There is No Legitimacy Crisis: Support for Judicial Institutions in Modern Latin America

While important for every political institution, diffuse support—also called institutional legitimacy—is especially vital for courts. Conventional wisdom suggests that the public support the U.S. Supreme Court enjoys is unique, while widespread pessimism colors extant assessments of high courts’ legitimacy throughout the Americas. We show that not only is the U.S. Supreme Court not an anomaly, but the widespread assumption that Latin American courts are lacking in legitimacy is fundamentally wrong. We conclude with a discussion of the implications of this research for future endeavors and make our case for more careful measurement and interpretation of these critical concepts in future research.
All political institutions require the support of the public in order to be effective (Eas-ton 1965). Scholars widely agree that the public’s diffuse support—otherwise known as legitimacy, is of unique importance for courts because these institutions typically lack the ability to enforce their decisions directly. Reviewing a now mature corpora of work on the institutional legitimacy of the U.S. Supreme Court from the past 20 years, Gibson (2007) argues that “in comparison to other national high courts, the U.S. Supreme Court enjoys an extraordinarily wide and deep ‘reservoir of goodwill’—only a handful of institutions has support percentages approaching those of the American court” (522). Widespread pessimism colors extant assessments of public support for national high courts in separation of powers systems outside of the U.S.: citing the universally low levels of public confidence in the national high courts, scholars, politicians and pundits claim the judicial institutions throughout the Americas to be in a perpetual state of crisis, wholly lacking in legitimacy and institutional efficacy (Domingo 2004; Helmke 2010).

We challenge this conventional wisdom by cataloging variation in public support for courts throughout the separation of powers systems in the Americas, showing that contrary to common opinion, the assumption that Latin American courts are wholly lacking in legitimacy is generally misplaced. In fact, the public displays remarkable consensus in its institutional loyalty to its high courts, though public trust in high courts throughout the region is admittedly quite low. We attribute this to a misinterpretation of data that is widely available, though inadequately captures the concept of institutional legitimacy.

This descriptive result alone carries with it broad empirical and theoretical implications. The public’s unwillingness to tolerate inter-branch aggression and non-compliance is a central mechanism in many prominent theoretical models of comparative judicial independence and power: the threat of public backlash for non-compliance or inter-branch assaults implies that incumbents should have no recourse but to respect the court and to comply with its decisions (Clark 2009; Staton 2010). As Vanberg (2001) puts it: “The
fear of such a backlash can be a powerful inducement for legislative majorities to respect judicial decisions as well as the institutional integrity of a court” (347). The centrality of this mechanism, coupled with the widespread assumption that Latin American courts are fundamentally lacking in public support, has fueled a scholarly consensus that Latin American courts are weak and ineffective (Domingo 2004), and that the lack of public support is to fault for broader trends of institutional instability (Helmke 2010). The empirical result reported here suggests there is much more to this puzzle than immediately meets the eye, and multiple empirical and theoretical assumptions deserve reconsideration in light of these facts. We will conclude this note with a discussion of the implications of this research for future endeavors, and advocate for more careful measurement of these critical concepts in future projects.

**Public Support for Judicial Institutions in Modern Latin America**

In his pioneering work on public support, Easton (1965) differentiates between two types of public support that institutions require. Easton identified **diffuse support** as “form[ing] 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” (273). Other terms for diffuse support are institutional legitimacy, loyalty or fealty. Legitimacy represents a willingness to accept the decisions and coercive authority of an institution irrespective of one’s disagreement with its decisions. Institutional legitimacy is often measured via public opinion surveys, using a battery of questions that assess the extent to which individuals would tolerate fundamental changes to the institutional structure of a court, with the belief that an unwillingness to support institutional changes reveals a profound commitment to the institution as it is. In contrast to diffuse support, **specific support** refers to performance satisfaction and approval of institutional output. Easton (1965) described specific support as essentially “a quid pro quo for the fulfillment of demands”: specific support for an institution increases when an individual agrees with
an institution’s outputs, and it declines in the face of disagreement with an institution’s decisions (268).

In spite of the centrality of these concepts for both pure theoretical and empirical work, Easton’s distinction between the multiple conceptual dimensions of institutional support—much less their empirical differentiation—is rarely considered directly outside the U.S. contexts (Gibson et. al 1998 and Walker (2016) are noted exceptions to this rule). Constrained by a lack of available measures that adequately capture concepts of theoretical interest, analyses of institutional confidence measures are often interpreted as measures of institutional legitimacy (Helmke 2010; Kapiszewski 2012; Salzman and Ramsey 2013; Domingo 2004). This interpretation is all the more troubling in light of the work of Gibson, Caldeira and Spence (2003), who document that the commonly used measures of institutional trust are more closely related to short term satisfaction with the political regime than diffuse support, and the caution that “low levels of confidence should certainly not be interpreted as indicating low institutional legitimacy” (361). Consequently, the inferences that have been drawn about the institutional legitimacy of courts of the Americas are incomplete at best, and incorrect at worst.

We present here data on the public support for national supreme courts throughout

Gibson, Caldeira and Spence (2003) considered questions that differentiated short- (specific) and long-term (diffuse) measures of institutional support, finding that while expressed confidence in the high court correlates weakly with diffuse support, it was strongly associated with short-term evaluations of Court performance. What is more, the authors report that many respondents who appear wary or outright skeptical of the Supreme Court’s trustworthiness nevertheless displayed high levels of institutional fealty, and were nevertheless unwilling to accept or tolerate fundamental changes to the Supreme Court as an institution.
Latin America. Our measures of specific and diffuse support are taken from the 2008 Americas Barometer public opinion surveys, though elsewhere we show that the results discussed here generalize to other years in which similar questions were included in the core questionnaire (Redacted). To measure specific support, we follow the advice of Gibson, Caldeira & Spence (2003) and use a measure of Institutional Trust. Our measure of diffuse support, by contrast, is based on respondents' answers to the question “Do you believe that there might be a time in which the president would have sufficient reason to dissolve the Supreme Court, or do you think that sufficient reason could never exist?” This question taps a concept similar to one identified by Gibson, Caldeira and Spence (2003) as an accurate measure of Easton’s (1965) original concept of “diffuse support.”

Figure 1 lends additional credence to the assertion that the region’s high courts suffer a deficit of the public’s trust. The lighter colored bars in the left hand (a) panel represent the percentage of respondents who reported a high level of trust for their national supreme court in 2008. Two conclusions are readily apparent. First, public trust in national high courts is generally lacking: the regional average is only 38%, with some cases that dip well below 20%. Second, the United States Supreme Court—the highest bar toward the right of the plot—far outpaces its institutional counterparts in terms of public confidence throughout the rest of the Americas, as more than 75% of U.S. respondents claimed trust for the Supreme Court.

Yet turning to the second panel (b) of Figure 1, the distinction between difference be-

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2The item recommended by Gibson, Caldeira and Spence (2003) reads “If the U.S. Supreme Court started making a lot of decisions that most people disagree with, it might be better to do away with the Court altogether.” Indeed, in their discussion of the various indicators of diffuse support, Gibson, Caldeira and Spence (2003) contended that, lacking a multivariate composite score for diffuse support, this question alone is the next best option.
Figure 1: Darker colored bars represent the percentage of respondents answering in the negative to the question “Do you believe that there might be a time in which the president would have sufficient reason to dissolve the Supreme Court, or do you think that sufficient reason could never exist?” Lighter colored bars represent the percentage of respondents reporting trust in the supreme court, taken from the question “To what extent do you trust the Supreme Court?” The percentage of people reporting “Trust” includes all respondents claiming a 5, 6 or 7 on that 7-point Likert scale. To facilitate cross-national comparisons, the figures reported for the United States are taken from the 2006 AmericasBarometer.

The relationship between institutional trust and institutional legitimacy becomes readily apparent. Contrary to extant assertions and concerns about the overwhelming lack of institutional legitimacy, supreme courts throughout Latin America enjoy relatively high levels of institutional loyalty: a large percentage of all national populations profess an unwillingness to tolerate fundamental changes to their national high courts’ institutional integrity. Though the United States has long been assumed to be unique in its “reservoir of goodwill,” Figure 1 suggests that it is in fact not unique, nor is it a particular outlier. Relative to the other supreme courts of the Western Hemisphere, the U.S. stands only slightly above the hemispheric average of 79%. Far from implying widespread institutional crises, these figures paint a picture of national high courts that, despite the public mistrust they inspire, are
nevertheless broadly viewed by the public as a central component of the national constitutional system. Taken together, these patterns suggest that we have more to learn about the origins of institutional trust and more profound institutional fealty for the high courts of Latin America, which may well lead us to reconsider many claims about the institutional legitimacy of high courts across the region.

**Measurement Validity**

Some may question whether the measure we consider adequately captures the concept of *diffuse support*. We acknowledge in three ways the question we evaluate is less than ideal. First, this question wording is slightly different than the one explicitly advocated by [Gibson, Caldeira and Spence (2003)](#), in that it leaves the respondent to imagine a hypothetical situation in which they would support a given institutional change. Second, the explicit reference to “the President” implies a possible contamination: priming respondents to consider the actions of a presidential incumbent may invoke responses that have less to do with respondents’ commitment to high courts, as opposed to their fealty or support for the incumbent. Finally, the standard battery questions commonly analyzed by Americanists include 3-6 questions, querying whether respondents would support removing high jurists from office, reducing the jurisdiction of a high court, would support the court being made less independent or doing away with the court altogether. Unfortunately, the full battery of questions was not asked, so we are confined to consider what is available, which is admittedly the most extreme version of the possible quantities of interest. As such, we acknowledge that this measure may represent an outer bound of support: though we can directly speak to the extent to which respondents’ would be unwilling to do away with the court, it is entirely possible they would support less extreme measures of curbing or reducing the supreme court’s influence.

To evaluate the extent to which this question is a valid measure of the underlying concept of diffuse support, we included the Americas Barometer question on a public opinion survey
of 1000 respondents conducted on Amazon MTurk in December of 2017, in which we also asked our respondents the following four questions, per the advice of Gibson, Caldeira & Spence (2003):

- If the U.S. Supreme Court started making a lot of decisions that most people disagree with, it might be better to do away with the Court altogether.
- The right of the U.S. Supreme Court to decide certain types of controversial issues should be reduced.
- Justices on the U.S. Supreme Court who consistently make decisions at odds with what the majority wants should be removed from their position.
- The U.S. Supreme Court ought to be made less independent so that it listens a lot more to what the people want.
- Do you believe that there might be a time in which the president would have sufficient reason to dissolve the Supreme Court, or do you think that sufficient reason could never exist? (Americas Barometer 2008)
- Do you believe that when the country is facing very difficult times it is justifiable for the President of the country to dissolve the Supreme Court and govern without the Supreme Court? (Americas Barometer 2010)

This six-item scale has high reliability with a Chronbach’s alpha is 0.80. For context, consider Braumoeller’s (2008, 90) assessment: “Cronbach’s alpha is a worthwhile measure of intercoder reliability [and scale reliability assessment], with values below 0.60 considered clearly problematic, those in the 0.60—0.69 range borderline... 0.70—0.79 acceptable, and 0.80 and above very strong.” Moreover, the item set is strongly unidimensional, with an eigenvalue of the first factor of 2.68 but a mere 0.39 for the second factor. The factor loading for the Americas Barometer question item is 0.51, and while these item loadings are slightly lower the item loadings for the other measures of diffuse support in our scale, they are not out of the norm for other measures used in research on the U.S. Supreme Court, and well in line with the cut offs that are widely suggested. For example, Hair et al. (1998) write that “factor loadings greater than ±0.30 are considered to meet the minimal level; loadings of ±0.40 are considered more important; and if the loadings are ±0.50 or
greater, they are considered practically significant” (111). Thus, our Americas Barometer question appears to satisfy traditional metrics for factor loadings onto the same dimension as the gold-standard Gibson, Caldeira and Spence (2003) items. While the reference to the president into the item wording may contaminate the question, it does not appear to have wholly invalidated this question as a viable measures of judicial legitimacy.

**Discussion**

This descriptive result calls into question existing conventional wisdom about the level of public support for Latin American high courts, as well as related implications for extant assessments of their institutional integrity and potential efficacy. Institutional legitimacy—the profound public regard for the high court as an institution—is important, among other reasons, because it deters would-be institutional assailants and promotes compliance. The threat of public backlash has been theorized as a critical mechanism for protecting high courts from incumbents, who would seek to influence or undermine high courts via court curbing attacks (Vanberg 2001; Clark 2009). In the Latin American separation of powers systems, this threat of incumbent infringement and institutional assault is ever present and real, and the high courts’ lack of institutional legitimacy is commonly posited to be at fault (Helmke 2010; Kapiszewski 2012). The results presented herein suggest that there is more to the story here than meets the eye. If it is the case that Latin American courts are more widely legitimate than previously believed, then this begs the question as to what incumbents derive from their high court attacks (c.f. Clark 2009), and the extent to which the lack of public support for the judiciary is to blame for institutional instability throughout the region (Helmke 2010).

Second, but no less important, institutional legitimacy and the threat of public sanction is also a key mechanism in the assurance of compliance with judicial decisions. This assumption—that public support is a key determinant of compliance—has motivated a broad and compelling literature on strategic judicial behavior in high courts around the
world, impacting everything from the decisions they craft \(\text{Vanberg2001}\), to interbranch relations (Clark 2009), to their procedural and publication decisions \(\text{Vanberg2001; Staton2010}\). Consequently, and coupled with the widely reported fact that Latin American courts lack public confidence, it has been largely assumed that Latin American courts are generally impotent political actors and lacking in judicial power (Domingo 2004). Broadly speaking, our results suggest that Latin American high courts may have a reservoir of support that is deep enough to stand up to overreach by the other branches of government, and to secure implementation of their decisions. Minimally, we have much more to understand.

The distinction we draw—between trust and institutional commitment—is one with a difference. This research also serves as a call for more—and continuous—systematic research on the micro-foundations of public support for high courts and political institutions writ large. As with many comparative researchers, we stand on the shoulders of the immensely important data gathering capabilities of those who run cross-national surveys. While some of the questions on these large-scale survey operations are ideal for some purposes, others concepts of theoretical interest are measured imprecisely, or sometimes not at all. Our analysis suggests that scholars who use existing surveys to study institutional support must take care to interpret measures as applying to specific concepts only when such a linkage is clear. Also, when scholars have the opportunity to design and implement their own surveys, they need to take care to ask appropriate questions that provide valid representations of the concepts of interest.

**References**


