

Common Law Co-Counsel Season 5, Ep. 5: James Gibson

[THEME MUSIC IN, THEN UNDER]

Risa Goluboff: For decades, the Supreme Court has been one of the most trusted institutions of government, but will overturning *Roe v. Wade* affect its legitimacy? Today, James Gibson of Washington University in St. Louis shares new data with us revealing how the public is reacting to *Dobbs versus Jackson*.

James Gibson: We've got liberal Americans who have lost and lost and lost in Supreme Court litigation. And then along comes *Dobbs* and that pushed people over the cliff.

[THEME MUSIC UP, THEN UNDER AND OUT]

Risa Goluboff: Welcome back to *Common Law*, a podcast of the University of Virginia School of Law. I'm Risa Goluboff, the dean. We're now in the second leg of our fifth season, and today I am happy to welcome back Greg Mitchell as one of our four co-hosts, helping to choose and interview guests connected to their fields ranging from law and psychology – which is one of Greg's specialties – to business law and more. Greg, it is great to see you.

Greg Mitchell: Thanks, Risa. I'm happy to be back.

Risa Goluboff: To our audience members joining for the first time, Greg not only holds a law degree, but also a Ph.D. in psychology. His scholarship focuses on legal judgment and decision-making, expert evidence and public attitudes toward the law and legal institutions.

Greg Mitchell: That's right, Risa. And in fact, my second publication in a law review many, many years ago examined public acceptance of Supreme Court decisions on abortion rights. That article was written with Tom Tyler, who was one of our guests on the podcast last season, and the article presented the results of a survey that we did examining public reactions to the Supreme Court's 1992 decision in *Planned Parenthood versus Casey*, where the court upheld a woman's right to abortion under *Roe v. Wade*, but allowed states greater leeway to regulate abortions before a fetus was viable. In the *Casey* opinion, the court was very concerned about how its decision would be viewed in the eyes of the public. The *Dobbs* court, on the other hand, expressly rejected concern about the public's reaction to the decision as a valid consideration and likened *Roe v. Wade* to *Plessy v. Ferguson*, calling both "erroneous decisions that deserve no deference." The court's new stance on abortion rights begs the question of whether this court's legitimacy in the eyes of the public will suffer, and if so, what the practical consequences of a loss of legitimacy may be.

Risa Goluboff: These are really crucial questions to our whole legal system and our constitutional law system. And to address them, we are fortunate to have with us one of the leading scholars on public attitudes toward the Supreme Court, James Gibson.

Greg Mitchell: Jim is the Sidney W. Souers Professor of Government, as well as a professor of African and African American studies at Washington University in St. Louis. And he is the Professor Extraordinaire [Extraordinary] in political science at Stellenbosch University in South Africa, which has to be one of the best titles ever given to an academic.

Risa Goluboff: That is a really fabulous title, especially on top of all those other titles. But Professor Extraordinary, I mean, it sounds like “Ambassador Extraordinary and Plenipotentiary.”

Greg Mitchell: Well, the titles are well deserved, given Jim's scholarly output and influence. He's published 11 books. He has a new book ready for publication on the health of the American democracy following the 2020 presidential election, and he's published too many articles for me to count. Most importantly for our talk today, Professor Gibson has new data on the impact of the Dobbs decision on public support for the Supreme Court.

[THEME MUSIC CREEPS IN]

Risa Goluboff: That sounds terrific. I'm really looking forward to this conversation and we will be right back with Jim Gibson.

[THEME MUSIC UP FULL, THEN UNDER AND OUT]

Risa Goluboff: Jim, thank you so much for joining us, we are just thrilled to have you.

James Gibson: Pleased to be here. Thank you for having me.

Greg Mitchell: Jim, I've been a fan of your work for a long time, especially your work on legitimacy in the courts. Before we get into your new study on the effect of Dobbs on public attitudes toward the court, could you tell us what you mean when you say legitimacy?

James Gibson: Yes. There are essentially two forms of legitimacy. One is a normative theory of legitimacy by which the actions of an institution are judged according to some normative or ideological grounds. The second we refer to as sociological legitimacy, and it is an empirical concept, and it is simply what the public thinks about the institution. I have virtually nothing to say about normative legitimacy; I have a lot to say about sociological legitimacy as a political scientist.

Greg Mitchell: Let's get into it. Tell us more about sociological legitimacy.

James Gibson: The most interesting thing about it is that it changes very, very slowly. I liken it to loyalty. A single transgression by a friend doesn't necessarily end a relationship. Repeated transgressions may alter the relationship. The American people feel the same way about their institutions. We sometimes refer to this as a reservoir of goodwill, which allows the institutions to perform poorly or make decisions that people disagree with and get away with it. And so legitimacy is a form of political capital that's second to none.

Greg Mitchell: The concept can apply across any institution. It's not just the Supreme Court that we're focusing on here, right?

James Gibson: In fact, legitimacy theory has become embraced by vastly different scholars, scholars of different disciplines and different interests. They talk about the legitimacy of algorithms. They talk about the legitimacy of central banks. They talk about the legitimacy of transnational courts. So yes, it applies broadly and what it is – to put the finest point on it – it's the suspension of instrumentalism. It's the suspension of a quid pro quo. It's the suspension, if you will, of strict rationality. I'll support that of which I approve. And so people are finding that central banks require it. All kinds of different institutions require it.

Risa Goluboff: You know, you said one of the surprising things about this is how unchanging it is, how hard it is to degrade that legitimacy of an institution. And you talk about in your paper the positivity bias, right? That in the case of courts, once they're perceived as legitimate, then people are inclined to view decisions positively. So can you tell us more about positivity bias and what those findings mean?

James Gibson: I can, and I'll use as the example to explain the theory, a dispute over the outcome of a presidential election.

Risa Goluboff: Great.

James Gibson: Not in 2022, but in 2000.

Risa Goluboff: Bush versus Gore.

James Gibson: In Bush versus Gore. So, we have lots of data of before and after on people's opinions toward the Supreme Court bracketed or bookended around Bush versus Gore. There are about five or six different studies all reaching the same conclusion. And what we found is that that decision increased the legitimacy of the court. It did so even among Democrats and even among African Americans. Obviously it did so among Republicans who won in that decision.

Risa Goluboff: What's your theory about why that is?

James Gibson: I remember my own personal experience with Bush versus Gore. I watched the whole thing on CNN for about a month. And I remember the dispute in Florida being covered as just a complete chaotic situation when the Florida Supreme

Court ruled. I also remember CNN covering the U.S. Supreme Court's ruling on Bush versus Gore, and they sat outside of the building and they spoke in hushed tones, almost as if waiting for the white smoke to come out of the chapel to tell us who the president's going to be. The level of deference to the institution was stunning in my view. So we developed something called positivity theory. And positivity theory is grounded in the work of Danny Kahneman, Nobel Prize winner. Probably the most important book of our time, "Thinking Fast, Thinking Slow." The theory that people acquire information from symbols, and they do so under the radar.

Greg Mitchell: In terms of the Supreme Court, the symbols you're talking about are things like the black robes, the raised bench, the Supreme Court building itself, right?

James Gibson: Yes.

Greg Mitchell: Why does it matter that those symbols are understood subconsciously or under the radar, as you put it?

James Gibson: That's so important that under the radar, it's subconscious, because that means that people don't counter-argue, don't try to rebut the information. If you say to me, "Russia is a great country today," I immediately think, "Well, here's 20 reasons why Russia is not a great country today." But a symbol comes in under the radar and I don't have a conscious reaction to it, and therefore I don't rebut, and therefore it's influential. It's a very, very powerful theory, applying even to employment discrimination on racial grounds, etcetera.

Greg Mitchell: But of course, the second half of Danny's book is "thinking slow" and there is a role for more deliberative thought. It begs the question, at what point would the deliberative thought overcome the more intuitive, automatic reactions to the Supreme Court. What happens if, over time, you see the court continually making decisions that do seem to be based on something other than the law or neutral decision-making. Does that have any impact over time?

James Gibson: I was prepared to answer your question very quickly until you said, "based on the law or neutral decision-making." The problem is that we're all legal realists now, and that includes the American people. What the American people hate, what they hate about Congress, for instance, is unprincipled, strategic, political decision-making. Now, the court has not been accused of engaging in that sort of decision-making. So when I say that we're all legal realists, what I mean is we all understand the role of ideology, we accept it, and it doesn't undermine legitimacy. The role of partisanship, however, is an entirely different issue.

Greg Mitchell: Well, no, I think that's an important distinction. So you would distinguish between political or judicial ideology versus mere gamesmanship or political strategy and partisan, uh, games that – the kind you might see in the Senate or House of Representative, for instance.

James Gibson: Yes, that is correct.

Greg Mitchell: So Bush v. Gore was not understood necessarily as a neutral or reasoned decision based only on the law, but you would still call it a principled decision because it was driven, or at least the public saw it as driven by a coherent ideology?

James Gibson: That's correct. What the public saw is that conservatives voted for Bush and liberals voted for Gore and there were more conservatives, so Bush won.

Risa Goluboff: I take you not to be saying it ISN'T political. I take you to be saying, it APPEARS not to be political. It appears to be doing something else because of the institutional trappings. Am I right about that?

James Gibson: Absolutely correct. And thank you for correcting me because I'm not alleging that it's not political. I'm a political scientist, so I believe everything is political.

[LAUGHING]

Greg Mitchell: Right.

James Gibson: The correction is perceived to be political or politicized. We have evidence that the politicization of courts is what's damaging to legitimacy, the perception of judges as politicians in robes.

Greg Mitchell: With Bush v. Gore, your data showed the court actually gaining legitimacy in the eyes of the public, despite this opinion that probably a majority of the U.S. was not happy about. Fast forward to 2022 and we get another really important decision, the Dobbs versus Jackson Women's Health Organization decision that overturned Roe v. Wade, a decision that it appears a majority of the U.S. does not favor. And you're seeing, I think, as shown in the data in your new paper, something very different going on with the public's perception of the court. Is that fair to say?

James Gibson: It is fair to say, but I think we need to set the stage for Dobbs a little bit more completely, if I may.

Greg Mitchell: Please.

James Gibson: There's a recent paper by a Steve Jessee, Neil Malhotra, and Maya Sen at Texas, Stanford, and Harvard, in which they show that since about 2020, the court has moved markedly and consistently to the right. Now, what we have always argued in the past is that most people are getting something from the court. Most people are getting some decisions that they like, some decisions that they don't like. And so, yeah, you lose one today, but you win one tomorrow, and at the end of the day, the decision-making process seems okay, so the whole process seems legitimate. But as the court becomes more uniformly and consistently conservative, then we run into the problem of permanent or semi-permanent losers.

Risa Goluboff: As you write, we've seen this before, right, in the way African Americans were treated by the court under Chief Justice Burger.

James Gibson: African Americans under the Warren Court and after the segregation decisions were extremely supportive of the U.S. Supreme Court. But over time, the succession of decisions contrary to Black interest undermined support. It undermined loyalty. If your friend cheats on you five times in a row, then your loyalty begins to evaporate. And that's what happened with African Americans. That may be what's happening with the American people since 2020. So the context that I think is so important about Dobbs is first that the court has become consistently conservative. And that's unlike 2019. That may not be intuitively obvious to you, but if you look at the, uh, Roberts Court over the last 15 years or so, it's been roughly 60/40 conservative/liberal, and now the court has become consistently conservative. We've got a, a group of liberal Americans who have lost, and lost, and lost in Supreme Court litigation. And then along comes Dobbs on an issue that's grounded in moral concerns, and therefore not necessarily negotiable or compromisable and that pushed people over the cliff.

Risa Goluboff: Do you think, uh, that the impact that you're seeing is a short-term impact in the immediate aftermath of Dobbs, or do you think going forward you're going to continue to see a deterioration of perceived legitimacy of the court? Will that only happen in cases where there are also moral considerations, or do you think it expands beyond that set of cases into all of the cases?

James Gibson: There is a theory that says these effects do not persist. It's a theory that says that people forget their displeasure and legitimacy regenerates itself. There's also another factor that may make Dobbs not have lasting effect, and that is the court may get scared. We have instances – the European Court of Justice is the best instance I know of – we have instances where judges have looked at my data and they've said, "Uh oh, we've got a problem. We've got to reign in our decisions. We've got to be much more careful about our decisions." That's Roberts' – Chief Justice Roberts' – position, right? Roberts is an institutionalist, Roberts is doing everything he can to protect the institution, and so he wants the court to go under the radar to become invisible for a term or two.

Greg Mitchell: We should, I think, actually just talk about how striking the results of this most recent survey were so that people understand the difference that you observed because you've been running surveys on public attitudes towards the Supreme Court for years and years, and you saw a marked change after the Dobbs decision. Maybe you should just tell us how significant that change was.

James Gibson: The context for the finding is, as you say, just absolutely minuscule change over the last 30 years in support for the court. Maybe a little bit of a boost for Bush versus Gore, maybe a little bit of a decline for the decision on the Voting Rights Act. Marginal changes over time. But really, essentially consistent support. That's not true with Dobbs. I've never seen any data like this. It's not catastrophic. I don't want to oversell the finding. Not like legitimacy has entirely evaporated, but there is an order of magnitude decline in the standardized indicators that we ask in our surveys that come before and after Dobbs.

Risa Goluboff: For context, in your paper you compare the impact of the Dobbs decision to the impact of the Amy Coney Barrett confirmation. Can you tell us about that?

James Gibson: Everybody was seemingly upset about the Barrett nomination coming a few weeks before the election, in the context of the Merrick Garland refusal, all kinds of unhappiness over Kavanaugh and blah, blah. Lots of things suggested that this was going to be consequential for the institution. It had no effect whatsoever.

Risa Goluboff: None at all?

James Gibson: I'm talking about the difference between a July 2020 survey and a December 2020 survey. Court legitimacy didn't change at all. Then along comes Dobbs about a year, year-and-a-half later, and the change in Dobbs is orders of magnitude greater than the change for the Barrett confirmation.

Risa Goluboff: Is it possible that in Dobbs you're seeing a cumulative effect from the politics of the confirmation process earlier that didn't necessarily surface in the absence of the losing, right? It's the combination of the perceived politics of the nomination and confirmation process with the sense of systematic losing or losing in the morally significant case.

James Gibson: That's a difficult question. It's not clear to me that controversial nominations necessarily damage the institution. Some people may believe that Kavanaugh is guilty as sin, but that doesn't necessarily rub off on the institution itself. Even attitudes toward Clarence Thomas and his wife's involvement in the election and all of the controversy on that, we've got to be a little bit careful, because the American people distinguish between the actions of a single justice versus the institution itself. Now, back to your question about cumulateness: One thing that may have made the court vulnerable at the time of Dobbs: First, elite condemnation of the decision was widespread. The elites reacted to Dobbs quite differently than the way they reacted to Bush versus Gore. But we also have an institution that's vulnerable. We have a leak of an opinion. You folks probably know better than I, but I believe that's unprecedented in modern times. We have the election controversy. We have Thomas' wife. We have Alito's draft of the opinion 30 years earlier. There are a whole series of things that make people question the process by which the decision was made. I'll be the first to say I don't have great data on that. I do not have great data on that, but it's conceivable to me that all of these factors came together at a single point in time. Then you have a decision first that everyone knows about. Most – 63% – disagree with. And a decision grounded in moral concerns of great importance to people. All of these factors came together to make Dobbs perhaps a once-in-a-lifetime threat to the legitimacy of the institution.

Greg Mitchell: Let's assume that Roberts and others on the court aren't able to reverse this trend, and in the next few years, your survey data continues to be negative about the court. What are the practical consequences of that? I mean, if

you read the Dobbs decision, seems like the majority is unconcerned about public opinion. So are there practical consequences from, uh, the courts losing legitimacy?

James Gibson: Well, we know something about this. Courts around the world that have lost legitimacy have been physically attacked. The Nigerian, uh, Constitutional Court was burned, as was the Pakistani court. But let's focus on the U.S. The vulnerability of the court at this moment, it seems to me, is structural change in the institution. The Dobbs paper shows widespread support for limited terms for the justices. No longer life terms. There's growing support for enlarging the number of members on the court. There may be ways to make the court become more transparent. There are increasing demands for judicial proceedings to be televised, for instance. There are lots of threats to the institutional structure that flow from the loss of legitimacy.

Risa Goluboff: One could see the changes that might occur if we were to go down this path as reinvigorating the legitimacy of the court. The court becomes more responsive, the court becomes more transparent, and it regains some legitimacy. On the other hand, to the extent that I understand the current legitimacy of the court to be in part a function of the black robes, the lack of transparency, the lack of television, the symbols that set the court aside from the normal flow of politics are a big piece of why we endow it with that legitimacy. Do you think if the path that you just described happens, we end up in a worse place because the old ways of legitimacy are gone and the new structures don't endow the same?

James Gibson: Transparency is good for the court, not bad. Transparency allows people to see the decisions. Transparency exposes folks to the symbols. If I were Roberts right now, I'd put cameras all over the Supreme Court building. In my view, in short, transparency aids rather than hurts the institution.

Greg Mitchell: As you've been working on the impact of Dobbs on the views of the Supreme Court, you've also been wrapping up work on your new book, "Democracy's Destruction." Now that title sounds ominous, but you actually reach fairly optimistic conclusions about the health of our institutions following the 2020 presidential election. Is that a fair, very quick summary of your conclusions from the book?

James Gibson: It is fair, but may I make one correction?

Greg Mitchell: Please.

James Gibson: The title of the book is "Democracy's Destruction?" question mark.

Greg Mitchell: Good point. Good point. And you answer that with a negative, that no, we haven't destroyed democracy yet, despite what some may perceive as strong efforts to do so.

[LAUGHING]

Greg Mitchell: So could you tell us the basis for your more optimistic take on democratic institutions following the 2020 election? What data did you rely on to reach those conclusions?

James Gibson: Let me be a little bit careful. What this book addresses is whether the institutions themselves were damaged, by which I mean: Did they lose legitimacy among the American people? I contend that Trump and the Republicans made efforts to undermine those institutions. The question is whether they succeeded. The evidence is overwhelmingly that they did not succeed. The institutions thrived during this entire period. I break down the analysis to pre-insurrection and post-insurrection. Obviously, I thought that post-insurrection would have the greatest impact because of the truly unprecedented nature, the widespread information, et cetera. I didn't find that. I didn't find that the court's legitimacy was undermined. I didn't find that the Senate's legitimacy was undermined. I didn't find that the president's legitimacy was undermined.

Risa Goluboff: That's really interesting and not what a lot of people would've expected. So can you tell us why?

James Gibson: Yes. There's several elements to the explanation. The first element is changes in alienation from institutions may have happened before the election. So the marginal effect, the increased effect of the election, the insurrection, et cetera, was small because all of the changes had already taken place. A second element is backlash. It's clear that there was a mobilization of pro-democratic forces in reaction to Trump and Republicans' efforts to undermine democracy and overturn the institution. Another thing you have to remember is that the proportion of people who believe Trump's claims is small. It's not large. You'll hear in the press that it's a majority of Republicans, and that may be true, but Republicans are a third of the country, so it's half of a third. I'm not saying these people are unimportant, but I am saying that big majorities of the American people rejected the claims that Trump and the Republicans made, and therefore they did not draw new conclusions about the legitimacy of American political institutions.

Greg Mitchell: You've also talked about the way people respond to the surveys themselves as being a potential factor. Can you say more about that?

James Gibson: Uh, yes. In survey research, people are talking these days about "expressive" responding to surveys, and that is people who don't give their true opinions, but they give their opinions that they think their party would like to hear. So I believe that some Republicans are saying, "Yes, I think the election was stolen," when they really believe it was not stolen. And as a consequence, the contaminating effects of all of those allegations is small, not large, cause they don't really believe it. As I say, my evidence on that's not strong, but I think when you put it together with backlash, various other factors, the consequences that rubbed off on these institutions from these efforts to undermine them are really very, very small.

[THEME MUSIC CREEPS IN]

Risa Goluboff: Thanks so much for being here. It was really a fascinating conversation, Jim. We really appreciate it.

James Gibson: Certainly. Thank you very much.

Greg Mitchell: Thanks so much.

James Gibson: Bye-bye.

[THEME MUSIC UP FULL, THEN UNDER]

Risa Goluboff: Jim has certainly given us a lot to think about, Greg. He ends on a pretty optimistic note, I would say, but it does make you wonder what would happen to the court's legitimacy if liberal losses continue to pile up.

Greg Mitchell: Right. And we may be embarking on a, an experiment in real time with the makeup of the current court. I mean, the frightening thing is if you wed his research on political violence with his research on the court, one does wonder if there's going to be greater acceptance of not just protests, but maybe violent protests of the court. It's a little bit frightening.

Risa Goluboff: He points out that the sense of legitimacy for the institutions of the federal government are generally quite high, But in fact, how many people does it take to, to turn to political violence before there is a real threat, even if there's overall majority or preponderance support for political institutions.

Greg Mitchell: Look, there's a reason why there have been bills in Congress for greater protection of federal judges, right? And it's not just the Supreme Court. It's all the federal judges who have had to deal with an increasing level of violence or invasions of privacy at least. So ...

Risa Goluboff: Yeah.

Greg Mitchell: It seems like there are some members of the current court who are adamantly opposed to taking into account public opinion and – on principled grounds, that they don't think that they're simply a voice of, you know, that they're supposed to be attendant to public opinion, they're supposed to be doing what the law requires, but there may be practical consequences for that.

Risa Goluboff: It is really interesting to think about feedback loops between scholars and political actors, whether they be, you know, officials or the general public, right? His scholarship might lead people to behave differently. And I think we've seen, at least in academic discourse, and I think to some extent in popular discourse for a number of decades now, discussions about the relationship between the court and politics, and whether the court does or should take account of the likelihood of backlash, the likelihood of political mobilization after particular cases. That was certainly a conversation around Dobbs. It was a conversation around the

Affordable Care Act decisions a number of years ago, right? That conversation is in part spurred on by academic analysis of the court and its relation to politics and public opinion. It's really interesting to think about the ways in which both legal actors and political actors then are in a feedback loop with this academic discussion.

Greg Mitchell: I think we sometimes do get too focused on what our fellow academics are saying and their views, and we don't appreciate just how different public views of the court and what the court does may be. You were asking about transparency. I don't know if it was implicit in your question, but I thought you were thinking the transparency might undercut some of the legitimacy, which was my assumption as well.

Risa Goluboff: And I think there are justices who think that, right? And I'm mostly channeling justices who have been worried about that being the case, right?

Greg Mitchell: Right. But it was so interesting for him to say, "No, no, no, letting the public see the court and see the almost regal nature of the court will actually increase legitimacy." And it just, just shows how he's very much focused on how the public just looks at the institution, quite literally the surface of the institution. Whereas we're so focused on what the court says, what the court does, and how it explains itself that we, I think sometimes fail to appreciate there is a different level that the public may be attending to. So he could well be right that opening the court up could actually increase the legitimacy.

Risa Goluboff: Right.

Greg Mitchell: I just thought that was very interesting because that would not have been my hypothesis whatsoever.

Risa Goluboff: Yeah. And it goes back to the Kahneman "Thinking Fast and Slow," right? At what level, and with what consciousness are we trying to intervene in the conversation? Or is he trying to intervene? Or is the court trying to intervene into the conversation?

Greg Mitchell: Right, right. Well, a lot of interesting questions raised, and I think as he would say, a lot of unanswered questions because we just don't know the long-term effects of Dobbs or the insurrection.

[THEME MUSIC CREEPS IN]

Risa Goluboff: Yeah, that was such an interesting conversation. I'm really glad that you invited him to the podcast. Thank you so much.

Greg Mitchell: Thank you.

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Greg Mitchell: That wraps up this episode of Common Law. If you want to find out more about the work of Jim Gibson, visit our website, Common Law Podcast dot com, where you'll also find all our previous episodes and more.

Risa Goluboff: We hope you'll join us next time and throughout the season with our "Co-Counsel" hosts for more explorations of how law shapes our lives. I'm Risa Goluboff.

Greg Mitchell: And I'm Greg Mitchell. Thanks for listening.

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