Reassessing the Institutional Legitimacy of the South African Constitutional Court: New Evidence, Revised Theory*

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Abstract

Outside of South Africa, the South African Constitutional Court is one of the most esteemed high courts in the world. Inside the country, however, empirical evidence suggests that the Court has been unable to build much of a store of popular legitimacy. Some scholars have suggested that the shortfall of legitimacy is of little consequence; the Court has been able to maintain and express its independence, largely through the largess of the government. The purpose of this paper is to reconsider both the empirical evidence on the Court's support and the theoretical position that judicial independence can be effectively guaranteed by the government. I find that confidence in the Constitutional Court has indeed grown since its first decade of operation, and that the stark racial differences in support for the Court have mitigated to a considerable degree. However, confidence is not the same thing as legitimacy, even if sustained confidence in an institution may transform into institutional legitimacy, so the evidence I adduce cannot be taken to suggest that the Court has developed a "reservoir of goodwill" among the South African people. I conclude by identifying some ways in which the Constitutional Court might build its popular legitimacy, at very little cost to itself or its policy-making goals. In the end, the functions of a constitutional court require it to become, on occasion, an adversary of the government. Consequently, developing its own political capital ought to be a high priority for all courts aspiring to independence.

Constitutional courts around the world vary greatly in their efficacy and effectiveness. Some constitutional courts are extremely powerful, as exemplified by the United States Supreme Court and the German Federal Constitutional Court. Other constitutional courts – for example, the Bulgarian and Pakistani courts – have often been unable to get their decisions respected, obeyed, and implemented, and are often under attack by their governments and others.

Some theory is available that purports to account for the variability in the efficacy of constitutional courts. The dominant approach is Legitimacy Theory[1], which has been supplemented by the Positivity Theory of Gibson and Caldeira (e.g., 2009). Basically, these theories posit that constitutional courts profit from having institutional legitimacy (which is sometimes referred to as "diffuse support" – see Easton 1965, 1975). Institutional legitimacy is a form of political capital that protects the institution from reprisals for its decisions and that contributes to the likelihood that its decisions – even those unpopular with the majority – will be accepted and enforced. In essence, legitimacy reduces the institution's reliance on pleasing others with its rulings, thereby contributing to judicial independence and, perhaps, to decisions grounded in the rule of law.[2]

Legitimacy Theory has been applied by Gibson and Caldeira (2003) and Gibson (2004, 2008) to the South African Constitutional Court. These authors have argued that the Court

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[1] Useful reviews of Legitimacy Theory can be found in Tyler 2006, Gibson and Nelson 2014a, and Gibson (2014a).

[2] I say "perhaps" grounded in the rule of law because judicial independences actually means that judges are free to decide how they wish to decide. Those favoring judicial independence typically make the implicit assumption that judges prefer to decide cases in accordance with the rule of law. It must be recognized that independence might also mean that judges are free to decide cases in accordance with their own ideological preferences, irrespective of the rule of law.

actually began its existence with relatively low institutional legitimacy, which is not especially surprising inasmuch as institutional legitimacy is typically earned over a fairly long period of time (Gibson, Caldeira, and Baird 1998). Without much legitimacy in the beginning, the Court's unpopular decisions (e.g., declaring the death penalty unconstitutional) had a disproportionately negative effect on popular opinion toward the Court – disproportionate, that is, as compared to the effect of a negative ruling on a legitimate court. This body of research also indicates that, at least through a major public opinion survey in 2004, the Court had failed to acquire much additional legitimacy and therefore continued to suffer from a legitimacy deficit. With limited legitimacy, it is not clear how the Court could maintain and assert its independence and protect itself from reprisals for unpopular rulings.

Earlier research also found important racial differences in attitudes toward the Constitutional Court, with the three racial minorities in South Africa expressing decidedly less institutional support than black South Africans. As an institution designed at least in part to protect the rights of minorities, it is perhaps surprising that South Africa's minorities have not bonded with the Court. In the view of this earlier research on popular legitimacy, the Constitutional Court stands out as a fairly weak institution, unable to command the respect of all South Africans.

Not all scholars agree with these arguments and findings. Roux (2013), in particular, rejects the theory of institutional legitimacy, or at least so it seems. Roux argues that, even while acknowledging the low level of popular support the institution enjoyed in its first decade or so, the Court was able to carve out some considerable judicial independence for itself. Thus, at a

minimum, Roux posits that institutional legitimacy is not a *necessary* condition for judicial independence. This may, or may not, be a challenge to Legitimacy Theory.

Thus, some unanswered theoretical and empirical questions exist. At the empirical level, whether the Court built any institutional legitimacy after about 2004 or so is unclear inasmuch as no evidence one way or the other has been published. At the theoretical level, it seems necessary for Legitimacy Theory to offer a reply to Roux's critique. Each of these concerns is important, both for scholars and for the Court itself.

The purpose of this paper is to address these empirical and theoretical issues. On the empirical side, I examine some recent evidence on public opinion toward the Constitutional Court – even if I must acknowledge at the outset that the available data are not true measures of the Court's institutional legitimacy. On the theoretical side, I offer something of a rebuttal to Roux. Perhaps "rebuttal" is too strong a word; after accepting Roux's empirical analysis, I suggest that it actually demonstrates the *dependence* – not *independence* – of the Constitutional Court. I then go on to suggest that the Court's independence would be enhanced were it to be more concerned with building the institution's legitimacy, and I suggest, on the basis of some newly published research, a way in which institutional legitimacy might be built with very little cost to the Court's substantive policy agenda. In the end, I argue that institutional legitimacy is an invaluable form of political capital that all courts should seek to husband and maintain. I begin this analysis with an overview of Legitimacy Theory.

Theories of Institutional Legitimacy

Considerable agreement exists among social scientists on most of the major contours of

Legitimacy Theory. For instance, most agree that legitimacy is a normative concept, having

something to do with the right (moral and legal) to make decisions.[3] "Authority" is sometimes

used as a synonym for legitimacy. Institutions that are perceived to be legitimate are those with a

widely accepted mandate to render judgments for a political community; those without

legitimacy find their authority contested. "Basically, when people say that laws are 'legitimate,'

they mean that there is something rightful about the way the laws came about . . . the legitimacy

of law rests on the way it comes to be: if that is legitimate, then so are the results, at least most of

the time" (Friedman 1998, 256). To put it another way:

> Legitimacy is 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 legitimate is important to the
> success of authorities, institutions, and institutional arrangements since it is
> difficult to exert influence over others based solely upon the possession and use of
> power. 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. (Tyler 2006, 375).

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[3] Legal scholars in particular often distinguish between "sociological legitimacy" and "normative legitimacy" (e.g., Fallon 2005; Wells 2007). The latter refers to judging an institution by what the individual scholar thinks it ought to do. The former, the focus of this paper, concerns empirical, non-normative consideration of the attitudes, expectations, and behaviors of citizens toward the institutions that govern them. Throughout this paper, I make no normative judgments about whether more or less legitimacy is desirable. For some thoughts about whether it is possible for an institution to have too much legitimacy, see Gibson and Nelson 2014b.

Legitimacy becomes particularly relevant when people disagree about public policy. When a court, for instance, makes a decision pleasing to all, discussions of legitimacy are rarely relevant or necessary and do not emerge. When there is conflict over policy, then some may ask whether the institution has the authority, the "right," to make the decision. Legitimate institutions are those recognized as appropriate decision-making bodies *even when* one disagrees with the outputs of the institution. Thus, legitimacy takes on its primary significance in the presence of an *objection precondition.* As Friedman (1977, 141) rightly noted long ago: "We do not need a theory of legitimacy to explain why people obey a person with a gun, or adhere to an order that brings them personal honor or gain; or obey their religions or their moral codes."[4] To be effective, institutions such as courts need legitimacy – the leeway to be able to go against public opinion (as for instance in protecting unpopular political minorities) – and that legitimacy is best thought of as a form of loyalty to the institution. Thus, a crucial attribute of courts is the degree to which they enjoy the loyalty, not just approval, of their constituents.

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[4]Moreover, the literature on distributive and procedural justice (e.g., Lind and Tyler 1988; Tyler 1990) teaches us that those who lose on distributive issues often find losing palatable if the procedures leading to the decision are perceived to be fair (e.g., Baird 2001). Similarly, Simon and Scurich (2011) report some interesting findings relevant to the difference between those who are disappointed in a Court decision and those who are not (i.e., winners and losers). Their focus is on judicial reasoning, a process variable. They conclude (2011, 719): "Participants were indifferent toward the modes of reasoning when they agreed with the outcome of the judges' decision, but were differentially sensitive to the judicial reasoning when the judge's decision frustrated their outcome." This finding seems compatible with my claim that legitimacy is for losers (Gibson 2014a). However, I acknowledge that controversy exists in the literature on the causal relationships among perceived fairness, legitimacy, and compliance (see Gibson 1989, Tyler and Rasinski 1991, and Gibson 1991).

How does institutional loyalty develop and how does it change over time? Some earlier research has considered the dynamics of opinion toward the court. Scholars have analyzed aggregate time series (e.g., Caldeira 1986; Marshall 1989; Mondak and Smithey 1997); generational or cohort change (e.g., Gibson and Caldeira 1992); change in response to major court decisions (Gibson, Caldeira, and Spence 2003b; Franklin and Kosaki 1989; Kritzer 2001; Bartels and Johnson 2013; Gibson and Nelson 2014c); a few true panel studies (surveys repeated over time with the same respondents) have been conducted (e.g., Tanenhaus and Murphy 1981; Hoekstra 2000, 2003); some work has tried to develop a formal model of opinion change (e.g., Mondak and Smithey 1997); and several scholars have attempted to induce change in the experimental laboratory (most notably, Mondak – e.g., 1992, and Hoekstra 1995). However, to date, no comprehensive theory of how legitimacy emerges for law and courts has been produced.

Gibson, Caldeira, and Spence (2003a) and Gibson and Caldeira (2009) have proposed a theory of "positivity bias" that goes some distance toward accounting for how institutional loyalty arises and changes over time. Figure 1 diagrams how this process unfolds. According to the theory, exposure to legitimizing judicial symbols begins a process of distinguishing courts from other political institutions. The message of these powerful symbols (robes, decorum, deference by the mass media, etc.) is that "courts are different" (see Scheb and Lyon 2000, who refer to this as the "myth of legality"). Owing to these differences, courts are worthy of respect, deference, and obedience – in short, legitimacy. Exposure produces a positivity bias in the sense that even when the initial stimulus for paying attention to courts is negative (e.g., a controversial court decision), judicial symbols enhance judicial legitimacy, which shields the institution from

attack based on disagreement with its decision (Gibson, Lodge, and Woodson 2014). Thus, the task for newly formed judicial institutions is to develop a separate "non-political" identity that distinguishes it from the other, political institutions of governance. One question of this paper is whether the South African Constitutional Court has been able to accomplish that goal.

[PLACE FIGURE 1 ABOUT HERE]

The Special Meaning of Legitimacy in a Society Divided by Race

Legitimacy takes on a special importance in racially divided societies (see Horowitz 1991; Gibson 2000). In such societies, differences in history, culture, values, and interests can produce dramatically different views of the duties of political institutions and assessments of whether they are functioning properly. In the South African case, whatever sub-cultural differences may have "naturally" occurred were vastly exacerbated by the actions of the state itself. Within such divided societies, political conflict can take on a zero-sum quality, with the winnings in politics being equally and routinely balanced by the losses. Such polities face enormous difficulties when it comes to consolidating democracy.[5] If the legitimacy of democratic institutions varies across the major ascriptive groups in a polity, then it is difficult to confine political conflict to ordinary issues of public policy, and to keep them from spilling over to conflict over the very

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[5] In South Africa, scholars and practitioners alike have worried that multiculturalism might undermine the fledgling democracy (e.g., Giliomee and Simkins 1990; Giliomee 1995, 1998). For instance, if elections are nothing more than a racial census (see Horowitz 1991) – if political allegiances are strongly and perhaps irrevocably tied to race – then the political pluralism so essential to democratic governance has difficulty emerging (see also Mattes, Taylor and Africa 1999, 236; Giliomee and Schlemmer 1994).

nature of the political regime itself.[6] If the package of democratic institutions – including the Constitutional Court – does not achieve legitimacy within all segments of the populace, conflict over democracy itself is likely to emerge.

Do South Africans of all races extend legitimacy to the primary political institutions of their new democratic system?[7] In one sense, this question seems trivial. Why would black South Africans not grant legitimacy to the political institutions that are now directly accountable to them, the black majority? After all, it is in the interests of Africans to support the institutions that represent them, the institutions for which they struggled for so long. Instrumental considerations alone seem to dictate that the new majority would support South Africa's political institutions.

However, the African majority may not feel the same about the Court and the country's parliament. Democracy is a compromised institutional structure. By that I mean that democracy is a system in which multiple interests can gain access to political power. The best points of access for majorities are the presidency and parliament. By definition, the majority wins in majoritarian arenas. One who supports the ANC should be quite content with the institution of parliament (even if displeased with any given policy action by the legislature) since that institution is designed to reflect majority interests and preferences. One might not always be satisfied with one's party or representatives, but the institution itself is structured so as to be accountable to those in the majority, thereby contributing to institutional loyalty.

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[6] For an analysis of support for the basic institutions and processes of democracy within South Africa's various racial communities see Gibson 2003.

[7] Nearly all of the analysis that follows posits (and finds) that orientations toward South Africa's political institutions are influenced by the race of the respondent. Because race is complicated in South Africa, Appendix A provides further discussion of the issue.

Not all democratic institutions are so accountable to the majority, however. Courts in particular are established to provide a means for minorities – those whose interests and preferences are shared by less than half of the population – to pursue at least some of their interests. To win in majoritarian contexts requires assembling a majority. To win in minoritarian institutions like courts requires only the resources necessary to file a lawsuit. Courts are often established specifically as a means of checking majoritarianism, especially when granted the power to say what the constitution means (as in South Africa). The majority is not free to do anything it wishes, to adopt any policy that seems desirable at the moment. Instead, courts provide an avenue for a minority to try to prevent the majority from achieving its goals, and therefore judicial institutions should be especially favored by those who perceive themselves as part of a minority.

I have tried to be careful with the word "minority," using it to designate those whose interests and preferences are not shared by half or more of the people in a political system. When I refer to "minorities," I certainly do not intend to necessarily imply under-privileged minorities. The minority capable of taking advantage of minoritarian institutions is often (if not typically) a privileged minority (e.g., Dahl 1957). In a sense (but only in a sense), institutions are insensitive to the substantive interests of those who seek advantage through the institutions. Courts therefore may be a means through which those with power under the old apartheid system (now a minority) attempt to maintain their positions of power and privilege.

Consequently, a most difficult task for South Africa lies in building the legitimacy of the judiciary under the new system. The courts in the New South Africa are only remotely

accountable to the majority. These courts also have access to a fabulously liberal constitution

that is at odds with majority opinion in many important respects (e.g., the easiest example, use of

the death penalty, which most South Africans of every race strongly support). Moreover, the

doctrine of parliamentary supremacy that reigned under apartheid has been abrogated by the new

constitution. Now, Parliament, the instrument of the majority, is subservient to the constitution,

and those whose job it is to say what the constitution means: the judges. Thus, even if Africans

should logically support the new parliament, whether they should extend legitimacy to South

Africa's new courts – especially the Constitutional Court – is less predictable.

A similar, but opposite logic, should characterize the views of white South Africans (and

those of Asian origin as well, and perhaps even of Coloured people). It is unlikely that many

white South Africans will directly profit from majoritarian political institutions in the near

future.[8] Thus, whites can be expected to be particularly supportive of institutions like courts

because they are more likely to advance the interests of minorities. For whites, Parliament is

problematic since that institution is unlikely to be responsive to the demands of the small white

minority. This problem is exacerbated by the fact that whites have little hope of ever becoming a

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[8]I say "directly profit" since it is possible to argue that all South Africans profit from a set
of institutions that satisfies the demands and expectations of people. Thus, minorities profit from
majoritarian institutions because such institutions keep the majority happy (or, rather, in the
absence of such institutions the majority would be very unhappy), thereby contributing to system
stability, from which whites profit. But care should be taken with such logic since it can become
Panglossian or tautological (one always profits in some way from everything). I could be said to
profit from the murder of my wife because, by society punishing the murder, it reaffirms and
reinforces the norm that murder is improper, thereby giving me solace and perhaps even
reducing the chances of murder – even my murder – happening in the future, which is of course
to my benefit.

majority in the country; they are consigned to minority status (so long as race-based politics

prevails, as is likely). Thus, a pressing challenge for South Africa's new system is to find a way

to induce white South Africans to extend legitimacy to all political institutions, including those

biased toward representing the interests of the majority. South Africans must come to extend

legitimacy even to those institutions that do not necessarily advance their short-term interests.

Thus, it is reasonable to expect support for Parliament to be more widespread than

support for the Constitutional Court, given the electoral connection Parliament has to its

constituents. And based on a simple theory of self interests (individual and group), I also

hypothesize that the African majority will extend more support to Parliament than to the Court,

while whites (and perhaps the other racial minorities in South Africa) will express greater

allegiance to the Constitutional Court than to the country's legislature.

Roux's Theoretical Challenge

In *The Politics of Principle*, Theunis Roux (2013) offers a comprehensive and masterly analysis

of the role of the Constitutional Court in the first decade of democracy in South Africa. There is

a tremendous amount to admire in Roux's analysis.

Roux is unequivocal in his rejection of the view that institutional legitimacy is a

necessary condition for judicial independence:

> As studies by James Gibson and others have shown[footnote omitted], the Court
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> never built much institutional legitimacy (in the sense of 'diffuse public support'),
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> and thus the kind of success that the strategic approach posits for a well-

functioning constitutional court eluded it. Nevertheless, measured by its capacity

to decide politically controversial cases and have its decision enforced, the Court

was very effective. Indeed, the interesting thing about the Chaskalson Court is

that it was able to play its constitutionally assigned veto role from the very outset,

and it continued to play this role *without ever building much institutional*

legitimacy. (Roux 2013, 4, emphasis added).

Several aspects of this quotation deserve emphasis. First, Roux picks no empirical fight

with Gibson: both agree that the institutional legitimacy of the Constitutional Court during its

first decade was low.

Second, Roux argues that independence does not require legitimacy. Unclear from this

quotation, however, is exactly how the Court was able to "get away with" making independent

rulings that many, including the government, found disagreeable.

Roux's position is that the Constitutional Court enjoyed independence because the ANC

allowed it to be independent. In turn, the ANC allowed an independent Constitutional Court

because it profited from that independence. However, over time, the ANC's support for

independence waned a bit. As a consequence, the Court became less independent. Thus, the

Constitutional Court's judicial independence in South Africa is dependent upon the position of

the governing majority at any given point in time.

The nature of the African National Congress's commitment to judicial

independence changed during this time . . . from a commitment that was initially

based on its strategic interest in the Court's capacity to consolidate the transition

to democracy to one based on the Court's role in legitimating the ANC's social transformation project. As that project began to falter, and as the moderate wing of the ANC that had supported the constitutional settlement began to lose control of the party, the Court became increasingly exposed to political attack. By the time of Justice Chaskalson's retirement, the fragility of the ANC's support for the Court that was later to surface in the leadership battle between Mbeki and his successor as President, Jacob Zuma, was already apparent. (Roux 2013, 7).

Furthermore:

Although initially quite well insulated from the effects of its low public support by the ANC's commitment to judicial independence, the Court became progressively more exposed to political attack as Chaskalson's term as Chief Justice progressed, certainly when compared to courts in mature constitutional democracies." (Roux 2013, 8).

Thus, the crux of Roux's argument is that the Constitutional Court is secure in its judicial independence only to the extent that the dominant faction within the ANC is supportive of independence. This strikes me as a quite precarious position for a high court. In addition, to the extent that the justices themselves agree with Roux's analysis, this is precisely a scenario in which judges might restrain themselves for fear of generating attacks on the institution. In such a case, the Court's independence is not under its control.

Recall for a moment exactly what institutional legitimacy involves. Gibson has written that "legitimacy is for losers," by which he means that legitimacy becomes especially relevant

when one is dissatisfied with the performance of an institution. Winners rarely question the basis of their winning; losers, however, often ask whether their losing was just, whether the process by which they lost is fair. Easton referred to legitimacy as a "reservoir of goodwill," by which he meant loyalty to the institution. Those who cede legitimacy to an institution will stand by it when it makes "wrong" decisions. Support for the institution is not connected in any sort of quid-pro-quo fashion to satisfaction with the institution's short term performance (Gibson and Nelson 2014c). Because an institution knows that it enjoys the loyalty of its constituents, it is not dependent upon satisfying them with its decisions in all cases.

According to Roux's analysis, ANC support for the Constitutional Court does not seem to be based on loyalty to the institution; instead, it is strategic, based on the performance of the institution and the goals of the party.[9] And as Roux has shown, whether the ANC believes itself to benefit from having an independent court has changed over time, with the maintenance of the Court's independence not being high on the list of priorities of the current ANC leadership. Under this scenario, it does not seem appropriate to judge the Court to be independent. Indeed, in this state of dependence, the institution has forms of political capital with which it could fend off an attack by the government.

I suspect that Professor Roux actually believes institutional legitimacy is an important form of political capital for constitutional courts, and that a constitutional court would – and should – prefer to have more popular legitimacy than less popular legitimacy. Courts with a

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[9] Caldeira and Gibson showed some time ago (1992) that, generally, elites are more likely to base their support for courts (at least the U.S. Supreme Court) on satisfaction with its performance than on some form of institutional loyalty.

reservoir of goodwill in the mass public are more difficult to attack successfully than courts without such as reservoir (as Franklin D. Roosevelt learned from his attempt to manipulate the U.S. Supreme Court in the 1930s). Just as American state courts sought independence through electing their judges in the 19th century – with elections providing the institutional legitimacy required to make those courts independent of the dominant party machines – the South African Constitutional Court would acquire greater independence were it to have the loyalty of the South African people. With the loyalty of its constituents, the institution would no longer be so dependent upon the government for its independence.

This line of argumentation therefore requires that we examine evidence on how South Africans feel about and judge their highest constitutional court. It is to that task that I turn next.

Earlier Research on the Institutional Legitimacy of the South African Constitutional Court

According to this conceptualization of popular legitimacy, the views of ordinary South Africans of their Constitutional Court matter. Consequently, it is important to attempt to learn the nature of their views. Conducting surveys using representative national samples and valid and reliable measures of institutional support is the methodology by which legitimacy is assessed.

The earliest systematic study of the institutional legitimacy of the South African Constitutional Court is that reported by Gibson and Caldeira (2003). Using data from interviewing 3,258 South Africans in a nationally representative survey conducted in 1996, with a follow-up interview in 1997, Gibson and Caldeira paint a picture of an institution with relatively low legitimacy: "Very few South Africans actively distrust the Court, but the reservoir

of goodwill for this institution is not particularly deep or solid. In the minds of many South Africans, the Court seems to be on a sort of probation, based on a cautious and somewhat suspicious trust. This is not surprising in light of the newness of the Court at the time of the interview (1997)" (Gibson and Caldeira 2003, 10). Moreover, the authors observed significant racial differences in attitudes, asserting that "Africans are the most supportive constituency for the Court, with whites, Coloureds, and Asian South Africans extending somewhat less legitimacy to the institution" (Gibson and Caldeira 2003, 11).

Changing Attitudes toward the Constitutional Court

Gibson (2008) compared the earlier survey results to his 2004 data on the responses to identical questions asked in his comparable 1997 and 2001 surveys. He concluded from these data that support for the Court seemed to *change little between 1997 and 2004*. The mean scores for every measure of institutional support were very similar, as were the percentages of respondents giving a supportive answer. Generally, he concluded that "it is difficult to find in these data much evidence that loyalty toward the Court has increased in the last few years. Instead, the minimalist conclusion to be drawn is that the Court has *not* broadened its support in the seven years between the first and last surveys."

Cross-National Comparisons

Gibson next compared his data to comparable data from surveys in a number of different countries. He focused on responses to a statement referring to "doing away with" the court if it

continually makes decisions with which many people disagree, under that contention that this summary of institutional loyalty provides a useful basis for cross-national comparison. Figure 2 reports Gibson's cross-national data.

[PLACE FIGURE 2 ABOUT HERE]

These data support several conclusions (including the conclusion that enormous variability exists in the legitimacy of these constitutional courts). Most important, in comparison to other national high courts, the South African Constitutional Court in the first decade of its life did not enjoy a very wide or deep "reservoir of goodwill." Only a handful of institutions had lower support scores than the South African Court. Even in 2004, the Court had the support of only 34 % of attentive South Africans, in comparison to 83 % of the Americans attentive to their Supreme Court (in 2001). Even though the South African Constitutional Court is a young institution, it does not fare particularly well in comparison to high courts in transitional polities like Poland (even if the Constitutional Court does attract more support than the much-embattled Bulgarian high court).

Summary

All of the data considered by Gibson point to the same conclusion: The Constitutional Court has achieved only low to moderate legitimacy within the South African mass public. The Court enjoys no more support than Parliament (even though courts in established democracies typically are much more favored than legislatures), and there has been little increase in support in the last

few years. Even in cross-national perspective, the South African Constitutional Court does not stack up particularly well against its peer institutions.

Recent Public Perceptions of the South African Constitutional Court

Not a great deal is known about contemporary public attitudes toward the South African Constitutional Court, perhaps in part owing to the elitist view that it makes little sense to ask ordinary people their views of a technical and complex legal institution, and in part owing to the view that the courts are somehow different from other political institutions and therefore knowing people's attitudes and evaluations is not particularly relevant to the operation of the judiciary. Indeed, so far as I am aware, the only efforts to measure directly the legitimacy of the Constitutional Court are to be found in my surveys of 1996/1997, 2001, and 2004.

Lack of data on the public legitimacy of the Constitutional Court may also be a function of the fact that legitimacy is difficult to measure. Scholars have spent considerable effort in both conceptualizing and operationalizing institutional legitimacy (e.g., Gibson, Caldeira, and Spence 2003a; Gibson 2011), and, in general, it is clear that measuring legitimacy requires asking multiple questions, some of which are sophisticated (and are especially difficult to ask in a poorly educated society like South Africa). Even the efforts we have mounted in the past are limited owing to the numerous other demands on our survey instruments. In the absence of "perfect" measures of institutional legitimacy, one must therefore do the best one can with the data that are available, even while recognizing their frailties and limitations.

Much of the empirical analysis presented in the remainder of this paper relies upon

surveys conducted annually by the Institute for Justice and Reconciliation (IJR) in South

Africa.[10] These surveys, based upon Gibson's (2004) initial work on operationalizing a multi-

dimensional conceptualization of "reconciliation," annually measure various attitudes and values

of representative samples of the South African population.

Unfortunately, however, the IJR surveys do not include a valid measure of the

institutional legitimacy of the Constitutional Court. Instead, the surveys routinely ask about

confidence in various institutions (see Wale 2013).[11] As Gibson, Caldeira, Spence (2003a) have

shown, confidence questions measure both diffuse and specific support, but are predominantly

influenced by the respondent's performance evaluation (specific support). It is certainly true that

positive performance evaluations sustained over time can morph into institutional legitimacy

(Gibson, Caldeira, and Baird 1998), but it is unwise and misleading to treat cross-sectional

confidence measures as indicating an institution's legitimacy.

Nonetheless, in the absence of a direct measure of institutional legitimacy, I will examine

confidence in the Constitutional Court, understanding it to be primarily a measure of

performance satisfaction[12], and with the further understanding that sustained performance

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[10] See http://www.ijr.org.za/political-analysis-SARB.php [accessed 11/2/2014].

[11] The stem of the question read: "Please indicate how much confidence you have in each of the following institutions? Would you say a great deal, quite a lot, not very much or none at all?"

[12] The empirical evidence is that the confidence question is in essence asking citizens whether they have confidence that the court will make decisions of which the citizen approves. Thus, the responses are not exactly retrospective assessments of institutional performance, but are rather expectations about future performance. Still, performance assessment, past or future, are more akin to specific than diffuse support.

satisfaction can contribute to an institution's legitimacy.[13] Thus, in some sense, sustained

performance satisfaction may be a necessary condition for a constitutional court to acquire

legitimacy among its constituents, and therefore tracking confidence over time is potentially

important and relevant. Still, we must always remember that confidence is different from

legitimacy.

Satisfaction with the Performance of the Constitutional Court

In the 2013 IJR survey, just under 60 % of the respondents said they had "quite a lot" or "a great

deal of confidence" in the Constitutional Court, in contrast to about 36 % who expressed "not

very much" or "no confidence at all" (the remaining 4 % had no opinion of the Court). More

than twice as many South Africans said they had "a great deal of confidence" in the Court as

compared saying they had "no confidence at all" (20 v. 9 %, respectively). Thus, the Court in

2013 seemed to enjoy the confidence of a solid majority of South Africans.

Should a 60 % confidence level be treated as high, medium, or low? There are several

possible standards that can be used to answer this question. Compared to the magical 50 % figure

of majority rule, 60 % is comfortably larger. Compared to those expressing limited confidence,

the 60 % figure is nearly twice as large. From these vantage points, the Court seems to possess a

solid level of support from South Africans.

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[13] A debate currently exists among scholars on the question of whether evaluations of individual court rulings have much impact on legitimacy. Bartels and Johnston (2013) argue that they do; Gibson and Nelson (2014c) argue that they do not.

Cross-institutional comparisons provide another point of comparison. From this perspective, the Constitutional Court is not, however, the most revered of South African institutions. As depicted in Figure 3, South Africans express more confidence in religious institutions, the broadcast media (e.g., radio and TV), the Public Protector, and the print media (e.g., newspapers). Confidence levels for the Court are roughly on par with confidence in big companies and the legal system in general. Still, the Constitutional Court draws somewhat more confidence from the mass public than do South Africa's other major political institutions.

[PLACE FIGURE 3 ABOUT HERE]

Figure 3 reveals that, at the aggregate level, the Constitutional Court is rated more positively than South Africa's other major political institutions. A better handle on this comparison can be gained, however, by determining *within each respondent* the relative confidence expressed in the institutions. For instance, comparing confidence in the Constitutional Court and Parliament, 52.4 % of the respondents express equal levels of confidence, 20.9 % express more confidence in Parliament than the Court, and 26.7 % express more confidence in the Court than the Parliament. Comparable figures for the presidency are 49.6 %, 23.5 %, and 27.0 %, respectively. From this vantage point, the Court does not seem to have carved out much of a unique role for itself within South African public opinion.

Inter-racial Differences

Virtually all questions of South African politics are connected in one way or the other to race. It is therefore useful to consider whether confidence in the Constitutional Court varies according to whether one is from the majority race in South Africa or from one of the racial minorities.

Figure 4 reports the percentages of the four major racial groups that express relatively high confidence in the Constitutional Court. Two conclusions spring from this table. First, there are practically no differences among white, Indian/Asian, and Coloured South Africans, with, in each instance, just more than one-half of the respondents expressing support for the Court. Second, black South Africans express significantly more support for the Court than do members of the three racial minorities. The difference is about 10 percentage points (and it is statistically significant). As in the earlier surveys, the racial majority in South Africa supports the high court more than the racial minorities.

[PLACE FIGURE 4 ABOUT HERE]

Still, it is noteworthy that among all four racial groups in South Africa a majority expresses considerable confidence in the Constitutional Court. Indeed, this simple fact may be more significant than the conclusion that comparatively minor inter-racial differences exist in performance evaluations.

Age Cohorts and Confidence

The 2013 data I am reporting in this paper are cross-sectional in nature. They can be compared to earlier surveys, of course, but they are not particularly adept at predicting future support for the Constitutional Court.

One possible method for drawing inferences about future change involves comparing age cohorts. If younger South Africans express more support for the Court than older South Africans, then one might predict that generational replacement alone would result in higher support levels. This might be especially the case were the "Born Free" generation of South Africans distinctively supportive of the Court.

Unfortunately, this does not turn out to be so. As shown in Figure 5, only the slightest differences in confidence in the Court exist across generations. Younger South Africans express slightly more confidence in the Court, but the differences across age cohorts are not statistically significant. It appears that generational change is not a mechanism through which the Constitutional Court can build further institutional legitimacy.

[PLACE FIGURE 5 ABOUT HERE]

Change in Confidence

Yet another basis for assessing the 60 % figure expressing relatively high confidence in the Court is to compare it to equivalent surveys over time. The IJR data allow this comparison, at least for the period from 2006 to 2013, when their annual surveys repeatedly asked the confidence questions. Gibson did not ask about confidence in the Constitutional Court in his

2004 survey, but did in 2001. Using these data, we can chart the nature of change in Court confidence over the course of the decade. Figure 6 reports these data.

[PLACE FIGURE 6 ABOUT HERE]

The first thing to note about these data is that confidence in the Constitutional Court increased rather substantially from Gibson's survey in 2001 to the IJR surveys conducted later in the decade. In 2001, 46.3 % of South Africans had relatively high confidence in the Court. The average level of confidence for the eight IJR surveys is 61.8 %. There is some variability in the IJR figures, but none is as low as was found in the 2001 survey. In every IJR survey, a majority of South Africans reports a relatively high degree of confidence on the Constitutional Court.

The IJR figures do bounce around somewhat (as might be expected for performance evaluations). In 2008 and 2009, confidence in the Court dipped a bit, although it rebounded in 2010 through 2012. In 2013, confidence in the Court declined significantly – about 10 percentage points – as compared to 2012. Unfortunately, data for 2014 are not yet available, so it is unclear whether the 2013 findings are starting a contrary trend in confidence.

From these data it seems clear that confidence in the Constitutional Court changed rather substantially from 2001 to the present. Unfortunately, data are not available to pinpoint exactly when in the early 2000s confidence took its greatest leap. Recall that, in terms of diffuse support for the Court, Gibson (2008) has reported that change between 2001 and 2004 was largely trivial. Still, the data clearly support the conclusion that confidence in the Constitutional Court significantly increased over the course of the decade.

Converting Confidence into Legitimacy

The 2001 reconciliation survey included both measures of confidence in the Constitutional Court and the legitimacy of the institution. Just as in previous research, the two measures are moderately correlated: r = .44. The equation indicating the rate at which confidence turns into legitimacy is:

Legitimacy = .663 + .436 * Confidence

At the highest level of observed confidence, the predicted number of supportive responses to the three measures of institutional legitimacy is 2.0. At the lowest level of confidence, the expected number of supportive answers is 0.7.[14] That the relationship is not stronger indicates that there is considerable slippage between performance evaluations and diffuse support. Some may support the institution even though being dissatisfied with its performance in the short-term, just as some may oppose the institution but be pleased by its recent decisions.[15]

In 2001, the average expected number of supportive replies to the three diffuse support measures based on the one's level of confidence in the Court was 1.3. Using the same equation (i.e., from 2001) but applying it to the confidence data in 2013 produces an average expected number of supportive replies of 1.4. This suggests that, even if confidence in the performance of

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[14] Roughly, having "not very much" confidence in the Court corresponds to giving one supportive reply (1.1), while having "quite a lot of confidence" corresponds to one and one-half (1.5) supportive replies to the three statements.

[15] In the 2001 data, I regressed confidence in the Constitutional Court on satisfaction with its performance and diffuse support. While both predictors are significantly related to confidence, the variance in confidence is considerably more strongly determined by performance satisfaction than by diffuse support. The two betas (standardized regression coefficients) are .39 and .26, respectively. This analysis confirms that satisfaction reflects performance evaluations to a greater degree than institutional support.

the institution has increased, the institution's legitimacy may not have changed much. Of course, slow change is predicted by Legitimacy Theory; legitimacy only accrues with the slow accretion of repeated satisfaction with the performance of an institution. Nonetheless, according to this analysis, the observed increase in confidence in the Court in recent times is unlikely to have morphed into a significant increase in the legitimacy of the institution.

Summary

From the vantage point of the confidence indicators, the picture painted by Gibson's earlier analysis seems to have changed in important ways. Confidence in the Constitutional Court has increased substantially, and a majority of South Africans of every race now expresses a relatively high level of confidence in the institution. To a considerable degree, this reflects overall confidence in South African political institutions; only a relatively small portion of the South African population expresses a distinctive level of support for the Constitutional Court. We are not certain exactly how confidence evolves into legitimacy, but by the best statistical estimates, this evolutionary process is quite slow. Still, if satisfaction with the institution's performance is a necessary condition to building legitimacy, then these data provide some degree of optimism that support for the Constitutional Court is headed in an institutionally favorable direction.

Building Legitimacy

Are there strategies other than satisfying its constituents with its decisions that can provide an additional boost to the Court's legitimacy? In a recent paper, Gibson and Nelson (2014d) have

shown that mere exposure to the symbols of judicial authority can enhance a court's legitimacy. The authors used an experimental design with a nationally representative sample of Americans born in the U.S.[16], and randomly assigned the respondents to exposure to three judicial symbols (the U.S. Supreme Court justices in robes; the Supreme Court building; and a judge's gavel) versus three abstract, meaningless symbols (paralleling in structure the judicial images but with no content whatsoever). All respondents were exposed to a Court decision with which they disagreed on an issue of importance to them.

Even though all respondents were therefore disappointed in how the Court ruled, those exposed to the judicial symbols did not reduce their support for the institution, while those shown abstract images did. In a related study, Gibson, Lodge, and Woodson (2014) have shown that exposure to these judicial symbols also enhanced the willingness of citizens to accept court decisions with which they disagree. According to these authors, exposure to judicial symbols activates a set of considerations, probably connected to justice and fairness, which enter working memory and influence how the Court and its decision are judged. These findings provide significant support for Positivity Theory. More important perhaps, they show how a Court can utilize non-substantive, non-policy factors to build, maintain, and enhance the legitimacy of their institution.

It is not clear that the South African Constitutional Court has availed itself to the fullest of the symbols of judicial authority and legitimacy. Indeed, the Constitutional Court has seemed

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[16] In pilot studies with students at Stony Brook University, Woodson, Gibson, and Lodge (2011) found differing effects of judicial symbols depending upon whether the student was American- or foreign-born. So as to avoid that confound in our TESS study, we confined the sample to American-born members of the KN panel.

in some instances to have rejected the use of the traditional symbols of judicial authority. For example, its logo is shown in Figure 7. According to the Court's website: "What the Court did not want were clichéd images of the scales of justice and Roman columns." It is not at all clear that ordinary South Africans would be inspired to respect the institution after being exposed to its logo: "Justice under a tree." South African judges are "judges," not "justices;" the courthouse is a beautiful modern building, not a cathedral to the law; the building houses a marvelous art collection, little of which has anything to do with the law; the judges eschew wigs; and the pictures of the justices on the Court's website show them in business clothes, not in their robes. I would be quite surprised to learn that the Court's style of presenting itself has any significant legitimacy-enhancing effects. This is not so of other constitutional courts around the world.

PLACE FIGURE 7 ABOUT HERE]

Gibson and Caldeira (2003, 24) have argued:

Moreover, a legitimacy shortfall may be exacerbated if a court fails to appreciate the need for mass legitimacy (a common failing of judges, given the elitist nature of lawyers) and therefore seeks anonymity rather than publicity for the institution's work. Judges have access to powerful symbols – even if they are symbols of authority – that can contribute mightily to legitimacy, especially since extant research so strongly suggests that "to know" courts is "to love them." Failure to mobilize these resources can only limit the effectiveness of judicial institutions.

The lesson of a considerable body of social science is that legitimacy can be obtained with relatively little effort and cost, so long as judges value popular legitimacy and take at least minimal efforts to cultivate legitimacy among the court's constituency. A wise constitutional court set on protecting its judicial independence would not neglect this crucial form of political capital.

Discussion and Concluding Comments

Scholars may disagree about how much institutional legitimacy a court has and whether alternative forms of political capital can make up for shortfalls in legitimacy. They do not disagree, however, that legitimacy can be a considerable asset for courts. All courts face problems of getting their decisions respected and implemented; all courts are, to at least some degree, vulnerable to interference by other political institutions. The simple proposition that greater institutional legitimacy contributes to greater judicial independence is not, generally speaking, controversial.

The independence of courts can be compromised by other political actors in a polity, including the legislature, the executive, and, under some circumstances, the mass public. All courts are to some degree accountable for their decisions[17]; the interesting questions pertain to whom the courts are accountable, and to what degree they are accountable.

The preferences of the mass public can pose a threat to judicial independence. On occasion, the mass public may prefer extra-legal or even illegal solutions to problems (e.g., the

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[17] The Center for Constitutions Transitions at NYU Law (2014) appropriately refers to judicial independence as "relative judicial independence."

quarantining of those treating Ebola patients). In such instances, judges may face a dilemma of deciding according to their understanding of the rule of law or acquiescing to the wishes of their constituents.

Under most circumstances, however, the mass public does not pose the greatest threat to constitutional courts. Instead, the greatest threat comes from the government. The Center for Constitutions Transitions at NYU Law (2014, 9) has asserted:

> A constitutional court plays many important roles, including promoting the rule of law, protecting individual rights, providing a forum for resolving disputes, enforcing the separation of powers, holding different political players accountable to their constitutional commitments, serving as "political insurance" for opposition parties and symbolizing the end of a period of authoritarian rule. The success of constitutional courts is closely tied to the success of constitutional democracy in the region.

The actor most likely to stand in the way of a constitutional court performing most, if not nearly all, of these functions is the government.

A constitutional court that is dependent upon the government to guarantee its independence is a constitutional court that has limited and precarious independence. The South African Constitutional Court enjoyed the support of the government for its independence during its early days. Today, that support is less certain. Therefore, the Court would do well to seek to mobilize other forms of political capital.

Indeed, one could imagine a constitutional court in an evolving democracy that adopted a more proactive role in shaping the country's popular legal culture, including advocating for the utility of independent courts. The Constitutional Court claims responsibility for the country's constitution; perhaps it might also claim responsibility for convincing the South African masses that the constitution is something of value to them. South Africa has a complex relationship with the rule of law (e.g., Gibson 2004), but, at a minimum, the rule of law is a sufficiently attractive value in South Africa that efforts to advance that value could bear fruit. For instance, as South Africans become increasingly concerned about official corruption, the judiciary could assume an activist role on that issue. Many avenues exist by which the courts could influence the popular legal culture of the country. Perhaps the most important missing ingredient is the motivation to do so.

Finally, this paper has struggled to find appropriate data on the legitimacy of South African institutions. To reiterate one additional time, my analysis of confidence in institutions cannot be considered to be an analysis of institutional legitimacy. Developing a strategy for the continuous monitoring of the health of the country's political institution therefore should be given high priority. In all new democracies, institutions are fragile. Without valid and reliable data on public perceptions and evaluations, we cannot know just how fragile democratic institutions may be, and without that knowledge, we cannot know how they can be protected.

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Appendix A: A Note on Race in South Africa

It is common in South Africa to divide the total population into four racial categories for the purposes of research or the explanation of demographic realities and/or socio-economic conditions in the country, and I follow this practice throughout the analysis reported in this paper.[1] As James and Lever (2000, 44) note: "The use of these categories is unavoidable given the fixity that they have come to acquire both in popular consciousness and official business." The use of these racial terminologies, however, differs from the way racial categorization may by understood in other societies. It is therefore important to understand the historical development of these categories, especially the legal boundaries imposed on racial groups by the apartheid government.[2]

The four racial groups are African, white, Coloured, and South Africans of Asian origin (Indian). These groups are also often referred to as population groups, ethnic groups (although this term usually refers to African subcategories such as Xhosa or Zulu), or national groups. The African majority has been known by European settlers by different names over time, such as "native," "Bantu," or "Black," and some of these terminologies were later formalized by apartheid legislation. The Africans were the original inhabitants of the area now called South Africa and were descendants of Iron Age farmers speaking different variants of Bantu languages, spoken in sub-Saharan Africa, east of Cameroon (James and Lever 2000, 44). Generally, I refer to these people as Africans or blacks.

The white inhabitants of South Africa (also formerly called Europeans) are descendants of Dutch, German, French (Huguenots who fled France due to religious persecution), English, and other European and Jewish settlers. Though South Africa was colonized by the Dutch and the British in different historical periods, the British colonization entrenched English as the most commonly spoken language.

"Coloured" is considered a mixed race category, although as James and Lever (2000, 44) argue, it is actually a residual category of people with quite divergent descents. Coloured refers to the children of intermarriages between whites, Khoikhoi (often referred to as "Hottentots") and the San (commonly referred to as "Bushmen"), and slaves from Madagascar and Southeast Asia and the Indonesian archipelago, and Africans (Thompson and Prior 1982, 34).

The Indian population came to South Africa largely as indentured laborers to work in the sugar plantations in Natal in the late nineteenth and early twentieth century. Yet, they came from different regions in the Indian Subcontinent, adhered to different religions, and spoke different languages, so that they, like Coloured people, are not a homogeneous group. I refer to these people as South Africans of Asian origin, despite the fact that some Coloured people are technically of Asian origin.

Earlier research has documented enormous differences across South Africa's groups in terms of a wide variety of political attitudes (e.g., Gibson and Gouws 2003, Gibson 2004a). Consequently, it is essential that race be incorporated into the analyses in this paper. To ignore race would be to fail to

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[1] For a most useful review of racial categorization under apartheid see Posel 2001.

[2] The editor of a special issue of *Daedalus* focused on South Africa had this to say about the use of racial terms in the articles in the journal: "Many of the authors in this issue observe the South African convention of dividing the country's population into four racial categories: white (of European descent), colored (of mixed ancestry), Indian (forebears from the Indian subcontinent), and African. The official nomenclature for 'Africans' has itself varied over the years, changing from 'native' to 'Bantu' in the middle of the apartheid era, and then changing again to 'black' or, today, 'African/black.' All of these terms appear in the essays that follow." See Graubard 2001, viii.

recognize that South African politics today continues to be shaped by its racist and colonial history. To incorporate race into this analysis is not to accept anything about apartheid, but is instead merely to acknowledge that apartheid shaped — and continues to shape — political reality in the country.
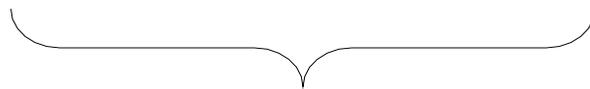
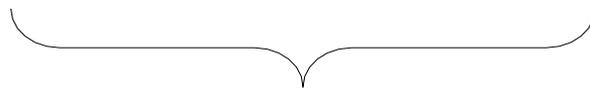# Figure 1. The Consequences of Positivity Bias

Exposure to Courts
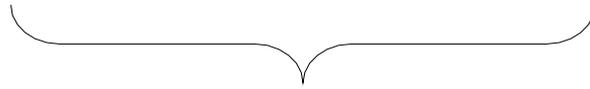
Exposure to Legitimizing Symbols

Acceptance of the Myth of Legality

Enhanced Institutional Esteem & Loyalty

Legitimacy

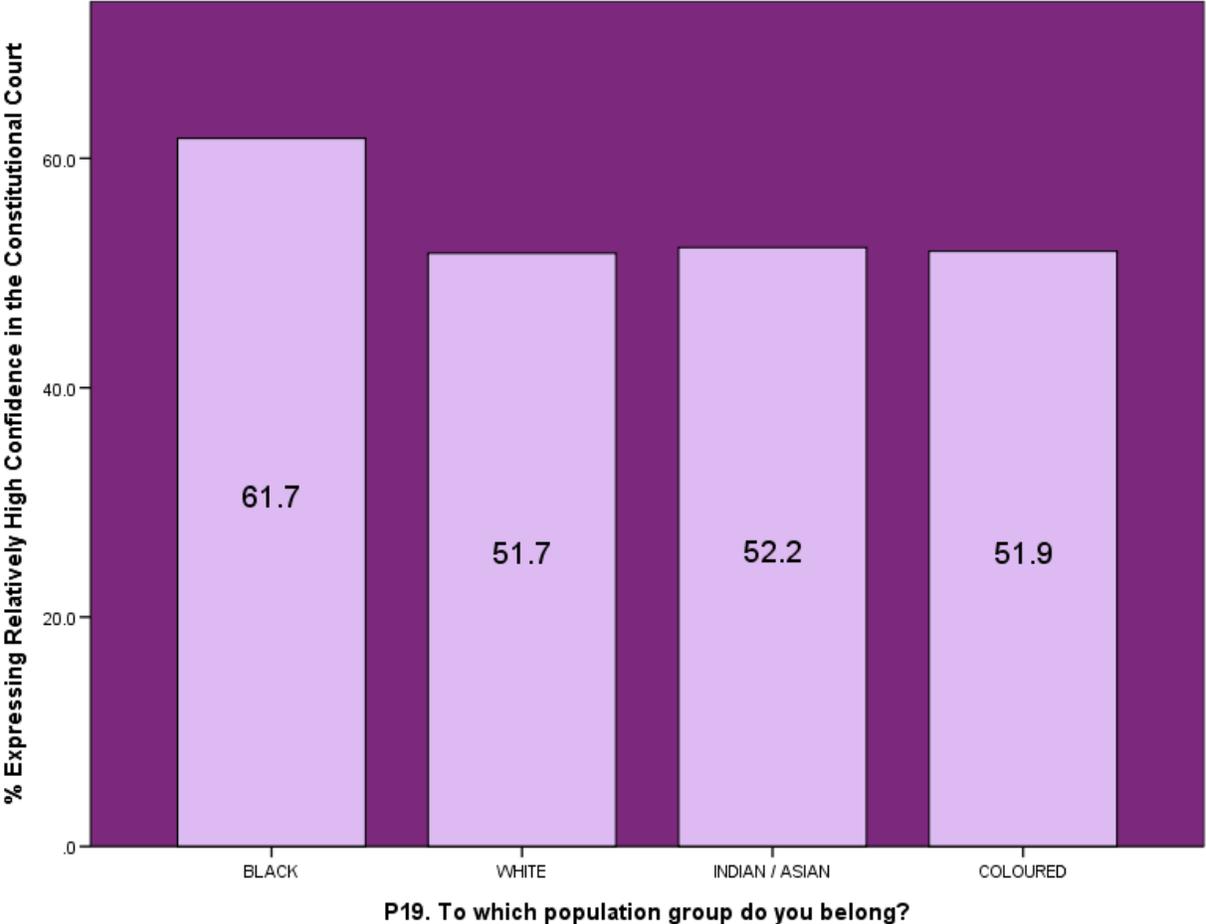**Figure 2. Cross-National Comparison of the Legitimacy of National High Courts**
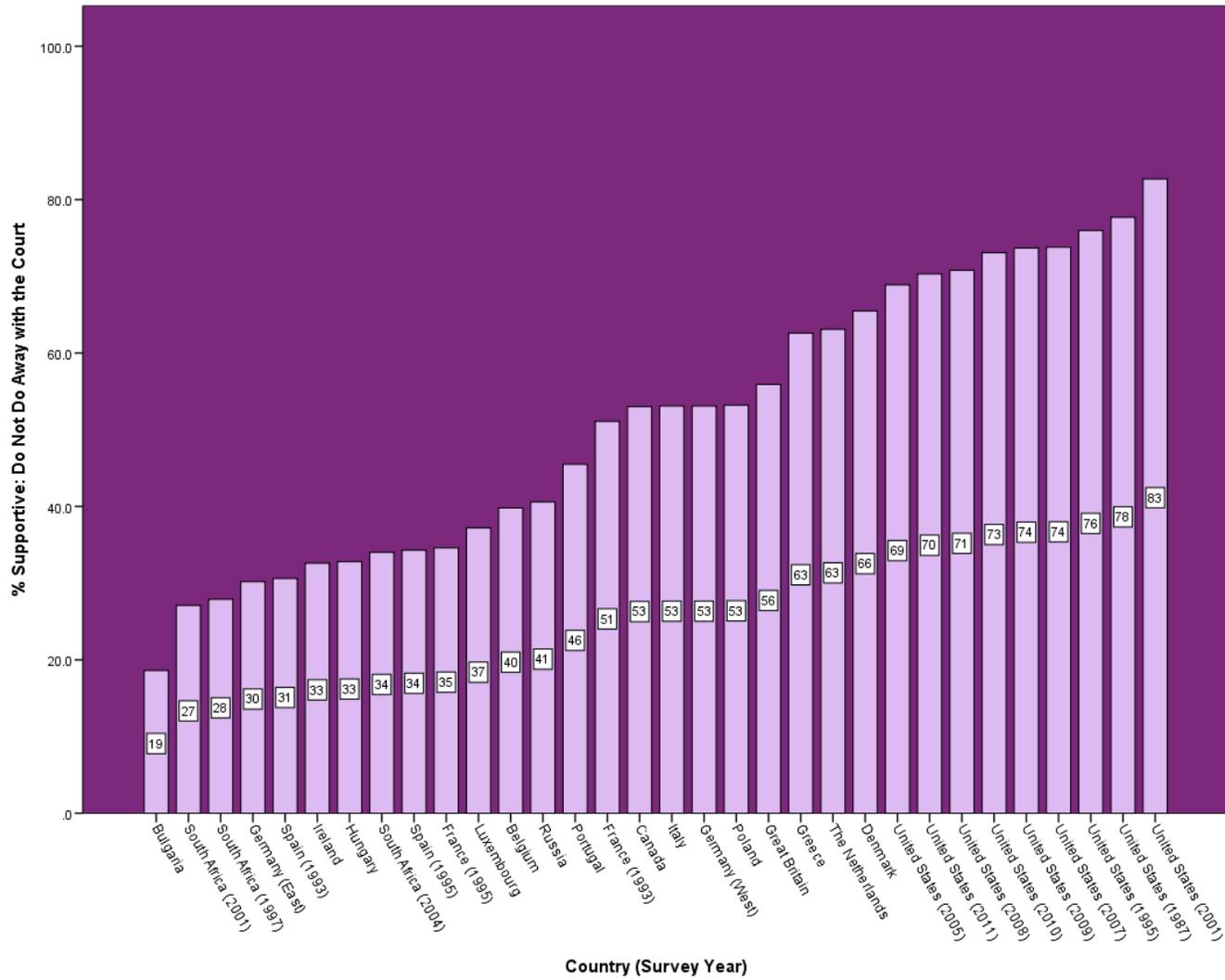
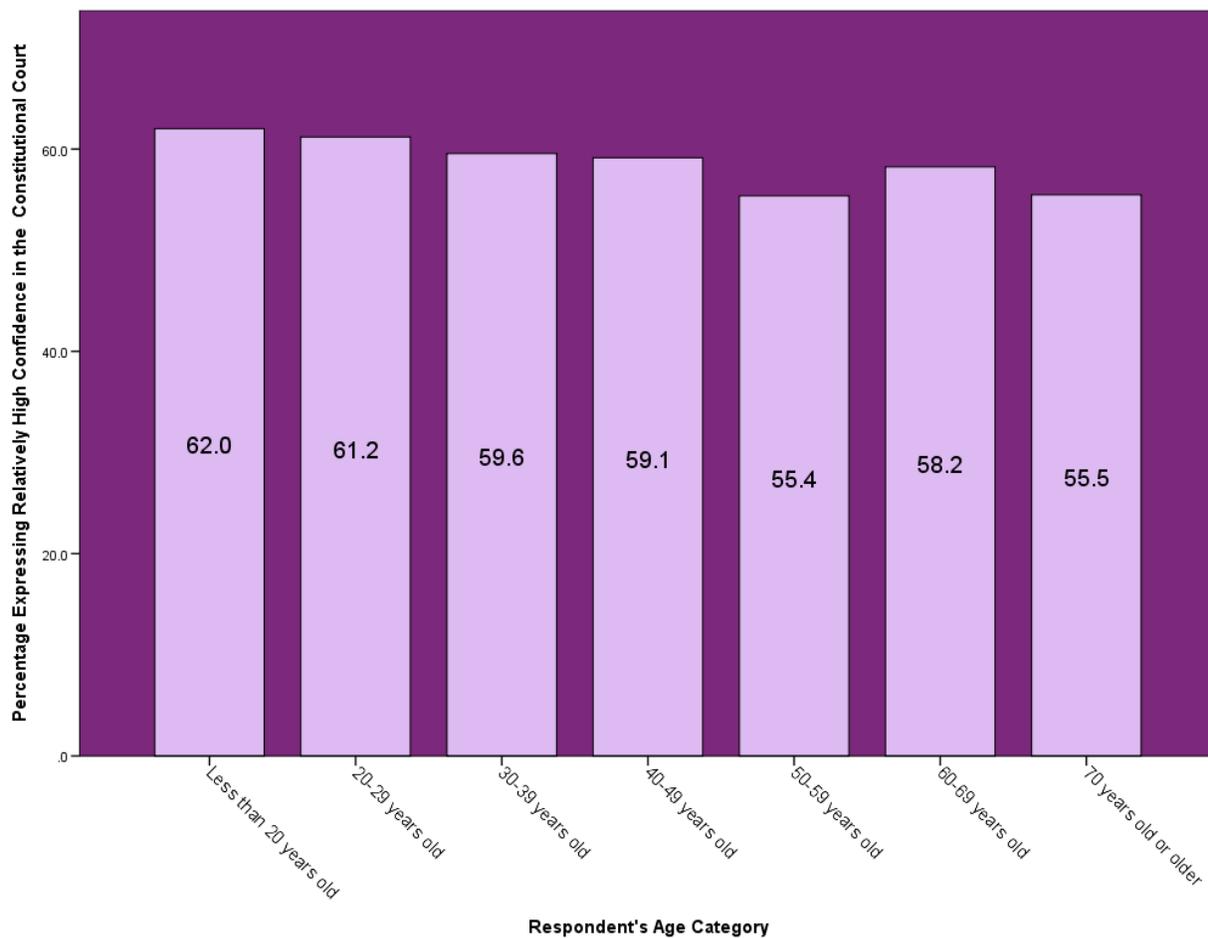**Figure 3. Confidence in South African Institutions, 2013**
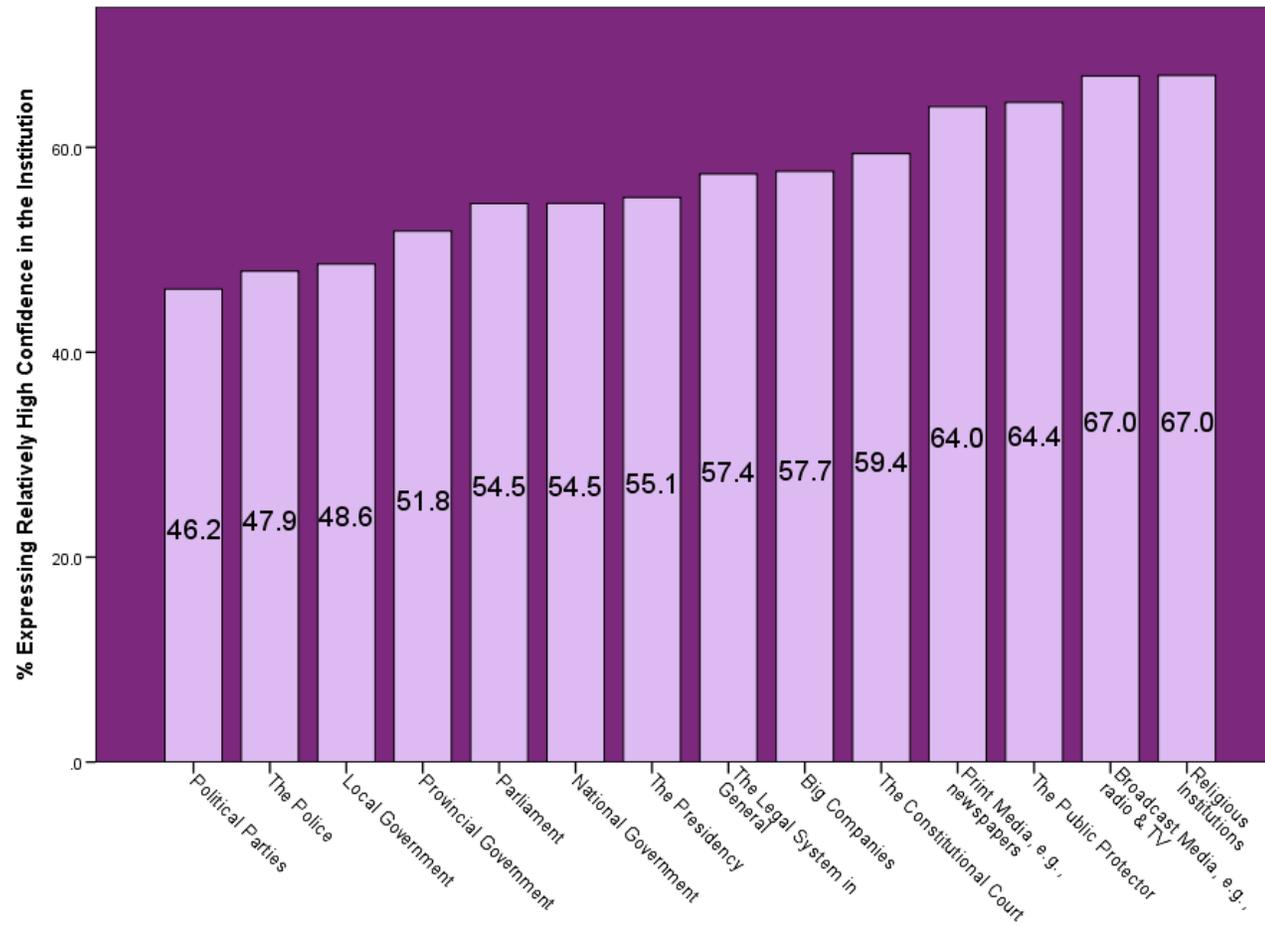
Source: IJR Reconciliation Barometer, 2013
N ≈ 3,590

Figure 4. Inter-Racial Differences in Confidence in the South African Constitutional Court
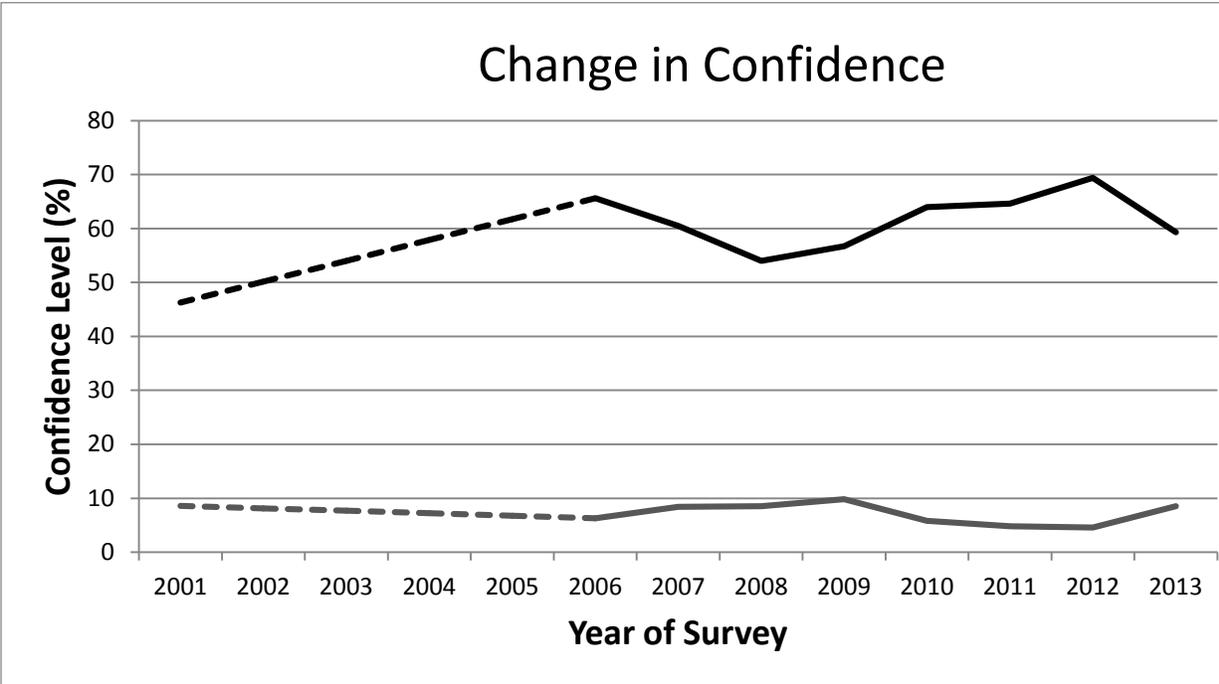

Source: IJR Reconciliation Barometer, 2013
$N \approx 3,590$

Figure 5. Age Cohort Differences in Confidence in the South African Constitutional Court

Source: IJR Reconciliation Barometer, 2013
        N ≈ 3,590

Figure 6. Change in Confidence in the South African Constitutional Court

Source: 2001, Gibson Survey (e.g., Gibson 2004)
        2006 – 2013, IJR Reconciliation Barometer Surveys

Note: The top horizontal line represents the percentages of respondents expressing relatively high confidence in the Constitutional Court. The bottom horizontal line represents the percentages of respondents expressing no confidence in the Court.

Figure 7. The Logo of the South African Constitutional Court