# DA—Court Legitimacy

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#### Supreme Court legitimacy is on the brink—staying “above the fray” of partisan disputes is key—the plan disrupts that.

Gershman 4/8 (Jacob Gershman, covers law for The Wall Street Journal and is lead writer of the Law Blog, “How Supreme Court Legitimacy is Shaped”, 4/8/16)//Miro

While clashing over the Supreme Court vacancy, President Barack Obama and Senate Republicans both agree to some extent that the legitimacy of the nation’s highest court is at stake. To the president, it’s political infighting over the next nominee that’s wounding the institution. “The courts will be just an extension of our legislatures and our elections and our politics and that erodes the institutional integrity of the judicial branch,” Mr. Obama said, speaking at the University of Chicago Law School on Thursday. GOP Sen. Chuck Grassley, in remarks on the Senate floor earlier this week, didn’t use the word “legitimacy.” But the chairman of the Senate Judiciary Committee talked about the public’s waning confidence in the court. In his view, that negative perception flows from polarizing rulings and reflects public frustration when justices don’t stick to the constitutional text and base their votes on political preferences. How people perceive, understand and judge the highest court in the nation has long fascinated and puzzled social scientists. Scholars looking at the subject have focused on the idea of legitimacy as the high court’s most precious resource. It’s the steel frame protecting the institution when a seismic ruling is handed down. Evaluations of legitimacy tend to be more stable over time than job approval numbers, but when it erodes, it can be much more damaging. According to James L. Gibson, a political science professor at Washington University in St. Louis, there was “little if any diminution of the court’s legitimacy in the aftermath of Bush v. Gore,” the 2000 case that resulted in the George W. Bush presidency. That’s because, he says, the high court had a deep reservoir of goodwill to drawn on. In a recent paper he co-wrote analyzing survey data, he explores further how the high court accumulates and loses legitimacy, drawing two main conclusions. One is that the greatest threat to the court’s legitimacy “comes from perceived politicization: the belief that the Court is just an ordinary political institution, largely indistinguishable from the other political branches.” The other is that for much of the public, ideological disappointment with rulings doesn’t by itself fuel a perception that the court is politicized. People can disagree with controversial decisions, but​ goodwill endures if people feel​ that justices ruled with principled sincerity. These days Republicans are far more likely than Democrats to disapprove of the way the Supreme Court is handling its job. And the court’s “job approval,” as measured by Gallup, is lower than usual as a whole. But, according to Mr. Gibson, there’s no evidence that Republicans judge the court as any less legitimate. Complicating the analysis, he conceded in an interview with Law Blog, is a lack of reliable recent data measuring institutional support. But Mr. Gibson says if he has any advice for the justices, it’s to “stay above the fray.”

#### Gun ban pulls the court into the fray

Murao 13 (Kyle Murao, Writer for Quora, attended the University of Chicago from 2004-08, spent the 2006-07 year studying at the Institut d'Etudes politiques de Paris, <https://www.quora.com/What-would-realistically-happen-if-the-US-government-started-seizing-all-privately-owned-assault-rifles>, Nov 12, 2013)//Miro

With the un-Constitutionality of this action? Without any context as to how such an initiative came to pass, I'd start out by reminding everyone that the sudden seizure of all privately-owned [insert property type here] is flatly un-Constitutional, violating both the 5th and 14th Amendments. Even if legislation were passed enabling the seizure of assault rifles, the government still could not just grab them from assault rifle owners without obtaining a warrant to search every owner's property, taking every one of those people to court, obtaining a conviction and then getting the court to order the weapons confiscated. Bottom line: If the US government started seizing all privately-owned assault rifles, Congress and state legislatures would have a fit. With the slipperiness of the definition of "assault rifle"? Recall that the term assault rifle means different things to different people. To many people in the anti-gun lobby, it means anything that looks like this: \*\*Let's assume for convenience's sake that the gun shown in the picture is capable of semi-automatic fire only.\*\* In that case, this might not have counted as an assault weapon under the 1994 Assault Weapons Ban, given that it's got a fixed butt-stock, no flash hider, no bayonet lug and no grenade launcher mount. I'm not a gun expert myself, but for most of the people I know who know their guns, what would determine if it's a true assault rifle or not is actually whether it's a selective fire weapon that has a fully automatic mode. In terms of how quickly you could fire bullets from this gun, it differs not a whit from the .22-cal. plinking guns children shoot at summer camp. Bottom line: If the US government started seizing all privately-owned assault rifles, gun manufacturers would find a way to supply the market with legal firearms that (i) comply with new rules & laws and (ii) prove anti-gun lobbyists' ignorance about guns. With the virtual certainty that the seizures would be challenged before the Supreme Court? In 2008's Washington DC v. Heller, Scotus basically said that gun bans violate the Second Amendment. This didn't specifically apply to states (I think Chicago, for instance, has draconian anti-gun laws that have not been struck down in the courts) but if we're talking about the US government here, I think it's safe to say that Heller is a good indicator of where the Supreme Court sits on the topic. For better or worse, like it or not, we have one of the more conservative courts in recent memory with a pretty favorable attitude toward the Second Amendment; so it seems unlikely that they would be favorably disposed to search and seizure of otherwise law-abiding citizens simply for the purpose of confiscating [legally obtained] property. Bottom line: If the US government started seizing all privately-owned assault rifles, the move would certainly be challenged, the Supreme Court would certainly take up the case, and would [almost] certainly order the seizures to stop.

#### Legitimacy key to global conflict suppression and soft power.

Sidhu 11 (Dawinder S. Sidhu, Prof @ UNM Law, “Judicial Review as Soft Power: How the Courts Can Help Us Win the Post-9/11 Conflict”, 2011)//Miro

There can be little doubt that military victory overseas, at present, stands beyond the grasp of American’s long and powerful arm.22 Perhaps even more sobering is the fact that even if the United States was faring better on the military front, such success would be insufficient to prevail in the war. As the 9/11 Commission noted, al Qaeda “represents an ideological movement, not a fi nite group of people,” akin to a “decentralized force.”23 The American strategy, however, appears to be one based on warfare. Judge Richard A. Posner observed that “we have no strategy for defeating them, only fighting them.”24 President Obama’s foreign policy objectives in the war have been considered to be “exclusively military” and, on that score, the war “is not going well.”25 Put differently, the American efforts appear to be limited in scope and disappointing in that narrow subset of possible action against transnational terrorism. These facts are beyond dispute—in committing the terrorist atrocities on 9/11, al Qaeda provoked the United States into a war in Afghanistan that was expanded to Iraq. These confl icts are being waged primarily on the military arena, and the achievement of American goals in both arenas has been frustrated despite years of effort, billions of dollars, and the lives of many American soldiers. What can we do differently? What other instruments are available to the United States such that defeating—not just capably fighting—the terrorists may be a closer prospect? Specifically, how can American law be an advantage to our national security? This Article seeks to answer these questions. In this Article, I will argue that the American response to Islamic terrorist factions must move outside the military sphere in which battles are fought between arms and men to a more conceptual contest for hearts and minds, where the ammunition in this abstract war will be fundamental American principles, particularly a constitutional commitment to the rule of law, and where advancements in the war will be based on incrementally increased attraction to America. This approach will speak to one’s will and conscience in an effort to secure a more lasting respite from the ongoing struggles that have no foreseeable end in sight, have been at- ended by suffering and sorrow, and have claimed a growing number of victims on all sides.26 Part I will distinguish between “hard power,” which generally constitutes the ability to attain favorable foreign policy outcomes by way of military force or economic coercion, and “soft power,” defi ned as the ability to achieve those outcomes by way of attraction.27 Though soft power generally is thought to include a nation’s values, social norms, and culture, academic studies have not fully demonstrated that a nation’s legal dimensions—specifically its legal institutions and adherence to the rule of law—are also a form of soft power.28 This part will attempt to make this showing, citing to aspects of the American constitutional design that may be attractive to people of other communities, including Muslims.29 The legal principles established by the Framers and enshrined in the Constitution are a source of attraction only if we have meaningfully adhered to them in practice. Part II will posit that the Supreme Court’s robust evaluation of cases in the wartime context suggests that the nation has been faithful to the rule of law even in times of national stress. As support, this part will provide examples of cases involving challenges to the American response to wars both before and after 9/11, the discussion of which will exhibit American respect for the rule of law. While the substantive results of some of these cases may be particularly pleasing to Muslims, for instance the extension of habeas protections to detainees in Guantánamo,30 this part will make clear that it is the legal process—not substantive victories for one side or against the government—which is the true source of American legal soft power. If it is the case that the law may be an element of soft power conceptually and that the use of the legal process has reflected this principle in practice, the conclusion argues that it would benefit American national security for others in the world to be made aware of the American constitutional framework and the judiciary’s activities related to the war. Such information would make it more likely that other nations and peoples, especially moderate Muslims, will be attracted to American interests. This Article thus reaches a conclusion that may seem counterintuitive—that the judicial branch, in the performance of its constitutional duty of judicial review, furthers American national security and foreign policy objectives even when it may happen to strike down executive or legislative arguments for expanded war powers to prosecute the current war on terror and even though the executive and legislature constitute the foreign policy branches of the federal government. In other words, a “loss” for the executive or legislature, may be considered, in truth, a reaffi rmation of our constitutional system and therefore a victory for the entire nation in the neglected but necessary post-9/11 war of ideas.31 As such, it is the central contention of this Article that the judicial branch is a repository of American soft power and thus a useful tool in the post-9/11 conflict.

## NR

### 2NR O/V

#### Supreme Court legitimacy is *on the brink* due to recent polarizing rulings—it must avoid being pulled into the fray of partisan decisionmaking in the status quo. Polarizing rulings, even if popular, diminish its credibility—that’s Gershman.

#### The Aff’s gun ban is exactly that sort of polarizing ruling—the Court would be forced to rule on it and there is widespread controversy—that’s Murao.

#### Supreme Court legitimacy is key to prevent global conflict—the American respect for *foundational constitutional principles* as manifested through the Court is a core aspect of soft power and key to conflict surpression—that’s Sidhu.

### 2NR—L Wall

#### <<Will Rule>>

#### Normal means is Supreme Court ruling on federal handgun ban—empirics: even limiting handguns to one per month was challenged in federal courts.

Kopel 15 [David Kopel, Research Director of the Independence Institute, Adjunct Professor of Advanced Constitutional Law, Denver University, Sturm College of Law, Associate Policy Analyst, Cato Institute, “D.C. gun registration law ruled partly unconstitutional” September 18, 2015 <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/09/18/d-c-gun-registration-law-ruled-unconstitutional/>] RDK

The U.S. Court of Appeals for the District of Columbia Circuit [today ruled](http://www.cadc.uscourts.gov/internet/opinions.nsf/46AD1BE68518069B85257EC400534ABB/%24file/14-7071-1573768.pdf) that several parts of the District’s gun registration law violate the Second Amendment. The court held the following provisions unconstitutional: registered guns be re-registered every three years. a gun must be physically brought to the D.C. police headquarters in order to registered. persons seeking to register a gun must pass a test about firearms laws. prohibition on registering more than one handgun per month.

#### A ban on guns is distinct from other regulations – the courts have to rule on it

Ford 14 [Dana Ford, Newsdesk Editor, writer and editor of breaking news for CNN Digital, “Judge rules Chicago gun ban is unconstitutional” February 26, 2014, http://www.cnn.com/2014/01/06/us/chicago-gun-ban/]RDK

A federal judge ruled Monday that Chicago's ban on virtually all sales and transfers of firearms is unconstitutional. "The stark reality facing the City each year is thousands of shooting victims and hundreds of murders committed with a gun. But on the other side of this case is another feature of government: certain fundamental rights are protected by the Constitution, put outside government's reach, including the right to keep and bear arms for self-defense under the Second Amendment," wrote U.S. District Judge Edmond Chang. "Chicago's ordinance goes too far in outright banning legal buyers and legal dealers from engaging in lawful acquisitions and lawful sales of firearms," he continued. Chang explicitly did not rule out other types of regulation, short of a complete ban, in order to "minimize the access of criminals to firearms and to track the ownership of firearms. "But the flat ban on legitimate sales and transfers does not fit closely with those goals," Chang wrote.

#### <<Perceived>>

#### Liberal rulings are *heavily scrutinized* and ensure *future conservative wins*

Ware 13

(Honorable Charles J., “SCOTUS Synopsis: U.S. Supreme Court 2012-2013 Term,” Open Salon, 1-24, <http://open.salon.com/blog/charlesjware/2013/01/24/scotus_synopsis_gestalt_us_supreme_court_2012-2013_term>)

The term will also provide signals about the repercussions of Chief Justice John G. Roberts Jr.’s surprise decision in June to join the court’s four more liberal members and supply the decisive fifth vote in the landmark decision to uphold President Obama’s health care law. Every decision of the new term will be scrutinized for signs of whether Chief Justice Roberts, who had been a reliable member of the court’s conservative wing, has moved toward the ideological center of the court.¶ The term could clarify whether the health care ruling will come to be seen as the case that helped Chief Justice Roberts protect the authority of his court against charges of partisanship while accruing a mountain of political capital in the process. He and his fellow conservative justices might then run the table on the causes that engage him more than the limits of federal power ever have: cutting back on racial preferences, on campaign finance restrictions and on procedural protections for people accused of crimes.

### 2NR—L AT: winners win

#### This might be true for the President…definitely not of the Supreme Court – there is no restriction on what cases they can hear or how many of them they can arbitrate…this argument literally makes no sense

#### Even if they’re right in theory, our link outweighs. Justices think in terms of limited capital and will constrain their rulings because of the plan

Yoo 4

(John C., Professor of Law, University of Texas, Texas LR, November, 83 Tex. L. Rev. 1)

n443. This last point is quite controversial. Jesse Choper has argued, for example, that "the people's reverence and tolerance is not infinite and the Court's public prestige and institutional capital is exhaustible." The judiciary's ability to strike down laws without incurring severe institutional costs, therefore, "is determined by the number and frequency of its attempts to do so, the felt importance of the policies it disapproves, and the perceived substantive correctness of its decisions." Choper, supra note 35, at 139. Others, by contrast, have asserted that the Court may - at least in some circumstances - actually enhance its legitimacy by actively confronting the political branches. See, e.g., Peter M. Shane, Rights, Remedies and Restraint, [64 Chi.-Kent L. Rev. 531, 546 (1988)](http://www.lexis.com/research/buttonTFLink?_m=11cba94a2e0463ed82e517fc38fdbd65&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b83%20Tex.%20L.%20Rev.%201%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=1258&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b64%20Chi.-Kent.%20L.%20Rev.%20531%2cat%20546%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=68&_startdoc=51&wchp=dGLbVzb-zSkAl&_md5=0f60d59f3a3132dcd480986426f03eed) (suggesting that, in some cases, the Court may enhance its legitimacy through opposing the political branches). It would be exceptionally difficult to verify either proposition empirically; about all that can be said with confidence is that the Court sometimes seems to behave as if it thinks its "institutional capital" is limited in this way, and the notion may at least constrain judicial behavior in this sense. See Young, State Sovereign Immunity, supra note 92, at 58-60.

### 2NR—L AT: Plan popular

#### The link only goes our direction – the Court will *take the blame* but *won’t get any credit*

Grosskopf and Mondak ‘98

(Anke, Prof PoliSci – U Pitt and Jeff, Prof PoliSci – Florida Stat, Political Research Quarterly,, v. 51, n3, September, p. 635)

Few of us cheer an umpire’s good call with the same passion that we boo when the umpire gets one wrong, and we certainly do not remember the good calls when we talk about the game at work on Monday. We hypothesize that precisely such a negativity bias operates on perception concerning the Supreme Court, meaning that the harm the Court suffers from its unpopular rulings is not offset by a boost in public esteem from its popular rulings. In research consistent with the negativity effect, several studies of the Supreme Court have found that, as in other contexts, negative information is more memorable than positive. Specifically, respondents offered approximately three times more disliked than liked cases when answering open-ended questions about the Court’s actions (Murphy and Tanenhaus 1968; Adamany and Grossman 1983). Also, a mathematical model of public support for the Supreme Court casts the negativity bias in formal terms, and shows that observed change in confidence in the Court in the period of 1973 to 1994 is consistent with the presence of a very strong negativity effect (Mondak and Smithey 1997).

#### More reasons they can’t win a link turn –

#### A. Negative reactions overwhelm any positive benefit that the Court could achieve

Friedman ‘5

Barry Friedman, the Jacob D. Fuchsberg Professor of Law, New York University School of Law, December 2005, “Article: The Politics of Judicial Review,” Texas Law Review, 84 Tex. L. Rev. 257, p. lexis

The critical question thus becomes how deep the Court's diffuse support among the general public is; for if theory holds, this is the leash on which the Court operates. Actually, a bungee cord might be a better analogy; for, in operation, the diffuse support hypothesis suggests that the judiciary can stray a certain distance from public opinion but that ultimately it will be snapped back into line. n393 Testing the length and flexibility of the cord is hard to do, however. It may be that there is greater tolerance for judicial deviation in some directions, such as with regard to the First Amendment. n394¶ Although the Court's degree of freedom of movement around public opinion may not be certain, positive scholars are fairly confident that one major determinant is information. The dynamics here are complex, but some generalities may be possible. Both negative and positive reactions to the Court influence public opinion, but negative reactions seem to be more intense and have a shorter half-life. n395 Perhaps it is for this reason that the [\*328] less people hear about the Court, the better for it. n396 As time passes, people develop a store of good feelings about the Supreme Court, reflected in the Court's relatively strong performance in public mood indicators. n397 Commentators who have studied public opinion and the Court regularly advise it to keep a low profile. n398

#### B. The abrupt nature of the ruling causes the link

Marshall ‘2

[William Marshall, prof of law @ UNC, Fall 2002 (73 U. Colo. L. Rev. 1217)]

It might also be argued that the judicial activism question is misguided because judicial activism is not inherently wrong. Rather, the proper inquiry should simply be whether a case was correctly decided - not whether it was activist. Although I agree that a determination of activism is not the same as a determination of merit (an activist decision is not necessarily wrong, a non-activist decision is not necessarily correct), the activism inquiry can shed light on the merits issue. A decision that overturns a federal law while ignoring precedent, text, history, and jurisdictional limitations would appropriately be subject to an activist critique regardless of result. In addition, one need not be completely in the camps of Alexander Bickel, Robert Nagel, Mark Tushnet, and others to recognize that there is value in judicial restraint. Court overreaching may negatively affect the political capital of the judiciary. Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962). Abrupt judicial action invalidating politically achieved results may undermine long-term support for the principles the decision was designed to achieve. Robert F. Nagel, Constitutional Cultures: The Mentality and Consequences of Judicial Review (1989). Courts may well be less receptive to progressive social and economic action than are the political branches. Mark Tushnet, Taking the Constitution Away from the Courts (1999). Finally, the activism critique is important in that it sets rhetorical constraints on actions that might otherwise appear unbounded. The legitimacy of a particular decision cannot be completely appraised without evaluating the deciding court's methodology. Activism is a part of that inquiry.

#### C. negativity bias

Grosskopf and Mondak 98

(Anke, Prof PoliSci – U Pitt and Jeff, Prof PoliSci – Florida Stat, Political Research Quarterly,, v. 51, n3, September, p. 636-7)

Few of us cheer an umpire’s good call with the same passion that we boo when the umpire gets one wrong, and we certainly do not remember the good calls when we talk about the game at work on Monday. We hypothesize that precisely such a negativity bias operates on perception concerning the Supreme Court, meaning that the harm the Court suffers from its unpopular rulings is not offset by a boost in public esteem from its popular rulings. In research consistent with the negativity effect, several studies of the Supreme Court have found that, as in other contexts, negative information is more memorable than positive. Specifically, respondents offered approximately three times more disliked than liked cases when answering open-ended questions about the Court’s actions (Murphy and Tanenhaus 1968; Adamany and Grossman 1983). Also, a mathematical model of public support for the Supreme Court casts the negativity bias in formal terms, and shows that observed change in confidence in the Court in the period of 1973 to 1994 is consistent with the presence of a very strong negativity effect (Mondak and Smithey 1997).