make errors without damaging public respect for procedures.[268] Moreover, ethnographic study of litigants indicates that people resist evidence that judges may be unworthy of their power. They will go to considerable effort to avoid interpreting an unfavorable experience with a particular judge as a negative reflection on the legal system in general.[269]

The effect of repeated exposure to negative experiences has not been directly examined using naturally occurring experiences. Even the members of disadvantaged groups, however, often base their evaluations of the legitimacy of legal authorities more heavily on procedural justice than on outcome favorability or fairness.[270] Since the members of such groups have suffered a lifetime of second-class treatment, it is striking that they nonetheless continue to base their allegiance on procedural justice judgments. Similarly, young, largely uneducated, generally unemployed minorities on trial for felonies have been found to evaluate their experiences in strongly procedural terms as well.[271] These individuals generalized from their experiences to their views about the legitimacy of legal authorities solely on the basis of judgments of procedural justice.[272]

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267. *See* THIBAUT & WALKER, *supra* note 106, at 74.

268. *See* E. Allan Lind & Robin I. Lissak, *Apparent Impropriety and Procedural Fairness Judgments*, 21 J. EXPERIMENTAL SOC. PSYCHOL. 19 (1985).

269. *See* JOHN M. CONLEY & WILLIAM M. O'BARR, RULES VERSUS RELATIONSHIPS 150–65 (1990).

270. *See* Tyler et al., *supra* note 121, at 639 (studying disadvantaged felony defendants).

271. *See* Casper et al., *supra* note 110, at 495.

272. *See* Tyler et al., *supra* note 121, at 645.

F. *Subjectivity and Its Limits*

From the perspective of social scientists, the subjective focus of the *Casey* Court is inviting. By linking their decision to public opinion, the Justices are seemingly opening up a vast enterprise to public opinion pollers, who can study both public attitudes about what the law should be and public willingness to empower the Court in many areas of public policy. Yet it is not clear either that this outcome is what the Court in fact intended or that such an enterprise would be desirable from the perspective of the legal system.

By linking Court behavior to the public acceptability of Court decisions,[273] the joint authors in *Casey* essentially divorce their opinion from objective measures of propriety, from a normative legal framework of the type outlined by Owen Fiss,[274] against which to evaluate judicial decisions. If public opinion is made relevant to Court outcomes, one must ask how the quality of the public's "opinions" is to be judged. The possible tyranny of majority rule is a well-rehearsed refrain, and thus majority opinion has generally been rejected as an appropriate guide to Court action, at least in the domain of civil rights.[275] In short, public opinion may be relevant to how well an opinion will be accepted, but it is unclear that it should serve as a basis for action.

In addition to the need for a standard beyond a simple majority or plurality rule for judging the "quality" of public opinion, the reasons for uncertainty about an emphasis on public opinion are several. First, how does the Court come to a reliable assessment of what public opinion on a given issue is? Are we left with the Justices simply trying to divine "the national psyche" themselves,[276] or do the public opinion pollsters assume this role? Second, when is public opinion relevant and when is it not? Is it

273. Planned Parenthood of S.E. Pa. v. Casey, 112 S. Ct. 2791, 2814 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.).

274. *See* Fiss, *supra* note 12.

275. Footnote four of *Carolene Products* is perhaps the most celebrated statement of the Court's role as the protector of minority interests. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST 75–77 (1980); Louis Lusky, *Footnote Redux: A* Carolene Products *Reminiscence*, 82 COLUM. L. REV. 1093 (1982).

276. *See Casey*, 112 S. Ct. at 2862 (Rehnquist, C.J., concurring in part and dissenting in part).

only with "intensely divisive" controversies, and if so, how do we judge intense divisiveness?[277]

A third significant problem area has to do with public opinions themselves and with legitimation through public opinion. Many factors may constrain or degrade people's social judgments. First, people may be unaware of their alternatives. Having never experienced the alternatives, people may not recognize that they could be much happier than they are given their alternatives. For example, at the local level many people are one-shot players in the legal system. It is suggested that they have little basis for knowing what they should expect.[278] Second, people may have low expectations. If people expect to get nothing from the legal system, they may be pleasantly surprised to receive a little. The system thus may benefit from providing people with little because they will develop low expectations. Studies of relative deprivation suggest that people can be very satisfied with objectively low outcome levels if those outcomes correspond with their expectations.[279] It is only when expectations change, and are therefore no longer met by obtained outcomes, that people become dissatisfied.

Professor Susan Silbey articulates a clear case for the limits of a subjective analysis.[280] She notes that a long history of critiques of dominant cultures argue that unequal power, when it exists, allows certain groups to create hegemony in a society's ideology.[281] Through control over the mechanisms of socialization—schools, the mass media—a dominant group can define the consciousness of an entire society, including subordinate groups that have different "objective" interests. In a hegemonic culture, a

277. *See id.* at 2863.

278. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). This suggestion receives some support in Conley and O'Barr's interviews with litigants. *See* CONLEY & O'BARR, *supra* note 269. Nationally, people are typically unfamiliar with the effects of social policies. Moreover, the unknown future effect of much social policy makes it very hard to know on what one should base one's opinion. It is very difficult to predict, for example, the effects of school desegregation or of lifting the ban on homosexuals in the military without actually implementing these policies.

279. *See* DONALD M. TAYLOR & FATHALI M. MOGHADDAM, THEORIES OF INTERGROUP RELATIONS: INTERNATIONAL SOCIAL PSYCHOLOGICAL PERSPECTIVES 110–28 (1987).

280. *See* Susan Silbey, Justice and Power in Legal Ideology, Presentation at the Summer Workshop on Law and Social Science (July 1993) (notes on file with authors).

281. *Id.*

certain construction of reality seems obvious to all members of society. In such a situation, people's subjective evaluations of their experience may depart substantially from their "objective" interests. If people's beliefs reflect "false consciousness" of the type that would be found in a hegemonic society, then there should be a value consensus among the members of a society, even a pluralistic one.

There is considerable evidence that a broad value consensus on core beliefs and values exists within American society,[282] although it should not be assumed that this consensus is the result of ruling class hegemony rather than some other, more benign process.[283] Whatever the reason, evidence on subjective beliefs is consistent with the idea of ideological hegemony. On the other hand, internalization of legitimation is "incomplete" in that minorities and those in low-income groups are not as accepting of core beliefs and values as are more socially central members of American society.[284] Hence, the glass is both half full and half empty. There is substantial consensus of beliefs among all Americans, but there are also differences in beliefs that reflect differences in objective circumstances.[285]

Recognition of the important role of ideology in shaping individual reactions to experiences highlights the need to consider the sociopolitical context within which legal decisions occur. Psychologists do acknowledge the importance of the larger society in shaping subjective reactions to particular experiences,[286] although they do not typically focus on social structural or cultural factors in their analyses.[287] Several legal scholars have recently sounded a

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282. *See* JENNIFER L. HOCHSCHILD, WHAT'S FAIR? (1981); JAMES R. KLUEGEL & ELIOT R. SMITH, BELIEFS ABOUT INEQUALITY: AMERICANS' VIEWS OF WHAT IS AND WHAT OUGHT TO BE 11 (1986). For classic treatments of the idea of value consensus, see Herbert McClosky, *Consensus and Ideology in American Politics*, 58 AM. POL. SCI. REV. 361 (1964); James W. Prothro & Charles M. Grigg, *Fundamental Principles of Democracy: Bases of Agreement and Disagreement*, 22 J. POL. 276 (1960).

283. Consensus, for example, may flow from the practice of airing conflicts via democratic procedures (i.e. the procedures might actually work well for most people).

284. *See* Karen S. Cook & Karen A. Hegtvedt, *Distributive Justice, Equity, and Equality*, 9 ANN. REV. OF SOC. 217 (1983).

285. Not all examinations of public views find such differences. Walter Murphy and colleagues examined public views about the Supreme Court among 1285 Americans of various races and incomes. They did not find the poor or minorities to be less supportive of the Court. *See* MURPHY ET AL., *supra* note 54.

286. *See, e.g.*, Tyler & McGraw, *supra* note 266.

287. For an example of such an analysis by sociologists, see Karen S. Cook & Karen

call for greater examination of how the social system constrains legal judgments[288] (although these writers are primarily concerned with how judges' judgments are constrained) and have proposed many interesting hypotheses. Yet empirical analysis of these hypotheses largely remains to be performed.[289] The arguments in *Casey* and the results reported in this Article only point out the great importance of understanding how evaluations of legal authority are created.

VI. CONCLUSION

The findings of our study provide considerable support for the legitimacy theory underlying the Court's decision in *Casey*. This conclusion is true on two levels: the role of legitimacy in Court empowerment and the basis of Court legitimacy. In each case, the basic reasoning of the *Casey* Court is supported by the citizen interviews that form the basis of the study.

The Court's first suggestion is that its legitimacy is a valuable asset. Although the importance of institutional legitimacy to organizational effectiveness has been a key assumption of theories of organizational effectiveness in the legal, political, and managerial arenas, legitimacy theory has recently been under heavy attack. Within the legal community, that attack is associated most prominently with Professor Alan Hyde's critique, which argues that there is no support for the proposition that legitimacy enhances authoritativeness.[290]

Hyde's attack on legitimacy theory is not an isolated one. Rather, it is one example of a general discounting of the impor-

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A. Hegtvedt, *Justice and Power: An Exchange Analysis*, *in* JUSTICE IN SOCIAL RELATIONS 19 (Hans W. Bierhoff et al. eds., 1986). For examples from anthropology, see CLIFFORD GEERTZ, LOCAL KNOWLEDGE (1983); MERRY, *supra* note 89; Yngvesson, *supra* note 90.

288. *See, e.g.*, J.M. Balkin, *Ideology as Constraint*, 43 STAN. L. REV. 1133 (1991); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441 (1990).

289. Legal scholars typically apply tools of linguistic analysis, often quite well, *see, e.g.*, Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988), but more rigorous empirical testing is rare in (if not totally absent from) these writings. Linguists also can analyze legal decisions directly. *See, e.g.*, Mel Topf, *Communicating Legitimacy in U.S. Supreme Court Opinions*, *in* 12 LANGUAGE AND COMMUNICATION 17–29 (1992).

290. *See* Hyde, *supra* note 19, at 389–91. Hyde goes on to argue that legitimacy may not even exist. *See id.*

tance of attitudes that promote law-abiding behavior. Concern about public attitudes toward the law, once a central concern of social scientists studying law, has been greatly reduced recently. Instead of studying such attitudes, researchers have focused more heavily on the judgments about costs and benefits that form the basis of the "rational" calculations in which people are presumed to engage when making decisions about how to behave relative to the law.

The change in focus away from study of attitudes toward law has led to a sharp decline in study of value socialization. Since people's behavior is not viewed as developing from social values, which themselves develop during childhood socialization, the study of the childhood socialization process has diminished in importance. Similarly, less attention has been focused on the content of adult attitudes toward the law. This focus on rational calculation is also evident outside the social science context.[291]

The focus of our study and analysis was not on the broader social movement through which the importance of attitudes about law has diminished. Rather, we had the more modest goal of refuting Professor Hyde's thesis: that one attitude—legitimacy—is without importance.

Several recent empirical studies strongly support the argument that legitimacy plays an important role in shaping the effectiveness of authorities. First, in his study of everyday obedience to the law, Tom Tyler demonstrated that evaluations of the legitimacy of legal authority have an important role in shaping the acceptance of legal rules.[292] Second, the findings of our study illustrate that public willingness to empower the Court to make abortion policy is related to the Court's institutional legitimacy. If people believe that the Court is generally the appropriate institution to interpret the Constitution, they are more likely to believe that the Court should be

291. The change in focus toward "rational" calculation of self-interest also has been reflected in society's response to emerging social problems. For example, the explosion in awareness of drug use as a social problem has led to legislation that increases the severity of punishment for drug-related crimes. Relatedly, increases in expenditures for police forces and the use of the Army and Air Force in drug enforcement are attempts to heighten the likelihood of apprehension for drug use. These deterrence-based strategies presume that the key to curtailing drug use lies in affecting the rational calculations of potential offenders, rather than in the creation of a value climate within which drug use would be undesirable.

292. *See* TYLER, *supra* note 21.

empowered to make abortion decisions. Institutional legitimacy is more important than is agreement with either past Court decisions in general or past Court decisions about the specific issue of abortion. These studies bring Professor Hyde's thesis into doubt. Although the Court appears unaware of the controversy underlying the legitimacy theory on which its *Casey* decision rests, this examination of that controversy suggests that the Court's position is empirically defensible. In short, the argument that it is important to maintain legitimacy in the eyes of the public is clearly supported.

The Court also suggests that its legitimacy in the eyes of the public is linked to a particular set of decisionmaking characteristics. Specifically, the *Casey* Court focuses on "principled decisionmaking" as key. The Justices argue that people are most strongly supportive of Court decisions when they believe that the Justices are neutrally evaluating the Constitution, rather than using their own personal values to make decisions. Again, the results of this study are generally very supportive of the Court's reasoning. First, the study shows that judgments about Court decisionmaking are linked to evaluations of Court legitimacy and to willingness to empower the Court to resolve controversial issues. Second, an examination of the psychology of procedural justice suggests that judgments about the Court's neutrality are central to evaluations of the legitimacy of the Court's decisionmaking procedures. Again, the Court's argument that objective, neutral decisionmaking underlies legitimacy is strongly supported.

More broadly, the findings of this study suggest that the model of "objective" interpretation of the Constitution is very much alive in the minds of Americans. This model has been critiqued by a variety of "critical" legal scholars over recent years.[293] Whatever the merits of these critiques, the Court remains a highly respected legal institution among the general public. Further, the public generally believes that the Court is a legitimate institution that uses fair decisionmaking procedures. These beliefs have very concrete implications: they serve as a basis for public willingness to empower the Court to resolve the controversial public policy issue of abortion.

From a social science perspective, the findings suggest the importance of understanding the nature of attitudes toward the

293. *See* Fiss, *supra* note 12, at 740–41.

law—law as it is represented within the minds of Americans. The personal values of the citizenry include feelings of obligation toward law and legal authority and beliefs that legal authorities are reasonable and fair. Such preexisting values likely form the basis of the willingness to empower legal authorities to resolve issues of public controversy.

APPENDIX A

DEMOGRAPHICS OF THOSE INTERVIEWED

EDUCATION

Eighth grade or less	1%
Some high school	6%
High school graduate	22%
Some college	35%
College graduate	20%
Post-college education	17%
Don't know	0%

INCOME (HOUSEHOLD)

$20,000 or under	19%
$20,001 to $40,000	23%
$40,001 to $50,000	21%
$50,001 to $70,000	10%
$70,001 and over	23%
Don't know/Refuse	4%

AGE

18–29	31%
30–39	25%
40–49	19%
50–59	11%
60– and up	14%
Don't know	0%

SEX

Male	48%
Female	52%

RACE

White	62%
Minority	38%

LIBERALISM/CONSERVATISM

Very liberal	16%
	17%
	17%
Neutral	4%
	18%
	16%
Very conservative	10%
Don't know	4%

PARTY IDENTIFICATION

Strong Democrat	17%
	27%
	14%
Neutral	9%
	9%
	14%
Strong Republican	6%
Don't know	4%

APPENDIX B

ITEMS USED IN SURVEY AND RESPONSE FREQUENCIES

RESPECT FOR INSTITUTIONS

Rate each group on a thermometer that runs from 0 to 10. The higher the number, the warmer or more favorable you feel about the group.

	Warm	Neutral	Cold	Don't Know	Total
U.S. Supreme Court	51%	23%	25%	1%	100%
Congress	26%	31%	43%	1%	101%

In general, how much respect do you have for the Supreme Court as an institution of the government?

48% A great deal
38% Some
11% A little
3% Not much at all
0% Don't know

When I think of our system of government, there's not much I can be proud of?

9% Agree strongly
30% Agree somewhat
39% Disagree somewhat
21% Disagree strongly
0% Don't know

INSTITUIONAL LEGITIMACY

Some people feel that we should get rid of the U.S. Supreme Court, while others are opposed to this idea. How do you feel?

1% Strongly support
2% Somewhat support
34% Somewhat oppose
62% Strongly oppose
2% Don't know

The U.S. Supreme Court can usually be trusted to make decisions that are right for the country as a whole.

22% Agree strongly
53% Agree somewhat
19% Disagree somewhat
6% Disagree strongly
1% Don't know

The U.S. Supreme Court does its job well.

20% Agree strongly
60% Agree somewhat
14% Disagree somewhat
7% Disagree strongly
0% Don't know

Our basic rights are well protected by the U.S. Supreme Court.

27% Agree strongly
44% Agree somewhat
20% Disagree somewhat
8% Disagree strongly
1% Don't know

The U.S. Constitution gives the Supreme Court too much power.

20% Agree strongly
33% Agree somewhat
30% Disagree somewhat
14% Disagree strongly
3% Don't know

The U.S. Supreme Court has the power to declare certain acts of Congress unconstitutional. Are you . . .

27% Strongly in favor
41% Somewhat in favor
22% Somewhat opposed
7% Strongly opposed
3% Don't know

Some people feel that if the U.S. Supreme Court were to continually make decisions that most people disagree with, we should do away with the Court altogether. Others feel that even if most people don't always agree with Supreme Court decisions, it should remain as part of government.

Feel should do away with Court

12% Very strongly
12% Somewhat strongly

Feel should keep Court

31% Somewhat strongly
46% Very strongly
3% Don't know

ATTITUDES ABOUT ABORTION

As you may know, the U.S. Supreme Court has decided that women have the constitutional right to make their own decisions about whether or not to have an abortion. How do you feel about this decision—are you . . . .

67% Strongly in favor
14% Somewhat in favor
9% Somewhat opposed
9% Strongly opposed
1% Don't know

Suppose a law were passed ending federal aid to hospitals that allowed abortions to be performed. How would you feel about this law? Would you be . . .

9% Strongly in favor
12% Somewhat in favor

20% Somewhat opposed
59% Strongly opposed
1% Don't know

Some people feel that the abortion issue is primarily a moral issue—that is, an issue of what is right and wrong—while others feel that it is primarily a legal issue—an issue of what a person's rights should be in this country. How do you feel? If you had to choose, would you say abortion is . . .

59% Primarily moral
36% Primarily legal
5% Both
2% Don't know

ABORTION AS A MORAL ISSUE

First, think about abortion as a moral issue—that is, think about your own personal views about what is right and wrong.

How do you feel about a pregnant woman having an abortion if there is a strong chance that the baby has a serious defect?

72% Morally right
23% Morally wrong
5% Don't know

If she were to obtain an abortion in the event that her life were in danger (because of the pregnancy)?

87% Morally right
10% Morally wrong
3% Don't know

If she had become pregnant as a result of rape?

85% Morally right
12% Morally wrong
2% Don't know

If she wanted an abortion for any reason?

58% Morally right
40% Morally wrong
3% Don't know

ABORTION AS A LEGAL ISSUE

Now think about abortion as a legal issue—that is, think about what a person's rights should be in this country.

How do you feel about a pregnant woman obtaining an abortion if there is a strong chance that the baby has a serious defect?

86% Legally entitled
13% Not legally entitled
2% Don't know

What about if she wanted the abortion because her life was in danger because of the pregnancy?

91% Legally entitled
8% Not legally entitled
1% Don't know

What about if she wanted an abortion because her pregnancy was the result of a rape?

92% Legally entitled
7% Not legally entitled
1% Don't know

And what about if she wanted an abortion for any reason?

70% Legally entitled
29% Not legally entitled
1% Don't know

EMPOWERMENT AND OBLIGATION

EMPOWERMENT

The power of the U.S. Supreme Court to make decisions about abortion should be reduced.

38% Agree strongly
21% Agree somewhat
17% Disagree somewhat
20% Disagree strongly
5% Don't know

The power to decide whether it is legal for women to have abortions should remain with the Supreme Court.

16% Agree strongly
20% Agree somewhat
22% Disagree somewhat
42% Disagree strongly
1% Don't know

GENERAL FEELING OF OBLIGATION TO OBEY GOVERNMENT

I feel that I should accept the decisions made by government leaders in Washington even when I disagree with them.

7% Agree strongly
31% Agree somewhat
28% Disagree somewhat
32% Disagree strongly
1% Don't know

There are times when it is all right for people to disobey the government.

15% Agree strongly
33% Agree somewhat
26% Disagree somewhat
26% Disagree strongly
0% Don't know

I can think of situations in which I would stop supporting the policies of our government.

32% Agree strongly
34% Agree somewhat
18% Disagree somewhat
16% Disagree strongly
0% Don't know

JUDGMENTS ABOUT COURT DECISIONMAKING

GENERAL

How much do you know about the way the Supreme Court decides what the law will be?

9% A great deal
44% Something
45% A little
2% Not much at all
1% Don't know

How often do you agree with the decisions that the Supreme Court makes?

32% Usually
53% Sometimes
11% Seldom
3% Almost never
1% Don't know

How often are the decisions made by the Supreme Court fair?

46% Usually
43% Sometimes
9% Seldom
1% Almost never
1% Don't know

Overall, the way the Supreme Court makes its decisions is fair.

22% Agree strongly
55% Agree somewhat
18% Disagree somewhat
4% Disagree strongly
1% Don't know

DURING THE LAST TERM

Thinking about the decisions made by the U.S. Supreme Court in the last year or so, would you say that you are aware of:

11% Most of their decisions
44% Some
41% Only a few
2% Not aware of any decisions (volunteered)
1% Don't know

How have you felt about their recent decisions? Would you say you've agreed with . . .

18% All/most
43% Some
31% Only a few
5% None of them
4% Don't know

How fair do you think their recent decisions have been?

14% Very fair
63% Somewhat fair
14% Not very fair
1% Not fair at all
6% Don't know

How fair do you think the way they've made their decisions has been?

17% Very fair
63% Somewhat fair
14% Not very fair
1% Not at all fair
6% Don't know

IF YOUR GROUP WENT BEFORE THE COURT

Suppose that an issue you cared about was being heard by the Supreme Court and you joined a group that wanted to present its views to the Court.

How likely do you think it is that the Court would make a decision that you agreed with?

27% Very likely
57% Somewhat likely
13% Not too likely
1% Not at all likely
1% Don't know

How likely do you think it is that the Court would make a decision that was fair?

10% Very likely

64% Somewhat likely
21% Not too likely
3% Not at all likely
2% Don't know

How likely do you think it is that the Court would make its decision in a fair way?

33% Very likely
52% Somewhat likely
10% Not too likely
3% Not at all likely
2% Don't know

JUDGMENTS ABOUT PROCEDURAL JUSTICE

GENERAL

CONTROL

There are ways for the average citizen to have their views presented to the Supreme Court before it makes its decisions. Do you . . .

22% Agree strongly
39% Agree somewhat
21% Disagree somewhat
15% Disagree strongly
3% Don't know

The views of average citizens influence the decisions made by the Supreme Court. Do you . . .

9% Agree strongly
37% Agree somewhat
34% Disagree somewhat
20% Disagree strongly
1% Don't know

NEUTRALITY

The Supreme Court justices are generally honest—giving the real reasons for their decisions. Do you . . .

32% Agree strongly
40% Agree somewhat
18% Disagree somewhat
9% Disagree strongly
1% Don't know

The Supreme Court gives equal consideration to the views of all of the different groups in America. Do you . . .

16% Agree strongly
35% Agree somewhat
28% Disagree somewhat
19% Disagree strongly
2% Don't know

The Supreme Court gets the kind of information it needs to make informed decisions.

25% Agree strongly
50% Agree somewhat
16% Disagree somewhat
7% Disagree strongly
3% Don't know

How much do you think the U.S. Supreme Court decisions are influenced by political pressures?

38% A great deal
37% Somewhat
16% A little
5% Not much at all
3% Don't know

TRUSTWORTHINESS

The Supreme Court considers the concerns of average citizens when making decisions. Do you . . .

12% Agree strongly
38% Agree somewhat
31% Disagree somewhat

17% Disagree strongly
2% Don't know

The Supreme Court tries to be fair when making its decisions. Do you . . .

37% Agree strongly
46% Agree somewhat
13% Disagree somewhat
4% Disagree strongly
1% Don't know

RESPECT FOR RIGHTS

The Supreme Court is concerned about protecting the average citizen's rights. Do you . . .

36% Agree strongly
41% Agree somewhat
15% Disagree somewhat
8% Disagree strongly
1% Don't know

IF YOUR GROUP WENT BEFORE THE COURT

CONTROL

How likely do you think it is that the Court would give your group an opportunity to present its views?

15% Very likely
46% Somewhat likely
31% Not too likely
6% Not at all likely
2% Don't know

How likely do you think it is that your group's views would actually influence the Court's decision?

9% Very Likely
43% Somewhat likely
33% Not too likely
7% Not likely at all
9% Don't know

NEUTRALITY

How likely do you think it is that the Court would get the information it needed to make a good decision?

32% Very likely
47% Somewhat likely
16% Not too likely
3% Not at all likely
2% Don't know

Do you think the Court would give your group:

37% Less consideration than other groups
37% The same consideration as other groups
20% More consideration than other groups
6% Don't know

How likely do you think it is that the Court would be honest—giving the real reasons for the decision?

34% Very likely
40% Somewhat likely
19% Not too likely
5% Not at all likely
1% Don't know

TRUSTWORTHINESS

How likely do you think it is that the Justices would consider your group's views before making a decision on that issue?

13% Very likely
54% Somewhat likely
21% Not too likely
4% Not at all likely
8% Don't know

How likely is it that the Justices would try to give your group's position fair consideration?

31% Very likely
49% Somewhat likely
16% Not too likely
3% Not at all likely
1% Don't know

How likely do you think it is that the Justices would genuinely care about your group's position?

16% Very likely
50% Somewhat likely
26% Not too likely
6% Not at all likely
2% Don't know

RESPECT FOR RIGHTS

How likely do you think it is that the Court would respect your rights as a citizen?

50% Very likely
38% Somewhat likely
9% Not too likely
2% Not at all likely
1% Don't know

THE THOMAS HEARINGS

During the fall of 1991, a special Senate committee held hearings to decide whether or not Clarence Thomas should become a justice of the U.S. Supreme Court. How much time, if any, did you spend watching these hearings on TV or listening to them on the radio?

39% A great deal
36% Some
16% A little
9% None at all
0% Don't know

In general, how much do you know about the Clarence Thomas hearings?

33% A great deal
49% Some
14% A little
5% Nothing at all
0% Don't know

As you may know, the Senate committee decided to confirm Clarence Thomas as a justice of the Supreme Court. How do you feel about that decision? Do you basically agree or disagree with the committee's decision?

21% Agree strongly
32% Agree somewhat
21% Disagree somewhat
24% Disagree strongly
2% Don't know