

WHAT DETERMINES THE INSTITUTIONAL LEGITIMACY OF THE HIGH COURT OF AUSTRALIA?

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Judicial legitimacy is fundamental to ensuring public acceptance of courts' decisions when judges have no electoral mandate. Yet, in Australia, we know very little about the legitimacy of the courts in the eyes of the general public or the factors associated with judicial legitimacy. Drawing on a survey of a representative sample of Australian adults, we address the question: what is the level of legitimacy of, or diffuse support for, the High Court of Australia among the Australian public, and what factors are correlated with the legitimacy of the Court? Our findings suggest that judicial legitimacy in Australia is mainly dependent upon people's commitment to structural democracy and democratic institutions. Consistent with previous studies regarding the Supreme Court of the United States, we find that Australians' loyalty to the High Court is not dependent on ideological commitment, for example, to ideas of tolerance or individual liberty. Instead, diffuse support for the High Court is based, primarily, on people's level of confidence in national institutions more broadly, on their level of support for notions of the rule of law, and on their commitment to the multi-party political system.

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This research was approved by Deakin University Human Research Ethics (Project 2018-115) and Monash University Human Ethics Committee (Project 12474). We thank Matthew Groves, Sarah Murray, the anonymous referees, and participants in a seminar at the School of Politics and International Relations at the Australian National University for helpful comments on an earlier version of this article. We are also grateful for the professional editing and thoughtful comments we received from the members of the *Melbourne University Law Review* who worked on this article.

Cite as:

Shiri Krebs, Ingrid Nielsen and Russell Smyth, 'What Determines the Institutional Legitimacy of the High Court of Australia?' (2019) 43(2) *Melbourne University Law Review* (advance)

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I INTRODUCTION

Judicial legitimacy has been described as a bundle of ‘factors justifying ... public trust’.¹ Public confidence in the courts is a contributing factor to judicial legitimacy, but is narrower in scope.² Judicial legitimacy is often equated with a court having diffuse support, which differs from specific support. Specific support is issue-specific and depends on whether one approves of the outcome in a specific case; however, diffuse support depends on having a ‘reservoir of ... goodwill’ that runs deeper than whether the outcome in a specific case is favourable.³ Tom Tyler describes legitimacy as

¹ Marc A Loth, ‘Courts in a Quest for Legitimacy: A Comparative Approach’ in Nick Huls, Maurice Adams and Jacco Bomhoff (eds), *The Legitimacy of Highest Courts’ Rulings: Judicial Deliberations and Beyond* (TMC Asser Press, 2009) 267, 268, quoted in Sarah Murray, ‘Preventive Justice, the Courts and the Pursuit of Judicial Legitimacy’ in Tamara Tulich et al (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge, 2017) 195, 202.

² Murray (n 1) 202.

³ John M Scheb and William Lyons, ‘Diffuse Support, Specific Support and Attentiveness: Components of the Public’s Assessment of the Supreme Court’ (1999) 27(4) *Southeastern Political Review* 765, 768–9, quoting David Easton, *A Systems Analysis of Political Life* (John Wiley & Sons, 1965) 273. We use the terms diffuse support and judicial legitimacy inter-

a psychological property of an authority, institution, or social arrangement that leads those connected to it to believe that it is appropriate, proper, and just. Because of legitimacy, people feel that they ought to defer to decisions and rules, following them voluntarily out of obligation rather than out of fear of punishment or anticipation of reward. ... Being able to gain voluntary acquiescence from most people, most of the time, due to their sense of obligation increases effectiveness during periods of scarcity, crisis, and conflict.⁴

Judicial legitimacy matters when decisions are controversial or unpopular. When courts make decisions of which everyone approves, legitimacy is not needed. However, when courts make decisions that are unpopular or with which people disagree, it is important that they enjoy legitimacy among those who disagree. In this sense, as James Gibson describes it, 'legitimacy is for losers'.⁵ In such circumstances, it is important that courts have 'a reservoir of goodwill' upon which they can draw to implement decisions that are disagreeable.⁶

Judicial legitimacy is important because it ensures that the public accepts decisions by courts, despite judges having no electoral mandate. While legitimacy is conferred on the Parliament via electoral mandate, judges are unelected. Similarly to the United States, the power of judicial review in Australia is not expressed in the *Constitution*.⁷ Rather, the power of the High Court of Australia to exercise judicial review to uphold the *Constitution* is

changeably in this article. Niels Petersen uses the terms 'diffuse legitimacy' and 'specific legitimacy' to refer to diffuse and specific support respectively: Niels Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa* (Cambridge University Press, 2017) 65.

⁴ Tom R Tyler, 'Psychological Perspectives on Legitimacy and Legitimation' (2006) 57 *Annual Review of Psychology* 375, 375. See also Sarah Murray, Tamara Tulich and Harry Blagg, 'The Innovative Magistrate and Legitimacy: Lessons for a Mobile "Solution-Focused" Model' (2017) 40(2) *University of New South Wales Law Journal* 897, 898–900.

⁵ James L Gibson, 'Legitimacy Is for Losers: The Interconnections of Institutional Legitimacy, Performance Evaluations, and the Symbols of Judicial Authority' in Brian H Bornstein and Alan J Tomkins (eds), *Motivating Cooperation and Compliance with Authority: The Role of Institutional Trust* (Springer, 2015) 81, 83 (emphasis omitted). See also Sarah Murray, 'A Letter to the Loser'? Public Law and the Empowering Role of the Judgment' (2014) 23(4) *Griffith Law Review* 545, 557.

⁶ Gregory A Caldeira and James L Gibson, 'The Etiology of Public Support for the Supreme Court' (1992) 36(3) *American Journal of Political Science* 635, 658 ('The Etiology of Public Support').

⁷ It can, however, be implied from ch III, which separates out judicial power from legislative and executive power: *Australian Constitution* ss 75–6. See also Linda Kirk, 'Judicial Power' in Anthony Blackshield, Michael Coper and George Williams (eds), *Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 372, 372–3.

mainly derived from the principle established by the United States Supreme Court in *Marbury v Madison*,⁸ which the framers of the *Australian Constitution* took for granted.⁹ Robert Woods notes: ‘A court may assert that it is competent to exercise judicial review [based on *Marbury v Madison*], but that assertion is meaningful only to the extent that other powerful political actors acquiesce to it.’¹⁰

Moreover, the High Court is vulnerable to public opposition to its decisions because it regularly decides cases against the preferences of the majority of the population. On the occasion of his swearing in as Chief Justice of the High Court, Sir Gerard Brennan stated:

Judicial method is not concerned with the ephemeral opinions of the community. The law is most needed when it stands against popular attitudes sometimes engendered by those with power and when it protects the unpopular against the clamour of the multitude.¹¹

⁸ 5 US (1 Cranch) 137 (1803).

⁹ Sir Anthony Mason, ‘The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience’ (1986) 16(1) *Federal Law Review* 1, 3, 6; Chief Justice Murray Gleeson, ‘Judicial Legitimacy’ (2000) 20(1) *Australian Bar Review* 4, 7–8; Justice McHugh, ‘The Strengths of the Weakest Arm’ (2004) 25(1) *Australian Bar Review* 181, 182–3. See also PH Lane, ‘Judicial Review or Government by the High Court’ (1966) 5(2) *Sydney Law Review* 203, 204–5; B Galligan, ‘Judicial Review in the Australian Federal System: Its Origin and Function’ (1979) 10(4) *Federal Law Review* 367; William G Buss, ‘Andrew Inglis Clark’s Draft Constitution, Chapter III of the *Australian Constitution*, and the Assist from Article III of the *Constitution of the United States*’ (2009) 33(3) *Melbourne University Law Review* 718, 781–8. In *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 (‘*Communist Party Case*’), Fullagar J stated that ‘in our system the principle of *Marbury v Madison* is accepted as axiomatic’: at 262. Sir Owen Dixon, ‘Marshall and the Australian Constitution’ (1955) 29(8) *Australian Law Journal* 420, 425 states that

[t]o the framers of the *Commonwealth Constitution* the thesis of *Marbury v Madison* was obvious. It did not need the reasoned eloquence of Marshall’s utterance to convince them that simply because there were to be legislatures of limited powers, there must be a question of *ultra vires* for the courts.

See also A-G (WA) v *Marquet* (2003) 217 CLR 545, where Gleeson CJ, Gummow, Hayne and Heydon JJ stated that in Australia, ‘[i]t is the courts, rather than the legislature itself, which have the function of finally deciding whether an Act is or is not within power’: at 570 [66].

¹⁰ Robert Woods, ‘Rights Review in the High Court and the Cultural Limits of Judicial Power’ (2013) 41(3) *Federal Law Review* 585, 590. See also Keith E Whittington, *Political Foundations of Judicial Supremacy: The President, the Supreme Court, and Constitutional Leadership in US History* (Princeton University Press, 2007) 9.

¹¹ Sir Gerard Brennan, ‘Speech on Swearing In as Chief Justice’ (Speech, High Court of Australia, 21 April 1995) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/brennanj/brennanj_swearing.htm>, archived at <<https://perma.cc/8XK5-CFP9>>.

Russell Smyth and Vinod Mishra found that, for extended periods (1917–29, 1932–41, 1949–72, and 1983–96) throughout the High Court’s past, it has been counter-majoritarian, where being counter-majoritarian is measured by the propensity to strike down legislation enacted by the current government (or a previous government of the same political persuasion).¹²

A few high-profile examples help to make the point. In the *Australian Communist Party v Commonwealth* (‘*Communist Party Case*’),¹³ the High Court ruled that the *Communist Party Dissolution Act 1950* (Cth) was invalid,¹⁴ despite an Australian Gallup Poll in May 1950 finding that 80% of voters favoured banning the Communist Party (and that poll was carried out one month before Australia entered the Korean War).¹⁵ In *Tait v The Queen*,¹⁶ the Premier of Victoria, Sir Henry Bolte, attempted to rush through the execution of Robert Tait prior to the *Mental Health Act 1959* (Vic) coming into force the next day, which, it was thought, would make the execution impossible.¹⁷ Bolte’s motives were political, given that there was general

¹² Russell Smyth and Vinod Mishra, ‘Judicial Review, Invalidation and Electoral Politics: A Quantitative Survey’ in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 18, 30.

¹³ *Communist Party Case* (n 9).

¹⁴ *Ibid* 3.

¹⁵ See George Winterton, ‘The Significance of the *Communist Party Case*’ (1992) 18(3) *Melbourne University Law Review* 630, 645. Winterton also suggests that public opinion was fuelled by ‘anti-communist hysteria fanned by the Korean War’: at 630. See also Fiona Wheeler, ‘The Latham Court: Law, War and Politics’ in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 159, where the *Communist Party Case* is described as ‘strongly countermajoritarian’: at 176. Interestingly, following the High Court case, a 1951 referendum sought to amend the *Constitution* and achieve what the High Court had struck down. The overall popular vote in that referendum was slightly against constitutional amendment (50.48%), which suggests that the favourable opinion expressed in the earlier poll (of 80% support) had changed rapidly (or was simply mistaken): Charles H Sheldon, ‘Public Opinion and High Courts: Communist Party Cases in Four Constitutional Systems’ (1967) 20(2) *Western Political Quarterly* 341, 353–4. If, indeed, the original poll had correctly identified the public opinion on this matter at the time, then the decision of the High Court was possibly a factor in the apparent shift in public opinion.

¹⁶ (1962) 108 CLR 620 (‘*Tait’s Case*’). The full transcript of the proceedings before the High Court sitting in Melbourne on 31 October 1962 are reproduced in Creighton Burns, *The Tait Case* (Melbourne University Press, 1962) 163–81.

¹⁷ Troy Simpson, ‘*Tait’s Case*’ in Anthony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 657, 657.

popular support for capital punishment at the time.¹⁸ Dixon CJ adjourned the case, granting a stay of execution ‘entirely so that the authority of this Court may be maintained’.¹⁹ When the Solicitor-General, Sir Henry Winneke, felt unable to give an assurance that the executive would not go ahead with the execution, the Court formally issued an injunction preventing the State government from executing Tait.²⁰

More recently, during the Mason Court, a small number of controversial decisions²¹ were heavily criticised by federal and state politicians on the basis that ‘the Court exceeded its legitimate bounds by appropriating to itself a power to remake the law, particularly the *Constitution*’.²² For example, McHugh J, who was a member of the Mason Court, suggested that recognition of an implied right to freedom of political speech amounted to the Court inserting a new s 129 into the *Constitution*.²³ As Paul Kildea and George Williams discuss, public responses to the most controversial decisions of the Mason Court were mixed; hence it is not clear that the Court was acting against the preferences of the majority.²⁴ The ‘political storm’ generated by the more controversial decisions of the Mason Court and the vitriolic nature of

¹⁸ According to Peter Blazey, ‘[t]here could well have been political factors involved, since the federal government had only scraped home by one seat in 1961, and it may have been felt that there was political mileage in a hanging’: Peter Blazey, *Bolte: A Political Biography* (Jacaranda Press, 1972) 92. See generally Burns (n 16) on Bolte’s political motivation for wanting to execute Tait: at ch 8. According to Roy Morgan polling in April 1962, six months after the High Court hearing, 53% of Australians favoured the death penalty for those convicted of murder: ‘Australians Say Penalty for Murder Should be Imprisonment (64%) Rather than the Death Penalty (23%)’, *Roy Morgan* (Web Page, 27 August 2009) <<http://www.roymorgan.com/findings/finding-4411-201302260051>>, archived at <<https://perma.cc/ML26-RVP4>>. This number corresponds with the figure given in Blazey (n 18), who states that Bolte ‘claimed the Labor Party [who opposed the execution] was ignoring public opinion, because 54 per cent of Victorians were in favour of capital punishment’: at 96.

¹⁹ *Tait’s Case* (n 16) 624.

²⁰ Simpson (n 17) 658.

²¹ See, eg, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (‘ACTV’); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 (‘Nationwide’); *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

²² Paul Kildea and George Williams, ‘The Mason Court’ in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 244, 244.

²³ *McGinty v Western Australia* (1996) 186 CLR 140, 234. It should be noted that McHugh J was referring to a freestanding principle of representative democracy in this context.

²⁴ Kildea and Williams (n 22) 255–7.

the political attacks,²⁵ however, underpinned the importance of the Court having legitimacy among those who disagreed with the decisions.

In late 2017, the High Court (sitting as the Court of Disputed Returns) decided on the citizenship of seven Members of Parliament pursuant to s 44(i) of the *Constitution*.²⁶ These cases — and their results — stirred up debates concerning problems posed by section 44 and its interpretation by the High Court,²⁷ culminating with a parliamentary report urging a referendum and amendment of section 44.²⁸ How people perceive the Court's role in cases such as this, when they may not agree with the outcome, depends on the legitimacy of the Court or the reservoir of goodwill that the Court has established.

Alexander Hamilton famously described the judicial branch as the least dangerous, given that the legislature controls the money and the executive controls force, but the judiciary controls neither.²⁹ As Chief Justice Gleeson puts it, because the Court makes decisions that will not always be popular with the public, the Parliament, or the executive, among the branches of government, the judiciary is 'the most dependent upon habitual conformity to its decisions, on the part of the community and the other branches of government'.³⁰ If the Court lacks legitimacy, this makes it more vulnerable to

²⁵ HP Lee, 'The Implied Freedom of Political Communication' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 383, 392, discussing the political reaction to the *Nationwide* (n 21) and *ACTV* (n 21) decisions.

²⁶ *Re Canavan* (2017) 263 CLR 284.

²⁷ See, eg, Graeme Orr, 'Entitled to Vote? Then You Should Be Entitled to Run', *Inside Story*, (Web Page, 15 August 2017) <<https://insidestory.org.au/entitled-to-vote-then-you-should-be-entitled-to-run/>>, archived at <<https://perma.cc/V3QE-2FLE>>.

²⁸ Joint Standing Committee on Electoral Matters, Parliament of Australia, *Excluded: The Impact of Section 44 on Australian Democracy*, (Report, May 2018) xix [5.45], archived at <<https://perma.cc/H8QK-VPLA>>.

²⁹ Alexander Hamilton, 'The Federalist No 78: The Judiciary Department' in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, ed Ian Shapiro (Yale University Press, 2009) 391, 392, cited in Chief Justice Murray Gleeson, 'Public Confidence in the Judiciary' (2002) 14(7) *Judicial Officers' Bulletin* 49, 49.

³⁰ Gleeson, 'Public Confidence in the Judiciary' (n 29) 49. James Gibson, 'Public Reverence for the United States Supreme Court: Is the Court Invincible?' (Research Paper, Department of Political Science, Washington University, 15 July 2012) ('Public Reverence') makes the similar point that the 'political capital [of courts] must be found in resources other than finances and force. For courts, their principal political capital is institutional legitimacy': at 9. The High Court can spend funds appropriated to it by Parliament and is reliant on the processes established by the executive for appropriating those funds: *High Court of Australia Act 1979* (Cth) s 35. Successive Chief Justices, including Chief Justice Susan Kiefel, have lamented

attacks from politicians and media commentators who do not agree with its decisions.³¹ Of course, here, legitimacy is not completely exogenous and can be undermined by constant political attack. Traditionally, it was the role of the Commonwealth Attorney-General to defend judges from political attacks when they occurred and promote understanding of the Court's decisions.³² This function fell out of favour when Daryl Williams was Commonwealth Attorney-General. Williams refused to defend the Court's decisions against such political attacks, on the basis that it was not the role of the Attorney General to do so.³³ The role of explaining the decisions of the Court, and maintaining diffuse support, is now largely left to the legal profession and the Court itself.³⁴ High Court judges seek to increase awareness through giving interviews and speeches, and through making the proceedings and judgments of the Court more accessible on its website.³⁵

'longstanding problems in Court funding': see, eg, High Court of Australia, *Annual Report 2016–2017* (Report, 30 November 2017) 6.

- ³¹ Brandon L Bartels and Christopher D Johnston, 'On the Ideological Foundations of Supreme Court Legitimacy in the American Public' (2013) 57(1) *American Journal of Political Science* 184, 185.
- ³² See LJ King, 'The Attorney General, Politics and the Judiciary' (2000) 74(7) *Australian Law Journal* 444; Alana McCarthy, 'The Evolution of the Role of the Attorney-General' (2004) 11(4) *eLaw Journal: Murdoch University Electronic Journal of Law* 26:1–12, 1–2 [2]; Gerard Carney, 'Comment: The Role of the Attorney-General' (1997) 9(1) *Bond Law Review* 1, 7.
- ³³ Daryl R Williams, 'Who Speaks for the Courts?' in Australian Institute of Judicial Administration (ed), *Courts in a Representative Democracy* (1995) 183, 190, 192; Daryl Williams, 'Judges Must Put Up Their Own Defence', *Australian Financial Review* (Melbourne, 27 April 2001) 57, cited in Justice Michael Kirby, 'The Judiciary in Federation Centenary Year: Good News, Bad News, No News' (Australian Institute of Judicial Administration Orator, Sydney, 22 June 2001) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_aija.htm>, archived at <<https://perma.cc/QC5Y-A6DS>>; Daryl Williams, 'Judicial Independence and the High Court' (1998) 27(2) *University of Western Australia Law Review* 140, where he states, 'I encourage judges to take more responsibility for defending themselves and their courts against criticism': at 150. A more recent (and more striking) example is Attorney-General George Brandis' open criticism of certain environmental litigants and litigations, which constitutes a de facto participation in attacks on the courts, by directly attacking those who rely on the court system: see Olivia Salama and Rob White, 'Dissent, Litigation, and Investigation: Hitting the Powerful Where It Hurts' (2017) 25(4) *Critical Criminology* 523, 530.
- ³⁴ This finding is supported by the *Guide to Judicial Conduct*, which allocates this function to the head judge of the relevant jurisdiction and makes no mention of the Attorney-General. That lack of reference to the Attorney-General may provide implicit acceptance by judges that this guardian role of the Attorney-General has ended: see Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, 2017) 26 [5.7.2].
- ³⁵ The audiovisual recordings of all Full Court hearings heard in Canberra have been made available on the High Court's website dating back to 2013: 'Recent AV Recordings', *High Court of Australia* (Web Page) <<http://www.hcourt.gov.au/cases/recent-av-recordings>>.

Given the significance of judicial legitimacy for the rule of law, it is important to understand the extent to which the courts are viewed as being legitimate, and the factors associated with differing levels of judicial legitimacy. A large literature exists on the determinants of the legitimacy of courts in the United States,³⁶ as well as select courts in other countries, such as the European Court of Justice³⁷ and the South African Constitutional Court.³⁸ There is also one multi-country study of the legitimacy of several final courts

archived at <<https://perma.cc/626J-M4P6>>. The High Court has also released media statements on important cases since *Commonwealth v Tasmania* (1983) 158 CLR 1, which marked the first time that the Court released a statement explaining one of its decisions: Martin Clark, 'Remembering the Tasmanian Dam Case', *Opinions on High* (Blog Post, 24 July 2013) <<http://blogs.unimelb.edu.au/opinionsonhigh/clark-tasmanian-dam/>>, archived at <<https://perma.cc/X8PF-MVXK>>. The High Court now posts summaries of judgments on its website in a form that should be intelligible to the public: see, eg, 'Case Summaries 2018', *High Court of Australia* (Web Page) <<http://www.hcourt.gov.au/registry/case-summaries-2018>>, archived at <<https://perma.cc/X6ZW-55Y3>>.

³⁶ See, eg, Damon M Cann and Jeff Yates, 'Homegrown Institutional Legitimacy: Assessing Citizens' Diffuse Support for State Courts' (2008) 36(2) *American Politics Research* 297; Sara C Benesh, 'Understanding Public Confidence in American Courts' (2006) 68(3) *Journal of Politics* 697; James L Gibson, Gregory A Caldeira and Lester Kenyatta Spence, 'Measuring Attitudes toward the United States Supreme Court' (2003) 47(2) *American Journal of Political Science* 354; James L Gibson and Gregory A Caldeira, 'Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court' (2009) 71(2) *Journal of Politics* 429 ('Knowing the Supreme Court'); James L Gibson and Gregory A Caldeira, 'Confirmation Politics and the Legitimacy of the US Supreme Court: Institutional Loyalty, Positivity Bias, and the Alito Nomination' (2009) 53(1) *American Journal of Political Science* 139 ('Confirmation Politics'); James L Gibson, 'The Legitimacy of the US Supreme Court in a Polarized Polity' (2007) 4(3) *Journal of Empirical Legal Studies* 507 ('The Legitimacy of the US Supreme Court'); James L Gibson, Milton Lodge and Benjamin Woodson, 'Losing, but Accepting: Legitimacy, Positivity Theory, and the Symbols of Judicial Authority' (2014) 48(4) *Law and Society Review* 837; James L Gibson, "'New-Style" Judicial Campaigns and the Legitimacy of State High Courts' (2009) 71(4) *Journal of Politics* 1285; Dino P Christenson and David M Glick, 'Chief Justice Roberts's Health Care Decision Disrobed: The Microfoundations of the Supreme Court's Legitimacy' (2015) 59(2) *American Journal of Political Science* 403; James L Gibson and Michael J Nelson, 'Is the US Supreme Court's Legitimacy Grounded in Performance Satisfaction and Ideology?' (2015) 59(1) *American Journal of Political Science* 162.

³⁷ See, eg, James L Gibson and Gregory A Caldeira, 'The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice' (1995) 39(2) *American Journal of Political Science* 459; James L Gibson and Gregory A Caldeira, 'Changes in the Legitimacy of the European Court of Justice: A Post-Maastricht Analysis' (1998) 28(1) *British Journal of Political Science* 63. See also Erik Voeten, 'Public Opinion and the Legitimacy of International Courts' (2013) 14(2) *Theoretical Inquiries in Law* 411.

³⁸ See, eg, James L Gibson and Gregory A Caldeira, 'Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court' (2003) 65(1) *Journal of Politics* 1; James L Gibson, 'The Evolving Legitimacy of the South African Constitutional Court' in François du Bois and Antje du Bois-Pedain (eds), *Justice and Reconciliation in Post-Apartheid South Africa* (Cambridge University Press, 2008) 229.

in Europe, Russia and the United States.³⁹ The related literature for Australian courts is scant. There is a small literature that examines public confidence in the criminal justice system, covering the ‘criminal courts’, ‘police’ and ‘prisons’. These studies have found that confidence in the criminal justice system and sentencing is generally low in Australia, and lower than in other western nations.⁴⁰ Kildea and Williams examine public attitudes to major decisions of the Mason Court based on polling data, but do not explicitly address legitimacy.⁴¹ Ingrid Nielsen and Russell Smyth examine public awareness of the High Court, based on responses from a nationally representative sample.⁴² They motivate their research by pointing out that public awareness of the Court is important because it is expected to be correlated with judicial legitimacy,⁴³ but they do not measure legitimacy or examine its determinacy for the High Court. Sarah Murray, Tamara Tulich and Harry Blagg explore legitimacy theory but in the lower court context, focusing on the implications of innovation for the legitimacy of magistrates.⁴⁴

In this article, we seek to answer the question: what is the level of legitimacy of, or diffuse support for, the High Court among the Australian public, and what factors are correlated with the legitimacy of the Court? To do so, we draw on the findings from a survey that was designed by the authors and administered to a representative sample of the adult Australian population over a four-week period in April and May 2018. The survey asked participants questions designed to elicit information on the legitimacy of the Court, legitimacy of the judges, confidence in institutions, political knowledge, political tolerance, support for the rule of law, support for the multi-party system, and support for individual liberty. A feature of the study is that we use multi-item instruments to measure each of these constructs, which have been

³⁹ James L Gibson, Gregory A Caldeira and Vanessa A Baird, ‘On the Legitimacy of National High Courts’ (1998) 92(2) *American Political Science Review* 343.

⁴⁰ See David Indermaur and Lynne Roberts, Australian Institute of Criminology, *Trends and Issues in Crime and Criminal Justice* (Report No 387, November 2009) and studies cited therein; Sharyn Roach Anleu and Kathy Mack, ‘The Work of the Australian Judiciary: Public and Judicial Attitudes’ (2010) 20(1) *Journal of Judicial Administration* 3. A more recent study found ‘moderate levels of confidence in the courts and sentencing’ based on a survey of 1,200 Victorians in August 2008: Karen Gelb, Sentencing Advisory Council (Vic), *Sentencing Matters: Predictors of Confidence* (Report, August 2011) 19.

⁴¹ Kildea and Williams (n 22) 255–7.

⁴² Ingrid Nielsen and Russell Smyth, ‘What the Australian Public Knows about the High Court’ (2019) 47(1) *Federal Law Review* 31.

⁴³ *Ibid* 32.

⁴⁴ Murray, Tulich and Blagg (n 4).

validated in previous studies. We focus on the High Court, and not the lower courts, for four reasons. First, as the final court of appeal for Australia,⁴⁵ the High Court's decisions are, in a sense, the most visible, and have the greatest practical significance for the populace as a whole. This also means that they are likely to attract the greatest controversy, and are most likely to come under attack from the politicians who disagree with them. Hence, having a reservoir of public support for its decisions is likely to be particularly important for the High Court. Second, the High Court has jurisdiction over important constitutional cases that influence society as a whole, and as such, its decisions require a broader legitimacy than, for example, concrete judgments in particular cases that are mainly relevant for their parties alone. Third, the High Court has asserted its primacy in the Australian judicial system and in fashioning the common law of Australia,⁴⁶ and as such has particular institutional significance in the Australian legal system. The fourth reason is practical. There are no studies of the factors correlated with judicial legitimacy for any Australian court. Thus, it makes sense to begin with a study of the High Court, the findings from which can serve as a benchmark for future studies.

As most of the existing literature on the determinants of judicial legitimacy is for the United States Supreme Court, or other courts in the United States, it is important to be cognisant of the institutional differences between the High Court and United States Supreme Court and what this might imply for the factors correlated with the High Court's judicial legitimacy. For one, the appointment and confirmation process of justices to the United States Supreme Court is a highly visible — and often very politicised — process.⁴⁷ In contrast, the appointment of Justices to the High Court tends to be a fairly secretive and opaque process. Similarly, the United States Supreme Court has a significant role in interpretation of the *United States Constitution* and, in particular, the *Bill of Rights*. There are many human rights, advocacy and policy interest groups that actively identify test cases to bring before the Supreme Court in order to effect social and legal change.⁴⁸ There is no parallel in Australia, where no bill of rights exists, and where, consequently, there is

⁴⁵ Section 11 of the *Australia Act 1986* (Cth) formally ended all rights of appeal to the Privy Council.

⁴⁶ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 91, 155 [148] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

⁴⁷ Timothy R Johnson and Jason M Roberts, 'Presidential Capital and the Supreme Court Confirmation Process' (2004) 66(3) *Journal of Politics* 663.

⁴⁸ The American Civil Liberties Union is a notable example: see 'Supreme Court Cases', *ACLU* (Web Page) <<https://www.aclu.org/defending-our-rights/court-battles/supreme-court>>, archived at <<https://perma.cc/HE4T-GTK6>>.

no equivalent to United States Supreme Court decisions such as *Brown v Board of Education*⁴⁹ on racial segregation or *Roe v Wade*⁵⁰ on abortion, which have become highly politicised over the years, and form a lens through which the public views the Court.

That the High Court is less politicised and that Australia does not have a bill of rights suggest that judicial legitimacy in Australia may depend more on how the public perceives the Court's broad commitment to upholding democratic institutions and processes and enforcing the rule of law, and less on the protection of minority rights and individual liberties. It is also arguable that differences in the levels of public familiarity with the judges themselves between the two countries could contribute to differences in the relative importance of these factors as correlates with judicial legitimacy. In the United States Supreme Court, the Justices have a celebrity status, and the position of several of the justices on minority rights is well-known.⁵¹ However, in Australia, the identity and views of individual Justices are less well-known. Justice Virginia Bell has suggested:

The reason I suggest why the community is uninterested in the judges who make these decisions is because of an unstated acceptance that the decisions are made on legal merit and not on the political or ideological sympathies of the judge.⁵²

Justice Bell's observations are consistent with the public viewing judicial legitimacy more in terms of how the Court enforces the rule of law and upholds broad democratic principles, and less in terms of the position of the Justices on highly politicised social, political and legal controversies.

II WHAT FACTORS ARE CORRELATED WITH JUDICIAL LEGITIMACY? THEORIES, VARIABLES, AND HYPOTHESES

A Judicial Legitimacy

To measure judicial legitimacy, we use two variables. The first is an index of institutional legitimacy of the High Court, which adapts four of the five items

⁴⁹ 347 US 483 (1954).

⁵⁰ 410 US 113 (1973).

⁵¹ A recent and demonstrative example of this phenomenon is the Hollywood film that centres on the earlier legal battles of Justice Ruth Bader Ginsburg (popularly known as 'RBG'): *On the Basis of Sex* (Focus Features, 2018).

⁵² Justice Virginia Bell, 'Examining the Judge: Launch of Issue 40(2) UNSW Law Journal' (Speech, Sydney, 29 May 2017) 6, archived at <<https://perma.cc/UGJ7-E8EZ>>.

used by Bartels and Johnson.⁵³ This index conceptualises institutional legitimacy as: (i) general trust in the Court; (ii) willingness to reject fundamental alterations to the functioning of the Court; (iii) viewing the Court as impartial; and (iv) viewing the Court as not overtly political.⁵⁴ It is conceivable that the general public may separate out the legitimacy of the Court as an institution and the legitimacy of its judges. Hence, we use a second, alternative measure of judicial legitimacy, which is a two-item index designed to specifically reflect how the public views the Justices of the High Court.⁵⁵

The literature exploring judicial legitimacy, while providing inconsistent findings, has identified five distinct groups of factors that may potentially influence levels of judicial legitimacy: (i) support for democratic institutions and processes; (ii) support for democratic values; (iii) political knowledge; (iv) political ideology; and (v) an array of demographic characteristics, including age, gender, and education.⁵⁶

B Support for Democratic Institutions and Processes

To measure support for democratic institutions and processes we use three indices: (i) confidence in institutions; (ii) support for a multi-party system;

⁵³ Bartels and Johnston (n 31) 188–9.

⁵⁴ The four items used to measure institutional legitimacy were as follows:

- 1 The High Court can usually be trusted to make decisions that are right for Australia as a whole.
- 2 The decisions of the High Court favour some groups more than others.
- 3 The High Court gets too mixed up in politics.
- 4 If the High Court started making a lot of rulings that most Australians disagreed with, it would be better to abolish the Court altogether.

Answers were given on a five-point scale where 1 = disagree and 5 = agree.

These are the four items recommended by Gibson, Caldeira and Spence (n 36) 358, 363–4. A fifth item — ‘Generally speaking, how much do you trust the High Court to operate in the best interests of the Australian people?’ (answered on a five-point scale where 1 = not at all and 5 = a great deal, based on Bartels and Johnston (n 31) 188–9) — was excluded from our analysis as it failed to load alongside the other items in either exploratory or confirmatory factor analyses, indicating that it measures a concept distinct from institutional legitimacy.

⁵⁵ The two items used to measure legitimacy of High Court justices were as follows:

- 1 The Justices of the High Court represent the best legal minds in Australia.
- 2 The Justices of the High Court push their own political agenda.

Answers were given on a five-point scale where 1 = disagree and 5 = agree.

⁵⁶ See, eg, Gibson, ‘The Legitimacy of the US Supreme Court’ (n 36) 515, 523–32.

and (iii) support for the rule of law. Each of these indices includes several previously verified items.

1 *Confidence in Institutions*

To measure confidence in institutions, we use a six-item index based on questions asked in the World Values Survey.⁵⁷ The confidence in institutions index is conceptualised in terms of confidence in six core institutions.⁵⁸ Previous studies, based on data collected in the Australian Survey of Social Attitudes,⁵⁹ have found that confidence in institutions in Australia tends to be low.⁶⁰ We hypothesise that participants who have more confidence in institutions in general will offer more diffuse support for the High Court and its Justices.

H1: There is a positive correlation between confidence in institutions and judicial legitimacy.

2 *Support for the Rule of Law*

Support for the rule of law is measured using a four-item index.⁶¹ This index has been widely used in previous research.⁶² Support for the rule of law is

⁵⁷ See, eg, '2005–2006 World Values Survey' in Ronald Inglehart et al (eds), *World Values Survey: Round Five* (JD Systems Institute, 2014) 1, 11 <<http://www.worldvaluessurvey.org/WVSDocumentationWV5.jsp>>, archived at <<https://perma.cc/47DA-5GCL>> ('World Values Survey').

⁵⁸ The question used to measure public confidence in institutions was as follows:

How much confidence do you have in each of the following:

- 1 The Prime Minister of Australia
- 2 The High Court of Australia
- 3 The Australian federal Parliament
- 4 The Australian Defence Force
- 5 The police
- 6 The criminal justice system

Answers were given on a five-point scale where 1 = not at all and 5 = a great deal.

⁵⁹ See 'The Australian Survey of Social Attitudes', *Australian Consortium for Social and Political Research* (Web Page) <<https://www.acspri.org.au/aussa>>, archived at <<https://perma.cc/YF4N-4UBF>>.

⁶⁰ See, eg, the studies reviewed by Gelb (n 40) 7–9.

⁶¹ Support for the rule of law is measured using the following four items:

- 1 It is not necessary to obey a law you consider unjust.
- 2 Sometimes it might be better to ignore the law and solve problems immediately rather than wait for a legal solution.

conceptualised along a spectrum ranging from particularism to universalism. At the particularism end, some individuals will perceive that a law should only be obeyed if the outcome is desirable, while at the universalism end, individuals will perceive that laws should be obeyed, irrespective of outcome.⁶³ As Gibson puts it: ‘Those who love law tend to love the Court.’⁶⁴ In the Australian context, the High Court, as the final court of appeal, is the principal guardian of the rule of law in Australia.⁶⁵ Following the research conducted in other jurisdictions, we hypothesise that people who support the universal application of the rule of law will express more diffuse support for the Court because they will perceive the Court as implementing the universal rule of law, irrespective of whether they see the specific outcome as desirable.

H2: There is a positive correlation between support for the rule of law and judicial legitimacy.

3 Support for a Multi-Party System

Support for a multi-party system is measured using a three-item index⁶⁶ that has been used in previous research.⁶⁷ Support for a multi-party system is a proxy for broader support for democratic institutions and processes, of which

- 3 The government should have some ability to bend the law in order to solve pressing social and political problems.
- 4 It is not necessary to obey the laws of a government that I did not vote for.

Answers were given on a five-point Likert scale where 1 = disagree and 5 = agree.

⁶² Previous research using this four-item index includes James L Gibson, *Overcoming Apartheid: Can Truth Reconcile a Divided Nation?* (Russell Sage Foundation, 2004) 386, 398; James L Gibson, ‘Changes in American Veneration for the Rule of Law’ (2007) 56(2) *DePaul Law Review* 593, 601–2; Gibson, ‘Public Reverence’ (n 30) 41–2.

⁶³ Gibson, ‘Public Reverence’ (n 30) 41.

⁶⁴ Gibson, ‘The Legitimacy of the US Supreme Court’ (n 36) 529.

⁶⁵ Chief Justice Murray Gleeson, ‘Courts and the Rule of Law’ (Speech, University of Melbourne, 7 November 2001) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_ruleoflaw.htm>, archived at <<https://perma.cc/KP42-F453>>. See also *ibid*, where Gibson describes the United States Supreme Court in this way.

⁶⁶ Support for a multi-party system is measured using the following three items:

- 1 The party that gets the most votes at the election ought not to have to share political power with the political minority.
- 2 Australia would be better off if we just outlaw all political parties.
- 3 What Australia needs is one political party which will rule the country.

Answers were given on a five-point Likert scale where 1 = disagree and 5 = agree.

⁶⁷ Previous research to use this three-item index includes: Gibson, ‘The Legitimacy of the US Supreme Court’ (n 36) 538. See also Gibson and Caldeira, ‘Knowing the US Supreme Court’ (n 36) 437.

the Court is one.⁶⁸ Previous research in the United States context has consistently found that those committed to democracy tend to provide stronger diffuse support for the Supreme Court.⁶⁹ Hence, we expect support for a multi-party system to be positively correlated with judicial legitimacy in Australia.

H3: There is a positive correlation between support for a multi-party system and judicial legitimacy.

C Support for Democratic Values

We use two indices to measure support for democratic values: support for individual liberty; and political tolerance. These two measures represent both democratic ideas in the abstract, and the application of democratic values to disliked groups.⁷⁰ In contrast to some of the previous literature, we separate these two indices from the indices used to measure support for democratic institutions and structures. This allows us to refine our analysis, and to distinguish between commitment to basic democratic structures and other, more substantive measures of democratic values, both in the abstract and with regard to disliked groups. Importantly, as these value-based measures are more culture-dependent, we find it useful to be able to compare democratic values in Australia, and their potential correlation with judicial legitimacy, to democratic values in the United States and other countries.

⁶⁸ See Sir Anthony Mason, 'Future Directions in Australian Law' (1987) 13(3) *Monash University Law Review* 149, 163:

Our evolving concept of the democratic process is moving beyond an exclusive emphasis on parliamentary supremacy and majority will. It embraces a notion of responsible government which respects the fundamental rights and dignity of the individual and calls for the observance of procedural fairness in matters affecting the individual. The proper function of the courts is to protect and safeguard this vision of the democratic process.

On the role of courts in a democracy, see Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press, 1996).

⁶⁹ Caldeira and Gibson, 'The Etiology of Public Support' (n 6) 653; Gibson, 'The Legitimacy of the US Supreme Court' (n 36) 529.

⁷⁰ Mark Peffley and Robert Rohrschneider, 'Democratization and Political Tolerance in Seventeen Countries: A Multi-Level Model of Democratic Learning' (2003) 56(3) *Political Research Quarterly* 243 ('Democratization and Political Tolerance').

1 *Political Tolerance*

Political tolerance is an inherently political concept, understood by some to be a part of the social dimension of liberalism.⁷¹ Others find that intolerance is expressed by both liberals and conservatives towards opposing political groups.⁷² To measure political tolerance, we use the two-step content-controlled approach employed in the World Values Survey.⁷³ First, we asked participants to name their most disliked group from among seven choices.⁷⁴ Once the participant had selected the group he or she disliked the most, we asked if an individual from that group should be allowed to: (i) hold public office; (ii) teach in schools; or (iii) hold public demonstrations.⁷⁵ Allowing participants to select the group that they dislike most before asking the civil liberties questions is important because it separates out the participant's political tolerance from political ideology. If, instead of doing it this way, we had specified a group — say left-wing extremists — a left-leaning participant may be more sympathetic and, hence, appear more tolerant than a right-leaning participant, whereas, in fact, tolerance is being confounded by ideology. Following the existing literature measuring political tolerance in various countries, we measure political tolerance in Australia as a scale of answers to the three civil liberties questions.⁷⁶

We hypothesise that people who have higher political tolerance will express more diffuse support for the Court. The reason is that if the Court

⁷¹ John L Sullivan et al, 'The Sources of Political Tolerance: A Multivariate Analysis' (1981) 75(1) *American Political Science Review* 92, 97.

⁷² Jarret T Crawford and Jane M Pilanski, 'Political Intolerance, Right and Left' (2014) 35(6) *Political Psychology* 841.

⁷³ See, eg, Inglehart et al (n 57) 8.

⁷⁴ The seven choices were: (i) Islamic fundamentalists; (ii) immigrants; (iii) Neo-Nazis; (iv) left-wing extremists; (v) welfare recipients; (vi) homosexuals; and (vii) criminals.

⁷⁵ One of the groups that the participants could select was 'criminals'. Section 44(ii) of the *Constitution* states that any person who is 'attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer' cannot be a candidate for federal Parliament. This section only prohibits a person from being elected to the federal Parliament while awaiting sentence or in prison. It does not extend to people released from prison after they have served their sentence. There are several instances in which individuals have been elected to the federal Parliament after being released from prison: Ian Holland, 'Crime and Candidacy' (Current Issues Brief No 22 2002–03, Politics and Public Administration Group, 24 March 2003) 4–5.

⁷⁶ See, eg, Sandra Marquart-Pyatt and Pamela Paxton, 'In Principle and in Practice: Learning Political Tolerance in Eastern and Western Europe' (2007) 29(1) *Political Behavior* 89, 95–6.

decides cases in favour of groups which they dislike, people who are more politically tolerant are more likely to respect the decision.

H4: There is a positive correlation between political tolerance and judicial legitimacy.

2 Support for Individual Liberty

Support for individual liberty is measured using a three-item index that has been used in previous research.⁷⁷ Previous studies have found a positive correlation between support for individual liberty and diffuse support for the United States Supreme Court.⁷⁸ To some extent this may reflect that the United States has a *Bill of Rights*, which has made its Supreme Court ‘the quintessential minoritarian institution in the American system of government’.⁷⁹ In the absence of a bill of rights, the High Court has not assumed the same role as protector of minority interests in Australia.⁸⁰ If, however, support for individual liberty is a proxy for broader support for democratic values, we would expect a positive correlation.

⁷⁷ Previous research to use this three-item index includes: Gibson and Caldeira, ‘Knowing the Supreme Court’ (n 36); Gibson, ‘The Legitimacy of the US Supreme Court’ (n 36); Caldeira and Gibson, ‘The Etiology of Public Support’ (n 6).

Support for individual liberty was measured using the following three items:

- 1 Society shouldn’t have to put up with those who have political ideas that are extremely different from the majority.
- 2 It is better to live in an orderly society than to allow people so much freedom that they can become disruptive.
- 3 Free speech is just not worth it if it means that we have to put up with the danger to society of extremist political views.

Answers were given on a five-point Likert scale where 1 = disagree and 5 = agree.

⁷⁸ Gibson and Caldeira, ‘Knowing the Supreme Court’ (n 36) 438; Gibson, ‘The Legitimacy of the US Supreme Court’ (n 36) 529; Caldeira and Gibson, ‘The Etiology of Public Support’ (n 6) 651, 652.

⁷⁹ Gibson, ‘The Legitimacy of the US Supreme Court’ (n 36) 529–30. See also Robert M Cover, ‘The Origins of Judicial Activism in the Protection of Minorities’ (1982) 91(7) *Yale Law Journal* 1287.

⁸⁰ See Nicholas Aroney and Benjamin B Saunders, ‘On Judicial Rascals and Self-Appointed Monarchs: The Rise of Judicial Power in Australia’ (2017) 36(2) *University of Queensland Law Journal* 221. The authors argue that there has been a modest rise in judicial power in Australia, but that the High Court has refrained from playing the overt policy role that final courts of appeal play in countries with a bill of rights. On the impact of bills of rights on the role of courts in rights protection, see generally JD Heydon, ‘Are Bills of Rights Necessary in Common Law Systems?’ (2014) 130 (July) *Law Quarterly Review* 392. Cf Harry Woolf, ‘Judicial Review: The Tensions between the Executive and the Judiciary’ (1998) 114 (October) *Law Quarterly Review* 579, 579–80, which states that the purpose of judicial review is to protect ‘the vulnerable sections of the community whose only source of protection is the courts.’

H5: There is a positive correlation between support for individual liberty and judicial legitimacy.

D *Political Knowledge*

To measure political knowledge, we asked nine multiple choice questions, testing awareness of the High Court and the Australian political system.⁸¹ We used multiple choice because previous research suggests that closed-ended multiple choice questions are a preferable way to test political knowledge, rather than to ask open-ended questions.⁸² For each question, participants were asked to select between five possible answers, of which one was ‘do not know’. Consistent with the more accepted view in extant research, we code ‘do not know’ as incorrect.⁸³ We follow the most common approach in the existing literature and sum the number of correct answers to obtain our measure of political knowledge.⁸⁴

We hypothesise that there is a positive correlation between political knowledge and judicial legitimacy, drawing on positivity theory.⁸⁵ Positivity

⁸¹ The nine questions were: (i) Who is the current Chief Justice of Australia?; (ii) Who is the current Prime Minister of Australia?; (iii) Who is the Leader of the Opposition in the federal Parliament?; (iv) How are judges of the High Court selected?; (v) How long do justices on the High Court remain in office?; (vi) How many Justices are there on the High Court?; (vii) How many female judges are there currently on the High Court?; (viii) Who has the last say when there is a conflict over the *Constitution*?; and (ix) Which party holds the majority of seats in the federal House of Representatives?

⁸² Jeffery J Mondak, ‘Developing Valid Knowledge Scales’ (2001) 45(1) *American Journal of Political Science* 224, 225.

⁸³ Jeffery J Mondak, ‘Reconsidering the Measurement of Political Knowledge’ (2000) 8(1) *Political Analysis* 57 suggests ‘do not know’ answers reveal some political knowledge and should be given partial credit: at 80. The more accepted view, however, is that ‘do not know’ responses to closed-ended items should be grouped with incorrect responses: see Robert C Luskin and John G Bullock, ‘“Don’t Know” Means “Don’t Know”: DK Responses and the Public’s Level of Political Knowledge’ (2011) 73(2) *Journal of Politics* 547, 554; Stephen A Jessee, ‘“Don’t Know” Responses, Personality, and the Measurement of Political Knowledge’ (2017) 5(4) *Political Science Research and Methods* 711.

⁸⁴ See, eg, Gibson and Caldeira, ‘Confirmation Politics’ (n 36); Benjamin Woodson, James L Gibson and Milton Lodge, ‘Judicial Symbols and the Link between Institutional Legitimacy and Acquiescence’ (Conference Paper, Annual Meeting of the American Political Science Association, 25 March 2011) 20.

⁸⁵ James L Gibson and Gregory A Caldeira, *Citizens, Courts, and Confirmations: Positivity Theory and the Judgments of the American People* (Princeton University Press, 2009) (‘Citizens, Courts, and Confirmations’) provides an outline of positivity theory, which they term ‘positivity bias’: at 7–8. See also David Adamany and Joel Grossman, ‘Support for the Su-

theory suggests that people who have more knowledge of federal Parliament and the executive on one hand, and the High Court on the other, will be better able to distinguish between the *political* functions that the various branches perform. In particular, people with higher political knowledge are more likely to be able to distinguish between the party politics of the Parliament and the far less overt political role of the High Court.⁸⁶ As a result, people with higher political knowledge will view the High Court as having more legitimacy than if the Court was regarded as being more political. As Nielsen and Smyth note, this reflects the relatively low esteem in which the Australian public holds its politicians.⁸⁷ It is important to note that positivity theory does not postulate that having more political knowledge per se results in the Court being viewed with greater legitimacy. Instead, political knowledge is a proxy for engagement with the political process. Individuals who have higher political knowledge are likely to be more aware of how politicians interact, for example in Question Time in Parliament, and contrast this with how judges and counsel interact in the Court. The latter exposes them to powerful legitimising symbols, such as how counsel and judges are attired and honorific forms of address (eg ‘Your Honour’, ‘My learned friend’, ‘If it pleases the Court’). These symbols show that the Court is not an ordinary political institution in the Australian political scheme.⁸⁸

H6: There is a positive correlation between political knowledge and judicial legitimacy.

preme Court as a National Policymaker’ (1983) 5(4) Law and Politics Quarterly 405; Caldeira and Gibson, ‘The Etiology of Public Support’ (n 6).

⁸⁶ This is not to say that the High Court does not have a political role. It has long been recognised that it does: see, eg, Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967); Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (University of Queensland Press, 1987); Haigh Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (Cambridge University Press, 2000). The point is simply that the High Court does not have a party-political role in the manner in which the Parliament and executive do.

⁸⁷ Nielsen and Smyth (n 42) point out that a survey administered in 2016 found that the extent to which the Australian public trusted its politicians was at its lowest level since 1969, with only 26% of participants expressing confidence in the federal government: at 57 n 7. See also Henry Belot, ‘Confidence in Democracy Hits Record Low as Australians “Disaffected with Political Class”’, *ABC News* (Web Page, 20 December 2016) <<http://www.abc.net.au/news/2016-12-20/2016-australian-election-disaffected-study/8134508>>, archived at <<https://perma.cc/V969-6Y28>>.

⁸⁸ Gibson and Caldeira, ‘Knowing the Supreme Court’ (n 36) make this point in respect to the US Supreme Court: at 437. See also Gibson and Caldeira, *Citizens, Courts, and Confirmations* (n 85) 9.

E *Political Ideology*

We measure political ideology based on two variables: a self-reported political ideology item; and a specific issue-based item focused on support for same-sex marriage.

1 *Self-Reported Political Ideology*

We control for political views, but do not hypothesise the relationship between political views and judicial legitimacy. In the US literature, it is well established that there is no systematic relationship between political views and diffuse support for the United States Supreme Court. Democrats and Republicans express roughly equal support for the Court, as do individuals who identify as liberals or conservatives.⁸⁹ Even among studies that suggest political ideology influences judicial legitimacy, it is ultimately concluded that a good share of the public is currently in ideological agreement with the Court, ‘resulting in sizable levels of legitimacy.’⁹⁰ Whether political ideology may impact the High Court’s legitimacy as a result of ideological disagreement with its decisions or not, the existing Court is described as restrained: it exercises its political power mainly through the development of separation of powers principles and federalism, rather than through intervening in the scope and content of constitutional rights and freedoms.⁹¹ Consequently, we do not expect political ideology to have a strong relationship with the High Court’s legitimacy at this time.

2 *Support for Same-Sex Marriage*

We asked participants how they voted in the 2017 plebiscite on same-sex marriage. One might expect that people holding more socially progressive views would support same-sex marriage.⁹² As discussed above, there does not seem to be an association between political views and judicial legitimacy based on the United States evidence.⁹³ Polling in the lead-up to the plebiscite

⁸⁹ Gibson and Caldeira, ‘Knowing the Supreme Court’ (n 36) 438; Gibson, ‘Public Reverence’ (n 30) 26–7. See also Gibson, ‘The Legitimacy of the US Supreme Court’ (n 36) 524.

⁹⁰ Bartels and Johnston (n 31) 197. However, Bartels and Johnson note that the conditional nature of this legitimacy means that ‘as times change ... agreement could turn into disagreement, resulting in lower legitimacy among those who had previously shown high legitimacy’.

⁹¹ Aroney and Saunders (n 80) 245.

⁹² See Darren E Sherkat et al, ‘Religion, Politics, and Support for Same-Sex Marriage in the United States, 1988–2008’ (2011) 40(1) *Social Science Research* 167, 177, which found a correlation between politically conservative views and opposition to same-sex marriage in the US.

⁹³ See above n 89 and accompanying text.

suggested that a majority of supporters of all major political parties, except Family First, agreed with same-sex marriage. However, support for same-sex marriage was higher among those who vote for the Australian Labour Party and Australian Greens.⁹⁴

The High Court rejected a challenge to the legal validity of the plebiscite in the period leading up to it.⁹⁵ One possibility is that those who voted 'yes' in the plebiscite may have appreciated the opportunity to vote and have had a higher level of specific support for the Court as a result. This said, the High Court case against the plebiscite was mounted by supporters of same-sex marriage who opposed the plebiscite. Therefore, another possibility is that at least some of those who voted 'yes' in the plebiscite disagreed with the Court's decision and have had a lower level of specific support for the Court as a result. Either way, as noted in the introduction, specific support for the Court (ie level of support for a specific decision) is not the same as diffuse support, which depends on having a reservoir of goodwill that runs deeper than whether one supports the outcome in a given case.⁹⁶ Given that support for same-sex marriage is an additional measure for political views, we do not state a hypothesis, which is consistent with our position on political views and judicial legitimacy.

⁹⁴ An analysis of support for same-sex marriage by voting preference, based on the results of a Roy Morgan poll administered in February 2016, found the following:

- Liberal voters: 59% approve, 41% disapprove;
- National voters: 67% approve, 33% disapprove;
- Labor voters: 88% approve, 12% disapprove;
- Greens voters: 97% approve, 3% disapprove;
- Family First voters: 49% approve, 51% disapprove; and
- Independent/others voters: 68% approve, 32% disapprove.

'Large Majority of Australians (76%) in Favour of Allowing Gay Marriage', *Roy Morgan* (Web Page, 1 March 2016) <<http://www.roymorgan.com/findings/6707-australian-views-on-gay-marriage-february-march-2016-201607191635>>, archived at <<https://perma.cc/7FM4-A97G>>. The polling results suggest that Labor voters were more in favour of same-sex marriage. However, of the 150 federal electoral divisions, just 17 divisions recorded a majority 'no' vote in the plebiscite, and most of these were in Labor-held western Sydney electorates: Nick Evershed, 'Full Results of Australia's Vote for Same-Sex Marriage, Electorate by Electorate: Interactive', *The Guardian* (online, 15 November 2017) <<https://www.theguardian.com/australia-news/datablog/ng-interactive/2017/nov/15/same-sex-marriage-survey-how-australia-voted-electorate-by-electorate>>, archived at <<https://perma.cc/P6AF-R7LP>>.

⁹⁵ *Wilkie v Commonwealth* (2017) 263 CLR 487.

⁹⁶ See above n 3 and accompanying text.

F *Demographic Factors*

1 *Age*

Whether older Australians will express more or less diffuse support for the High Court is not clear-cut. One possibility is that older Australians may be more engaged with the political process, including having a higher awareness of the High Court. This could reflect interest — one's peers may be more likely to discuss current affairs and politics as one gets older — and that older Australians have more time to follow current affairs.⁹⁷ Positivity theory suggests that political engagement is linked to judicial legitimacy through exposure to powerful judicial symbols.⁹⁸ Older Australians may be more impressed by such symbols, which would contribute to diffuse support.⁹⁹ On the other hand, older Australians may be less engaged with the political process.¹⁰⁰ This may be because older Australians may be less adept at accessing information — for example, via the internet or social media — and process information more slowly as a result of cognitive decline, at least beyond a certain age.¹⁰¹ Existing empirical evidence suggests there might be a positive relationship between age and diffuse support for the Court. Sharyn Roach Anleu and Kathy Mack found that older Australians were more likely to value the work of courts and judicial officers, based on responses in the 2007 Australian Survey of Social Attitudes.¹⁰² Nielsen and Smyth found that there was a positive correlation between age and awareness of the High Court, based on a nationally representative survey administered in November 2017.¹⁰³ On this basis, we hypothesise a positive association between the age

⁹⁷ See Brittany Bramlett, 'Aged Communities and Political Knowledge' (2013) 41(4) *American Politics Research* 674, 675.

⁹⁸ See above n 88 and accompanying text.

⁹⁹ For evidence that older generations (at least in countries that have experienced substantial economic growth in the past five decades) are more likely to exhibit respect for authority, see Ronald F Inglehart, 'Changing Values among Western Publics from 1970 to 2006' (2008) 31(1–2) *West European Politics* 130.

¹⁰⁰ Richard R Lau and David P Redlawsk, 'Older but Wiser? Effects of Age on Political Cognition' (2008) 70(1) *Journal of Politics* 168.

¹⁰¹ Richard Lau and David Redlawsk, *How Voters Decide: Information Processing in Election Campaigns* (Cambridge University Press, 2006) ch 6.

¹⁰² Roach Anleu and Mack (n 40) 5.

¹⁰³ Nielsen and Smyth (n 42) 53–4.

of the participant and judicial legitimacy, while recognising an alternative hypothesis of a negative association.¹⁰⁴

H7: There is a positive correlation between age and judicial legitimacy.

2 Gender

We hypothesise that females will express lower diffuse support for the High Court than males on two grounds. The first is that there is a large literature attesting to a gender gap in political knowledge in favour of males.¹⁰⁵ This is relevant because, if females have lower political knowledge, they may be less aware of the institutional differences between the three branches of government and thus be less exposed to the legitimising effect of judicial symbols, consistent with positivity theory. As such, they may be more likely to view the judiciary as having less legitimacy.

The second reason is that previous studies conducted in the US have proffered that historically disadvantaged groups, such as females, may perceive unequal treatment from the courts and have less affinity with them.¹⁰⁶ As Gibson notes:

As a ‘reservoir of goodwill’, legitimacy is not easily shaken in the short term by policy disagreements, but over the long haul, the repeated failure of an institution to meet policy expectations can weaken and even destroy that institution’s legitimacy in the eyes of disaffected groups.¹⁰⁷

A recent literature from a feminist perspective on the High Court’s jurisprudence, which has emerged in light of the appointment of Australia’s first

¹⁰⁴ Another possibility is that the relationship between the age of the participant and judicial legitimacy is nonlinear, meaning the relationship is positive to a certain age, but becomes negative after that age. To test this possibility, we would need to know the exact age of the participant and its quadratic (age squared). In the survey, participants did not provide their exact age. Instead, they provided their age in an interval (eg 18–24, 25–34, 45–54, and so on) so we are not able to test if the relationship is nonlinear.

¹⁰⁵ See, eg, Mónica Ferín and Marta Fraile, ‘Measuring Political Knowledge in Spain: Problems and Consequences for the Gender Gap in Knowledge’ (2014) 147 (July–September) *Reis: Revista Española de Investigaciones Sociológicas* 53, 66; Marta Fraile, ‘Do Women Know Less about Politics than Men? The Gender Gap in Political Knowledge in Europe’ (2014) 21(2) *Social Politics* 261, 283; Jason Barabas et al, ‘The Question(s) of Political Knowledge’ (2014) 108(4) *American Political Science Review* 840, 843, 849; Kim L Fridkin and Patrick J Kenney, ‘How the Gender of US Senators Influences People’s Understanding and Engagement in Politics’ (2014) 76(4) *Journal of Politics* 1017, 1030; Jennifer Jerit and Jason Barabas, ‘Revisiting the Gender Gap in Political Knowledge’ (2017) 39(4) *Political Behavior* 817, 818.

¹⁰⁶ See, eg, Cann and Yates (n 36) 310.

¹⁰⁷ Gibson, ‘The Legitimacy of the US Supreme Court’ (n 36) 515.

female Chief Justice, has emphasised that the Court's reasoning has, and continues to be, masculine in approach.¹⁰⁸

H8: Females will view the judiciary as having lower legitimacy than males.

3 Education

We hypothesise a positive relationship between education and diffuse support for the Court for two reasons. One reason is that better educated individuals are more likely to pay attention to the Court, learn more about it, and, as a consequence, be exposed to the Court's legitimising symbols.¹⁰⁹ The other reason is that, at the individual level, there is a positive relationship between education and holding democratic values.¹¹⁰ Thus, better educated individuals

¹⁰⁸ For a discussion of the historical underrepresentation of women in the legal profession in Australia, see Justice Mary Gaudron, 'Speech for Women Lawyers Association of New South Wales 50th Anniversary Gala Dinner' (Speech, NSW Parliament House, 13 June 2002) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gaudronj_wlansw.html>, archived at <<https://perma.cc/A2HS-RRND>>. While the High Court now has three female Justices (including the Chief Justice), the feminist perspective on the High Court's jurisprudence makes two points. First, prior to the appointment of Justice Gaudron in 1987, the Court was the sole preserve of male judges, and this affected the form of reasoning. Second, the appointment of a female Chief Justice, and several female justices since Justice Gaudron, has not disrupted law and legal reasoning in the ways that some feminist legal theorists had hoped: Kcasey McLoughlin, 'Feminism, Women Judges, Judicial Diversity and the High Court of Australia' (2017) 7(2) *feminists@law* 1, 2 ('Feminism and Women Judges'). See also at 4:

[I]t might be argued that masculinism is so deeply embedded within existing legal frameworks that the culture and privilege attached to them might be immovable. If such a destabilisation is possible, it will take the appointment of feminist judges who are not only aware of the importance of equality and the gendered nature of law, but also, willing and able to articulate that awareness.

See also Kcasey McLoughlin, 'The Politics of Gender Diversity on the High Court of Australia' (2015) 40(3) *Alternative Law Journal* 166; Kcasey McLoughlin, 'A Particular Disappointment?' Judging Women and the High Court of Australia' (2015) 23(3) *Feminist Legal Studies* 273; Kcasey McLoughlin, 'Judicial Fictions and the Fictive Feminists: Re-Imagination as Feminist Critique in *PGA v The Queen*' (2015) 24(4) *Griffith Law Review* 592; Heather Roberts, 'Women Judges, "Maiden Speeches", and the High Court of Australia' in Beverley Baines, Daphne Barak-Erez and Tsvi Kahana (eds), *Feminist Constitutionalism: Global Perspectives* (Cambridge University Press, 2012) 113; Margaret Thornton, 'Otherness' on the Bench: How Merit Is Gendered' (2007) 29(3) *Sydney Law Review* 391.

¹⁰⁹ Gibson, 'Public Reverence' (n 30) 33.

¹¹⁰ Seymour Martin Lipset, 'Some Social Requisites of Democracy: Economic Development and Political Legitimacy' (1959) 53(1) *American Political Science Review* 69, 79–80. For empirical evidence on the role of education in fostering democratic values, see generally Robert J Barro, 'Determinants of Democracy' (1999) 107(6) *Journal of Political Economy* S158; Edward L Glaeser et al, 'Do Institutions Cause Growth?' (2004) 9(3) *Journal of Economic Growth* 271.

can be expected to exhibit a cognitive bias in favour of the Court as a part of democratic governance.

H9: Better educated people will view the judiciary as having higher legitimacy.

4 *Born in Australia?*

There are competing arguments concerning the potential effect of the country of birth on the perceived legitimacy of courts. One argument is that people born in Australia express more diffuse support for the High Court than people born overseas. The reason for this expectation is that people born in Australia have grown up with the Australian political system and have been exposed to it all their lives, including learning about it at school. As such, people born in Australia are more likely to be familiar with the Court and are more likely to have been exposed to its legitimising symbols. Immigrants can be expected to be less familiar with the Court as a social institution, and may come from countries in which there is no democratic tradition. Hence, they may be less likely to exhibit the same support for democratic institutions that are associated with diffuse support for the Court.

An opposing argument is that immigrants who have not yet fully assimilated into their destination country, in a democratic society, will have a more positive view of the democratic institutions in their new home. The literature demonstrates that in the United States, later-generation immigrants become more cynical and distrustful of government under certain situations, similarly to other Americans.¹¹¹ Other studies have found that immigrants who have not fully assimilated into American society are actually more trusting of government than those who have assimilated into the American political system.¹¹² Similarly, Mark Correia found that Latino immigrants put more trust in, and feel less discriminated against by, the police than US-born Latinos.¹¹³

Based on these two conflicting sets of arguments, we test two opposing hypotheses on the potential effect of country of birth on judicial legitimacy:

¹¹¹ See Lisa García Bedolla, *Fluid Borders: Latino Power, Identity, and Politics in Los Angeles* (University of California Press, 2005) 107, 132, discussing this phenomenon in the context of the US Latino community.

¹¹² See, eg, Melissa R Michelson, 'Political Trust among Chicago Latinos' (2001) 23(3-4) *Journal of Urban Affairs* 323, 331-2.

¹¹³ Mark E Correia, 'Determinants of Attitudes toward Police of Latino Immigrants and Non-Immigrants' (2010) 38(1) *Journal of Criminal Justice* 99, 105-6.

H10(a): People born in Australia will view the judiciary as having higher legitimacy.

H10(b): People born in Australia will view the judiciary as having lower legitimacy.

III RESEARCH METHODOLOGY: ADMINISTERING THE SURVEY AND DETAILS ON PARTICIPANTS

A survey to elicit information on the above variables, which was designed by the authors, received ethics approval in March 2018. We then contracted the market research firm, Qualtrics, to administer the survey. The survey was administered by Qualtrics in the form of an online questionnaire over a four-week period during April and May 2018. The target sample was 500 participants aged 18 or above who are representative of the Australian adult population in terms of age, education, gender, and their state of residence.

Qualtrics maintain a large panel of individuals who have expressed an interest in participating in market research, and the participants in the study were drawn from that panel. In order for the final sample to be representative of the adult population along the dimensions outlined above, Qualtrics ensured that the sample from its panel was proportioned according to the Australian adult population and then randomised before the sample was administered. In the first instance, Qualtrics sent an email to potential participants outlining how long the survey was expected to take and that responses would be used for research purposes, but to avoid self-selection bias, Qualtrics did not state the subject of the survey.

Once participants invited from the Qualtrics database agreed to participate, they were asked to read an explanatory statement prior to commencing the questionnaire. This outlined the purpose of the survey and that responses would be used to write a paper regarding the level of support for the High Court. Participants were also informed that their involvement in the study was completely voluntary and that the survey would take approximately 10 minutes to complete. To compensate them for their time, participants were given a small cash or in-kind reward (eg airline points or gift cards) for taking part in the survey. The amount or form of reward were not dependent on participants' responses. Participants had the opportunity to request a summary of the responses and a draft copy of this article.

Qualtrics undertook several checks to ensure that the integrity of the final responses was maintained. They checked every internet protocol address and used digital fingerprinting technology to ensure that no participant completed two or more questionnaires. Qualtrics replaced participants who straight-

lined through the questionnaire or completed the questionnaire in less than one third of the average duration to complete the survey.¹¹⁴ The final sample was 518 participants.

IV RESULTS

Table 1 provides descriptive statistics in terms of gender, age, highest level of completed education, place of birth, and state of residence of the participants, as well as the political views of participants and how they voted in the same-sex plebiscite. There were approximately equal numbers of males and females, and a roughly approximate distribution across the five age categories. Around one third of participants had completed a Bachelor's degree or higher. Just over 80% were born in Australia, with the current state of residence reflecting the overall population distribution. Over half (58.7%) considered themselves to hold moderate political views, with the remainder identically distributed either side of moderate. Over two thirds (68.0%) voted 'yes' to same-sex marriage. There was a significant relationship between a participant's political views and whether or not they voted 'yes' in the same-sex marriage plebiscite, with those who voted 'yes' more likely to hold more liberal political views ($\chi^2 (df = 4) = 19.553, p < .001$).

Tables 2 and 3 show the level of diffuse support for the High Court and the level of support for the Justices of the High Court, respectively. The 'diffuse support index' and 'judicial support index' are, respectively, the summed and averaged responses across the individual items designed to measure support for the Court and support for the Justices.

Of the four items, the High Court draws most support in terms of trust, with a majority (53.7%) agreeing with the proposition that the Court can usually be trusted to make decisions that are right for Australia as a whole. The areas in which the Court enjoys the least support are the statements regarding favouritism and getting too mixed up in politics. Overall, 43.9% of participants agreed with the statement that the Court gets too mixed up in politics, while 44.8% of participants agreed with the proposition that the Court favours some groups more than others. This said, less than one third of participants (31.9%) favoured doing away with the Court if it made a lot of rulings with which most Australians disagreed. Additionally, it should be

¹¹⁴ 'Straight-lining' refers to the practice of providing the same answer to every question. The multiple choice questions required one of five possible answers labelled A to E. A participant who straight-lined through the questionnaire would, for example, answer 'A' to every multiple choice question.

noted that a large proportion of participants were neutral on all items. This means that while 43.9% of participants, for example, agreed with the proposition that the Court is too mixed up in politics, only 18.2% of participants disagreed with this statement, while 38.0% neither agreed nor disagreed.

With respect to support for the Justices, a majority of participants (50.6%) agreed with the proposition that the Justices represent the best legal minds in Australia. However, more than one third of participants (35.5%) agreed with the proposition that the Justices pushed their own political agenda. While this is a substantial proportion of the population, a higher percentage of participants believed that the Court as an institution is too mixed up in politics. This may reflect a preference for the Court to stay out of political issues, rather than a belief that the judges are pushing their own personal political agenda.

On the whole, diffuse support for the High Court is ambivalent, as is support for the Justices of the High Court, with the mean level of support for each falling close to the numerical value of three, which denotes that a participant neither agrees nor disagrees with a statement. This is similar to previous findings for the United States Supreme Court.¹¹⁵

Table 1: Descriptive statistics

		Percentage
Gender	Male	48.3
	Female	51.7
Age	18–24	15.1
	25–34	23.6
	35–44	22.0
	45–54	20.3
	55–65	19.1
Level of completed education	Primary school	25.7
	Secondary school	21.8
	Vocational qualification	20.8
	Bachelor's degree	20.3
	Master's degree	10.2
	PhD	1.2

¹¹⁵ See, eg, Gibson, 'Public Reverence' (n 30) 45.

Table 1: Descriptive statistics

Place of birth	Australia	81.1
	Asia	6.0
	Europe (other than UK)	1.9
	New Zealand	2.3
	United Kingdom	3.7
	Other	5.0
State of residence	New South Wales	31.9
	Queensland	20.3
	South Australia	7.1
	Tasmania	5.0
	Victoria	25.3
	Western Australia	10.4
Political views	Very conservative	6.4
	Conservative	14.3
	Moderate	58.7
	Liberal	14.3
	Very liberal	6.4
Voting in the same sex marriage plebiscite	Yes	68.0
	No/did not return the survey	32.0

Note: N = 518 for all items.

Table 2: Diffuse support for the High Court

	% Strongly disagree	% Somewhat disagree	% Neither agree nor disagree	% Somewhat agree	% Strongly agree	Mean	SD
The High Court can usually be trusted to make decisions that are right for Australia as a whole	4.1	15.4	26.8	44.2	9.5	3.4	0.99
The decisions of the High Court favour some groups more than others (R)	5	12	38.2	35.9	8.9	2.68	0.97
The High Court gets too mixed up in politics (R)	4.1	14.1	38	31.7	12.2	2.66	1
If the High Court started making a lot of rulings that most Australians disagreed with, it would be better to abolish the Court altogether (R)	10.4	21	36.7	23.2	8.7	3.01	1.01
Diffuse support index						2.94	0.68

Notes: N = 518 for all items; (R) denotes a reverse coded item, where responses were re-coded to reflect the reverse direction prior to analysis.

Table 3: Support for Justices of the High Court

	% Strongly disagree	% Somewhat disagree	% Neither agree nor disagree	% Somewhat agree	% Strongly agree	Mean	SD
The Justices of the High Court represent the best legal minds in Australia	1.9	9.5	38	40.9	9.7	3.47	0.87
The justices of the High Court push their own political agenda (R)	4.4	11.4	48.6	27.8	7.7	2.77	0.91
Judicial support index						3.12	0.7

Notes: N = 518 for all items; (R) denotes a reverse coded item, where responses were re-coded to reflect the reverse direction prior to analysis.

Table 4 shows the level of confidence that participants have in Australian political institutions. The ‘confidence index’ is the summed and averaged responses across the individual items. On average, the Australian public reported having the least degree of confidence in the Prime Minister and the federal Parliament, with nearly two thirds (62.7%) of the sample reporting that they have no confidence or only a little confidence in the Prime Minister, and 57.3% reporting no confidence or only a little confidence in the federal Parliament. The institutions in which the Australian public reported having the most confidence were the Australian Defence Forces and the police, with over half of the sample (54.3%) reporting that they have a lot or a great deal of confidence in the Australian Defence Force and close to half (46.5%) reporting the same level of confidence in the police. In the remaining two institutions — the High Court and the criminal justice system — the majority of participants had at least a moderate amount of confidence (65.4% and 51.5% respectively). Confidence in these two institutions fell between these two sets of extremes; these were the two institutions in which people had the least extreme views (43.8% had a moderate amount of confidence in the High Court, and 32.2% had a moderate amount of confidence in the criminal justice system). The average response in terms of confidence in the High Court was 2.86, falling just shy of the numerical value associated with the ‘moderate amount’ response category. The finding that confidence in the High Court and the criminal justice system is lower than confidence in the police is consistent with several previous Australian studies and has been attributed to people having more familiarity with the police than with the courts.¹¹⁶

¹¹⁶ Gelb (n 40) and studies cited therein: at 6.

Table 4: Confidence in Australian political institutions

How much confidence do you have in each of the following	% None at all	% A little	% A moderate amount	% A lot	% A great deal	Mean	SD
The Prime Minister of Australia	30.5	32.2	25.7	8.3	3.3	2.22	1.07
The High Court of Australia	6.4	28.2	43.8	16.2	5.4	2.86	0.95
The Australian Federal Parliament	22.2	35.1	31.9	8.7	2.1	2.33	0.99
The Australian Defence Forces	5	12.4	28.4	37.5	16.8	3.49	1.07
The police	7.7	13.9	31.9	32.4	14.1	3.31	1.11
The criminal justice system	19.7	28.8	32.2	14.5	4.8	2.56	1.11
Confidence index						2.8	0.76

Note: N = 518 for all items.

Table 5 shows the level of political knowledge among the participants in terms of the percentage of correct responses to a series of multiple-choice political knowledge questions. The ‘political knowledge index’ is the mean of the sum of correct responses across the individual items. When it comes to questions pertaining to the High Court, political knowledge is considerably lower compared to knowledge pertaining to the federal Parliament. While the vast majority of participants knew the identity of the Prime Minister (95.0%) and the Leader of the Opposition (83.2%), only 16.0% knew the identity of the current Chief Justice. In terms of more general questions about the composition of the High Court, less than one third of participants could correctly identify how the Justices are selected, how long the Justices remain on the Court, how many Justices sit on the Court, or how many of them are women. These results are consistent with those recently reported by Nielsen and Smyth in their study of public knowledge of the High Court.¹¹⁷

Table 5: Political knowledge among the Australian public

Question	Percentage correct
Who is the current Chief Justice of Australia?	16.0
Who is the current Prime Minister of Australia?	95.0
Who is the Leader of the Opposition in the federal Parliament?	83.2
Which one of the following statements best describes how judges on the High Court of Australia are selected?	29.0
Which one of the following statements best describes how long judges on the High Court of Australia remain in office?	17.0
Do you know how many Justices there are on the High Court of Australia?	13.9
Do you know how many of the judges currently sitting on the High Court of Australia are women?	12.5
Do you know who has the last say when there is a conflict over the meaning of the <i>Australian Constitution</i> ?	38.2

¹¹⁷ Nielsen and Smyth (n 42) 46–8.

Table 5: Political knowledge among the Australian public

Who holds the majority of seats in the Australian federal House of Representatives?	58.1
Political knowledge index	$\bar{x} = 3.63$ (SD = 0.83)

Note: $N = 518$ for all items.

Tables 6 and 7 show the level of political tolerance among the sample. Table 6 shows the percentage of the sample that nominated each one of seven named groups as the group that they dislike the most. Each participant could nominate only one group as their most disliked group and they then responded to the items presented in Table 7 with this specific group in mind. Our results demonstrate that Islamic fundamentalists are by far the most disliked group in Australian society, with 39.4% of respondents selecting this group as most disliked. The two other groups that were selected most often were criminals (25.7%) and neo-Nazis (23.0%). Table 7 shows the percentage who responded 'yes' to each of three questions that asked whether members of their most disliked group should be allowed to do a certain thing. On the whole, participants demonstrated a very low level of political tolerance in respect of their most disliked group. Over 90 per cent (90.7%) responded that their most disliked group should not be allowed to hold public office. Close to 90 per cent (89.8%) responded that their most disliked group should not be allowed to teach in a school. Over 80 per cent (81.7%) responded that their most disliked group should not be allowed to hold a public demonstration.

The 'political tolerance index' at the bottom of Table 7 is the mean of the sum of 'yes' responses across the individual items in Table 7. On average, participants responded 'yes' to less than one item ($\bar{x} = 0.83$), indicating a very low level of political tolerance. This finding is consistent with low levels of political tolerance observed in many other countries, based on analysis of repeated results from the World Values Surveys.¹¹⁸

Noticeably, those who selected Islamic fundamentalists as their most disliked group demonstrated significantly lower levels of political tolerance, and were significantly less likely to support allowing members of this group to hold public office, teach in schools, or hold public demonstrations. For example, those who selected Islamic fundamentalists as their most disliked group were significantly less likely to support allowing members of this group

¹¹⁸ See Peffley and Rohrschneider (n 70) 249.

to hold public demonstrations, than those who selected neo-Nazis as their most disliked group ($p < 0.01$). This finding is consistent with previous studies which identified a distinct intolerance towards Muslims in Australia, as well as in other countries.¹¹⁹

Table 6: Political knowledge among the Australian public

Among the following groups, which one group do you dislike the most?	Percentage nominated as most disliked
Islamic fundamentalists	39.4
Immigrants	4.6
Neo-Nazis	23.0
Left-wing extremists	4.2
Welfare recipients	2.1
Homosexuals	1.0
Criminals	25.7

Note: N = 518 for all items.

Table 7: Political tolerance among the Australian public

For the one group that you stated you disliked the most, should this group be allowed to ...	Percentage Yes
Hold public office	9.3
Teach in a school	10.2
Hold a public demonstration	18.3
Political tolerance index	$x = 0.38$ (SD = 0.81)

Note: N = 518 for all items.

¹¹⁹ See, eg, Scott Poynting and Victoria Mason, “‘Tolerance, Freedom, Justice and Peace’? Britain, Australia and Anti-Muslim Racism since 11 September 2001’ (2006) 27(4) *Journal of Intercultural Studies* 365.

Table 8 shows responses to items that indicate the participants' level of support for the rule of law. On the whole, participants were supportive of the rule of law, with a mean index score of 3.52. Of the specific items, a majority of participants disagreed with the statements that: it is not necessary to obey a law you consider unjust (60.0%); sometimes it might be better to ignore the law and solve problems immediately (50.6%); and that it is not necessary to obey the laws of a government that they did not vote for (73.0%). The item on which participants were most ambivalent was the statement that the government should have some ability to bend the law in order to solve pressing social and political problems, with almost a quarter of participants (24.5%) expressing neither agreement nor disagreement.

Table 9 shows responses to items that indicate the participants' level of support for a multi-party system. On the whole, participants were supportive of a multi-party system, with a mean index score of 3.33. For each of the three items, around three quarters of participants failed to agree with statements purporting to limit the scope of a multi-party system.

Table 8: Support for the rule of law

Support for the rule of law	% Strongly disagree	% Somewhat disagree	% Neither agree nor disagree	% Somewhat agree	% Strongly agree	Mean	SD
It is not necessary to obey a law you consider unjust (R)	28	32	19.5	16.8	3.7	3.64	1.16
Sometimes it might be better to ignore the law and solve problems immediately rather than wait for a legal solution (R)	18.9	31.7	20.5	25.7	3.3	3.37	1.15
The government should have some ability to bend the law in order to solve pressing social and political problems (R)	14.7	23.6	24.5	33	4.2	3.11	1.15
It is not necessary to obey the laws of a government that I did not vote for (R)	38.4	34.6	13.9	10.4	2.7	3.96	1.09
Support for the rule of law index						3.52	0.84

Notes: N = 518 for all items; (R) denotes a reverse coded item, where responses were re-coded to reflect the reverse direction prior to analysis.

Table 9: Support for a multi-party system

Support for a multi-party system	% Strongly disagree	% Somewhat disagree	% Neither agree nor disagree	% Somewhat agree	% Strongly agree	Mean	SD
The party that gets the most votes at the election ought not to have to share political power with the political minority (R)	12	24.3	37.3	22.6	3.9	3.18	1.04
Australia would be better off if we just outlaw all political parties (R)	20.1	28.4	29.2	16.2	6.2	3.4	1.16
What Australia needs is one political party which will rule the country (R)	25.5	23.7	22.4	23.4	5	3.41	1.23
Support for a multi-party system index						3.33	0.89

Notes: N = 518 for all items; (R) denotes a reverse coded item, where responses were re-coded to reflect the reverse direction prior to analysis.

Table 10 shows responses to items that indicate the participants' level of support for individual liberty. On the whole, participants were just on the supportive side, with a mean index score of 3.07. For each item, only a minority of participants agreed with statements purporting to limit individual liberty. However, for each statement, approximately one quarter to one third of participants were on the fence, neither agreeing nor disagreeing. The item that garnered the least support for individual liberty was the statement that it is better to live in an orderly society than to allow people so much freedom that they can become disruptive, with close to one half of participants (44.6%) somewhat or strongly agreeing with this statement.

Table 10: Support for individual liberty

Support for individual liberty	% Strongly disagree	% Somewhat disagree	% Neither agree nor disagree	% Somewhat agree	% Strongly agree	Mean	SD
Society should not have to put up with those who have political ideas that are extremely different from the majority (R)	13.5	28.8	31.9	19.3	6.6	3.23	1.11
It is better to live in an orderly society than to allow people so much freedom that they can become disruptive (R)	7.3	23.4	24.7	35.3	9.3	2.84	1.11
Free speech is just not worth it if it means that we have to put up with the danger to society of extremist political views (R)	13.7	27.8	24.1	27.8	6.6	3.14	1.16
Support for individual liberty index						3.07	0.88

Notes: N = 518 for all items; (R) denotes a reverse coded item, where responses were re-coded to reflect the reverse direction prior to analysis.

Table 11 contains results of a multiple regression analysis of diffuse support for the High Court. We have taken the logarithm of the dependent variable (diffuse support) as this allows us to interpret the coefficients in terms of a percentage change in diffuse support. The results show that among the index variables — the confidence index, the support for the rule of law index, and the support for a multi-party system index — each has a significant positive relationship with diffuse support for the Court. Hence, our first, fourth and fifth hypotheses are supported. This finding suggests that diffuse support for the Court is very much a function of confidence in institutions more generally, including broader support for democratic institutions and processes. This result is consistent with the main conclusions in multivariate studies of the factors correlated with diffuse support for the United States Supreme Court.¹²⁰

The coefficients on the index variables can be interpreted as a one unit increase in the index being associated with a percentage change in diffuse support for the Court. Here, a one unit increase refers, for example, to a participant responding that they ‘strongly agree’ rather than ‘somewhat agree’ or that they ‘neither agree nor disagree’ rather than ‘somewhat disagree’.

Specifically, a one unit increase in confidence in political institutions is associated with a 9.5% increase in diffuse support. A one unit increase in support for the rule of law is associated with a 5.4% increase in diffuse support. A one unit increase in support for a multi-party system is associated with a 7.3% increase in diffuse support for the Court.

To put this differently, the difference between ‘strongly disagreeing’ and ‘strongly agreeing’ with the statements measuring confidence in political institutions, support for the rule of law and support for a multi-party system, equate to 47.5%, 27% and 36.5% higher diffuse support for the Court, respectively.

Among the demographic variables, diffuse support for the Court among men is 4.2% higher than among women. This supports our sixth hypothesis. The other demographic variables (ie age, education, whether the participant was born in Australia), whether the participant was conservative or liberal, and how they voted in the plebiscite were insignificant.

Overall, of our eight hypotheses, we find support for four. The three indices that are not significantly associated with diffuse support for the Court are political knowledge, political tolerance, and support for individual liberties.

The finding for political knowledge may reflect the questions that we asked. Positivity theory postulates that greater knowledge of the Court

¹²⁰ Gibson, ‘The Legitimacy of the US Supreme Court’ (n 36) 531.

exposes individuals to the powerful legitimising symbols of the Court.¹²¹ Thus, awareness of basic facts about the Court will be associated with the Court having greater institutional legitimacy. However, one might argue that asking participants about basic facts such as the identity of the Justices or the composition of the Court does not address whether people understand the role of the Court in democratic governance.¹²² It is really the latter that matters for whether individuals express diffuse support for the Court. To take an analogy, it may be argued that one's esteem for democratic government in the Westminster tradition is not any less because one cannot identify the number of Ministers in Cabinet, which most people cannot. This last proposition is somewhat supported by the fact that replacing the political knowledge index with the single item of length of judges' appointment strengthened the correlation, though not to a significant level. In future studies, we will aim to develop a knowledge index specifically tailored for Australian society, identifying the key legitimising symbols of the judiciary.

The result for individual liberties reflects that, in Australia, the High Court is not associated with the protection of minority rights in the manner in which the Supreme Court is in the United States. The High Court is not the 'quintessential minoritarian institution' in the same way as the United States Supreme Court.¹²³ This observation stems from the absence of a bill of rights in Australia. While one would expect that support for individual liberties would reflect broader support for democratic governance, the positive association between support for democratic governance and diffuse support for the Court is reflected in the findings respecting support for a multi-party system and confidence in institutions.

Similarly, the result for political intolerance also reflects a perception of the High Court as a less political, and more reserved, institution with regard to protection of minorities. If one perceives the Court as impartial to minorities, and minorities' rights, then a stronger commitment for political tolerance should not be associated with increased diffuse support for the Court. These two findings — that support for both individual liberties and political tolerance are not positively correlated with judicial legitimacy — are comple-

¹²¹ Gibson and Caldeira (n 85) 7–8.

¹²² Nielsen and Smyth (n 42) 33. See also Arthur Lupia, 'How Elitism Undermines the Study of Voter Competence' (2006) 18(1–3) *Critical Review* 217, who suggests, in the United States context, that questions such as 'Can you identify the Vice President?' reflect a bias as to what academics think voters should know, but are not relevant to a voter's ability to make a competent choice at election time.

¹²³ Gibson, 'The Legitimacy of the US Supreme Court' (n 36) 530.

mentary, strengthening the conclusion that people's ideological commitment to egalitarian norms, and liberalism more broadly, is not related to their diffuse support of the Court. This finding is also consistent with the literature suggesting that the High Court is quite reserved when it comes to upholding minority rights, and is more active when it comes to upholding constitutional principles of federalism and separation of powers, as we identified earlier.¹²⁴

Of the other variables that are insignificant, our results suggest that diffuse support for the High Court is grounded in broader commitment to democratic institutions and processes more generally, such as the multi-party system, rule of law, and institutions that implement the rule of law (eg criminal justice system, the police and the defence forces), rather than ideology or partisanship. The results for age are plausible given that there are good arguments supporting a positive or negative association with diffuse support for the Court. Education is positively correlated with support for democratic values, so it is likely that the relationship between education and diffuse support is being captured by the three significant indices.

Table 11: Regression analysis of diffuse support for the High Court

	Co-efficient
(Constant)	.377***
Confidence index	.095***
Political knowledge index	-.003
Political tolerance index	.014
Support for the rule of law index	.054***
Support for a multi-party system index	.073***
Support for individual liberties index	-.012
Political views	.005
Voting profile in the same-sex marriage plebiscite	.011
Gender (Male = 1)	.042*
Age	.000

¹²⁴ See above n 80 and accompanying text.

Table 11: Regression analysis of diffuse support for the High Court

Level of education	-0.001
Whether born in Australia	-0.031

Notes: $N = 518$; ***, * denotes statistical significance at $p < .001$, $p < .05$, respectively.

It is possible that individuals might distinguish between the Court and the justices of the Court. If so, different factors might be associated with diffuse support of the Court than its Justices. To examine this possibility, in Table 12 we present the results from regressing support for the Justices of the High Court on the same set of variables as in Table 11. Again, we have taken the logarithm of the dependent variable (support for the Justices) as this allows us to interpret the coefficients in terms of a percentage change in support. The results show that among the index variables, the confidence index and the support for the rule of law index are both significant and have a positive association with diffuse support for the Justices of the High Court. Specifically, a one point increase in confidence in political institutions, on the five-point scale 1–5, is associated with an 11.5% increase in diffuse support for the Justices. A one point increase in support for the rule of law, again on the five-point scale 1–5, is associated with a 5.3% increase in diffuse support for the Justices.

The two variables that were significant in explaining diffuse support for the Court, but not the individual Justices, are gender and support for a multi-party system. That gender is insignificant in Table 12, could be explained by the finding that gender (male = 1) is positively correlated with our confidence in institutions index ($p = .045$). As women demonstrate a slightly lower level of confidence in institutions more broadly, this may explain the gender effect that we detected with regard to diffuse support for the High Court, as well as the lack thereof with regard to the Justices. Overall, the results for diffuse support for the Justices are consistent with the results in Table 11 for diffuse support for the Court as a whole. This result reflects that the justices are the face of the Court to the community and it is likely that diffuse support for the justices will spill over to diffuse support for the Court and vice versa. This is reflected in the average score of the diffuse support index (2.94) and the judicial support index (3.12) being very close together (see Tables 2 and 3).

Table 12: Regression analysis of support for the High Court Justices

	Coefficient
(Constant)	.525***
Confidence index	.115***
Political knowledge index	-.001
Political tolerance index	.018
Support for the rule of law index	.053***
Support for a multi-party system index	.013
Support for individual liberties index	-.016
Political views	.001
Voting profile in the same-sex marriage plebiscite	.037
Gender	.032
Age	.000
Level of education	.013
Whether born in Australia	.001

*Notes: N = 518; *** denotes statistical significance at $p < .001$.*

V CONCLUSION

We have sought to answer the question: what is the level of legitimacy of, or diffuse support for, the High Court among the Australian public, and what factors are correlated with the legitimacy of the Court? To do so, we designed a survey, which Qualtrics administered on our behalf to a nationally representative sample of the Australian population. We find that diffuse support for the Court and its Justices is mid-range, with both indices close to three on a five-point scale. We find that the main factors correlated with institutional loyalty toward, or diffuse support for, the Court as a whole are those associated with a broader commitment to democratic institutions and processes. Participants who expressed more confidence in political institutions and expressed more support for the rule of law and a multi-party system were more likely to express higher diffuse support for the High Court.

Our findings suggest that judicial legitimacy in Australia is mainly dependent upon people's commitment to structural democracy and democratic institutions. Consistent with our initial conjecture based on institutional differences between the High Court and United States Supreme Court, it seems that Australians' loyalty to the High Court is not dependent on ideological commitment, for example, to ideas of tolerance or individual liberties. Rather, diffuse support for the High Court is based, primarily, on people's level of confidence in national institutions more broadly, on their level of support for notions of the rule of law, and on their commitment to the multi-party system. This suggests that we should not expect a significant drop in judicial legitimacy following controversial rulings, and that judicial legitimacy in Australia should be expected to remain quite stable.

At the same time, our findings also demonstrate that this stable level of legitimacy is not very high. While a majority of Australians (53.7%) agree with the proposition that the Court can usually be trusted to make decisions that are right for Australia as a whole, 44.8% of Australians believe that High Court decisions favour some groups over others, and 43.9% of Australians believe that the High Court is too political. Less than 20% of respondents disagreed with these two propositions. More alarming, perhaps, is that 68.6% of Australians are open to the idea that under some circumstances (eg if most Australians disagreed with many of the Court's decisions) it would be a good idea to abolish the Court altogether. Of these 68.6%, about half could not make up their mind about it (that is, neither agreed nor disagreed), and the other half (31.9% of our respondents) were supportive of this proposition. Only about one third of our respondents (31.4%) rejected this extreme proposition. Gibson and Nelson previously concluded that 'the greatest threats to the [United States Supreme] Court's legitimacy lie in beliefs that judges are just ordinary politicians'.¹²⁵ If they are correct, our finding that many Australians view the High Court as too mixed up in politics is particularly significant.

While our findings suggest that studies of judicial legitimacy in Australia should focus on people's commitment to democratic structures and institutions, there is still much to learn about the public's knowledge of the High Court and the possible impact of this knowledge (or lack thereof) on the Court's legitimacy. On this point, our results differ from some United States studies, finding no support for positivity theory. Our findings show, quite remarkably, that the Australian public knows very little about its High Court.

¹²⁵ Gibson and Nelson (n 36) 592.

Only 16.0% of our respondents were able to identify Susan Kiefel as the Chief Justice of the High Court, in contrast to 95.0% who were able to name the Prime Minister, and to 83.2% who correctly identified the Leader of the Opposition in the federal Parliament. Less than one third of our respondents could tell how the Justices are selected, or how long they remain on the Court; moreover only 13.9% of respondents could tell how many Justices serve on the Court. Interestingly, the knowledge question about the Court that gained the highest score (38.2% of respondents answered it correctly) focused on the relationship between the branches of government. This finding supports our conclusion that the public commitment to democratic institutions and structures is key to understanding judicial legitimacy in Australia. With this in mind, it is necessary to develop an Australian measure that captures the key symbols disseminated to and valued by most Australians. Future studies should therefore further explore the public knowledge of the High Court, with a focus on aspects that are particularly important to Australians: democratic structures and processes. Understanding the legitimising symbols of the Australian judiciary will then enable scholars to unpack the relationship between knowledge of the High Court and its social legitimacy.

Finally, this study reveals that while Australians are committed to democratic structures and institutions, and to abstract rule of law principles, they tend to extend lower levels of political tolerance to minorities. This reflects a preference for a judiciary that focuses its power on constitutional principles of separation of powers and federalism, rather than on individual rights and protection of minorities.¹²⁶ As the Court continues its efforts to increase the accessibility of its rulings to the public, it could be beneficial to enhance education about democratic values and principles and to develop appropriate public resources.

¹²⁶ This finding is consistent with Sir Anthony Mason's observation that the *Australian Constitution* is best understood as a delineation of government powers rather than as a charter of citizens' rights: Sir Anthony Mason, 'Procedural Fairness: Its Development and Continuing Role of Legitimate Expectation' (2005) 12(2) *Australian Journal of Administrative Law* 103, 109.