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Legitimacy and Minority Rights

The morning of April 3, 1968, was fraught with tension. Nearly a decade and a half after Brown v. Board of Education (1954), racial integration had proved elusive. At first, the resistance was overt and powerful, echoing the words of a Mississippi judge who had taunted, “it will take an army of one hundred million men” to enforce desegregation (see Brandenburg 2004; Klarman 2006; Ross 2002; Sunstein 2004). But as time passed, segregation became a more insidious problem. Most southern districts adopted “freedom of choice” plans that offered minorities a say in the schools they would attend. But theory was not matched by reality. In one Virginia county, for example, 85% of African American students – and zero whites – attended the once all-black school (Stancil 2018). Against this backdrop, attorney Samuel W. Tucker stepped before the US Supreme Court. Tucker represented the petitioners challenging Virginia’s “part white part Negro” system of “dual schooling.” The case was Green v. New Kent County (1968). Free choice plans, Tucker argued, had little practical effect. Schools remained overwhelmingly segregated by race. He called on the justices to address the problem.

One month later, a unanimous Supreme Court offered one of the strongest frameworks for protecting minority rights ever endorsed by the US judiciary (Stancil 2018). Its ruling called for the “dismantling” of dual systems. It was not enough to simply offer school choice, the Court found. The government had a responsibility to proactively bring about integration.

Green ushered in a new era of backlash. On the night the ruling was announced, a cross was burned on the lawn of New Kent’s all-black school (Allen and Daugherity 2006). New segregation academies – private institutions created to evade desegregation mandates – sprung up.1 The North also became

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1 For more information, see “Segregation Academies and State Action,” Yale Law Journal 82(7): 1436–1461.
a venue for powerful resistance. Rather than referencing race overtly, northern communities attacked policies that would benefit African Americans, leading to the ultimate failure of court-ordered busing (Hannah-Jones 2019; Perlstein 2012). Nor was resistance confined to policy alone. The judiciary itself came under siege. To provide one example, detractors aimed to limit the power of the Supreme Court many times in the decade that followed Green by restricting its jurisdiction to weigh in on key policy matters (Nichols, Bridge, and Carrington 2014). Within a few years, the Supreme Court would issue Milliken v. Bradley (1974), backtracking on the most proactive efforts to combat segregation.

Long overshadowed by other civil rights decisions, Green highlights a basic tension that faces the US Supreme Court. While a fundamental responsibility of the institution is to protect the rights of vulnerable minorities, the Court depends on political leaders to carry out and the public to comply with its decisions. But in civil rights cases, the factor driving resistance was the public’s animus toward the very group the Court intended to safeguard.

FOUNDATIONS AND LIMITS OF SUPREME COURT AUTHORITY

Alexander Bickel considered the Supreme Court “the most extraordinarily powerful court of law the world has ever known” (1986, 1). In no small part, the power stems from judicial review as a check on the will of the majority in order to protect fundamental rights of the minority. Indeed, Alexander Hamilton advocated judicial independence for this very reason: “to guard the Constitution and the rights of individuals from . . . serious oppressions of the minor party in the community” (Federalist 78, emphasis added). The Court has often taken the charge seriously. Some of its most notable rulings exercised judicial review in order to protect the rights of political minorities and disliked groups. According to Justice Robert Jackson, “One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections” (quoted in Sandalow 1977, 1164).

Because the Court lacks the power to enforce, its ability to protect fundamental rights depends on the basic pillar of institutional legitimacy. Legitimacy, or diffuse support, consists of a long-standing, durable attachment to an institution on the part of the public (Easton 1965, 1975). It signals, in other words, the public’s willingness to acknowledge institutional authority even in the wake of controversial actions. Absent legitimacy, the Court may fear that politicians and the public will ignore or undercut its decisions.

Questions about the Supreme Court’s legitimacy have become common in recent years. Following the Court’s landmark same-sex marriage ruling in 2015, Justice Antonin Scalia bemoaned a “decree” that made an “unelected committee of nine” relying on the “mystical aphorisms of the fortune cookie” into the “Ruler of 320 million Americans.” Such language was not an expression of simple disagreement with an outcome, but rather suggested that the
decision lacked a legitimate basis. A year later, Scalia passed away, setting off a highly politicized battle over the future of the Court. Then, in 2018, the nomination of Judge Brett Kavanaugh to the Court sparked a firestorm when he was accused of sexual assault. The institution, some commentators suggested, faced a “crisis of legitimacy” (Continetti 2019). Political leaders offered proposals to restructure the Court, arguing that the modern institution could no longer claim to represent the American public. The developments raise troubling questions about Supreme Court legitimacy in the twenty-first century.

SUPREME COURT LEGITIMACY AND ITS RELATIONSHIP WITH MINORITY RIGHTS

James Gibson and colleagues continue to refine our understanding of Supreme Court legitimacy, or diffuse support, since publishing initial work on the concept over two decades ago. While acknowledging that diffuse support may shift gradually over time, work in this vein primarily emphasizes the obdurate nature of legitimacy as rooted in the democratic norms and political values held by the public. “Diffuse support,” Caldeira and Gibson write, “flows from those who are sympathetic to the function of the Court,” which includes “the protection of liberty and democracy” (Caldeira and Gibson 1992, 649; see also Gibson, Caldeira, and Spence 2003a, 2003b; Gibson and Nelson 2014, 2015; Nelson and Tucker in press).

From a different perspective, others identify threats to legitimacy in a polarized era. Bartels and Johnston (2013, 2020) argue that legitimacy may wither when citizens disagree with the policy direction and ideological preferences of the Court (see also Christenson and Glick 2015; Johnston, Hillygus, and Bartels 2014). Another study, buttressing this perspective, finds evidence of a “negativity bias,” or the idea that negative reactions to displeasing decisions tend to have a greater effect on Court legitimacy than positive ones (Christenson and Glick 2019). This stands in contrast to “positivity theory,” a long-standing view of how the Court is able to replenish its support even when enmeshed in political controversy (Gibson, Caldeira, and Spence 2003b).

Two other areas attracting recent attention concern the ability of political elites to manipulate support for the Court (Armaly 2018; Nelson and Gibson 2019) and debate over key measurement issues in the study of legitimacy (Badas 2019; Bartels and Johnston 2020; Nelson and Gibson 2020).

In spite of a robust and lively literature on legitimacy, the Green case suggests a critical but overlooked consideration. Recall that backlash to the ruling appeared not to derive from displeasure with the institution’s insufficient commitment to democratic norms nor, even, its ideological direction. It came instead from potent group-based attitudes: the strong negative feelings that many citizens held toward African Americans.

The Green case is no exception. The Supreme Court has explicitly and continually emphasized the importance of group-based considerations. This
jurisprudence nods back to Madison’s words in *Federalist 10*, which expressed concern that rights were “too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.” In other words, small and vulnerable groups require careful protection to secure their rights and liberties, a perspective adopted and expanded upon by the Supreme Court over the years. Justice Harlan Fiske Stone’s famous “footnote four” in *United States v. Carolene Products* (1938) set the stage for “searching judicial inquiry” when it came to the rights of religious groups, racial minorities, and others. Within two decades of Stone’s writing, the institution had issued landmark decisions concerning Japanese internment in World War II (*Korematsu v. United States* [1944]), racial covenants in real estate (*Shelley v. Kraemer* [1948]), and racial segregation. Rulings concerning equality before the law have continued into the modern era, including some of the most important cases of the twenty-first century, such as *Grutter v. Bollinger* (2003), *United States v. Windsor* (2013) and *Obergefell v. Hodges* (2015). Simply put, the protection of minority rights has found a central place in the jurisprudence of the modern Supreme Court.

Rights rulings have clear implications for the Court’s legitimacy and, in turn, its ability to balance majority will and minority rights. Singular among its caseload, decisions that safeguard unpopular groups have the potential to displease large segments of the population. By definition, these decisions protect the few at the expense of policies adopted by the many. Recognizing this fact, the Court has taken steps to shore up popular support in their wake. For example, in *Brown v. Board of Education*, Justice Felix Frankfurter and Chief Justice Earl Warren expended significant effort to secure a unanimous outcome (Tushnet and Lezin 1991, 1869–1880). The potential for public backlash significantly burdened the Warren Court, and the justices had concern that protecting minority rights would damage their legitimacy.

Were their fears justified? When citizens perceive the Supreme Court to favor unpopular social groups, does the Court’s legitimacy suffer? And how pressing is this concern for the modern Court? These questions cut at the heart of what may be considered the *rights paradox*: whether the Supreme Court, whose authority depends on acknowledgment of its legitimacy, endangers this resource when it protects the rights of narrow or unpopular segments in society.

**THE ARGUMENT**

This manuscript introduces a novel perspective for understanding the institutional legitimacy of the US Supreme Court. Drawing on an extensive body of work that suggests the important role played by strategic social groups in shaping public opinion (e.g., Brady and Sniderman 1985; Conover 1988; Conover and Feldman 1984; Converse 1964; Green, Palmquist, and Schickler 2004; Tajfel and Turner 1979), as well as research showing the increasing importance of social identity as it becomes more closely connected to political
identities (Huddy 2001; Mason 2015, 2018), I formulate a theory that explains how citizens use their views about disliked social groups to evaluate the judiciary. In this account, groups provide citizens a means to assess the Supreme Court by simplifying the standard of judgment. Citizens who evaluate the institution using their attitudes toward social groups consider two basic questions: To what extent is the Supreme Court an ally of various groups in society? And how do I feel about these groups? The major implication is that Americans translate their dislike for specific groups into judgments about judicial illegitimacy when the Court protects fundamental rights.

The argument takes seriously the idea that citizens are only moderately sophisticated, possess opinions on issues that shift over time, and commonly eschew ideological judgments for less abstract forms of thinking about political affairs (Converse 1964; Kinder and Kalmoe 2017). This is important when it comes to the judicial context, where there is evidence that group-based considerations are, for certain issues, more important than policy concerns for even the justices themselves (Baum 2017; Epstein, Parker, and Segal 2018). Moreover, the Court regularly reaches decisions regarding the rights afforded to various groups in society, and these rulings receive substantially more attention than others (Collins and Cooper 2012; Flemming, Bohte, and Wood 1997). As Green illustrates, the connection between various groups and the Court may be quite salient and potent. It may be visible for citizens who pay even a modest degree of attention to the institution.

Group antipathy theory makes a number of contributions to our understanding of the Court today. First, it connects debates concerning legal legitimacy to a wider dialogue about public opinion. This demonstrates that citizens do not entirely evaluate the Supreme Court as a unique or standalone entity but instead use their perceptions of how the institution connects to highly visible segments in political society. Second, the group antipathy account adds nuance to our understanding of judicial legitimacy. The manuscript demonstrates, both theoretically and empirically, that group antipathy and adherence to democratic values operate as distinct influences on judicial support. In other words, when citizens perceive the judiciary to favor groups they dislike, the abstract value of tolerance is not enough to prevent them from penalizing the Court. In addition, the manuscript shows that group antipathy independently shapes legitimacy even after accounting for ideological and policy-based judgments about the Court. Learning about a Court decision, citizens make distinct evaluations depending on whether it benefits groups they dislike, even holding the substance of the ruling itself constant. So, for example, free speech protections lead to more positive assessments of the Court when they involve a well-liked group, but a loss in legitimacy when they involve a disliked group. These group-based assessments influence perceptions of the Court’s ideological preferences as well.

Another advancement points to how Americans make judgments about the Court given their limited knowledge of political affairs. Many Americans pay
attention to the Court only in the wake of high-profile rulings, such as Obergefell, or during contentious nomination battles, such as the one that erupted over Brett Kavanaugh. Consonant with this insight, the group antipathy model demonstrates that Americans can evaluate the Court even if they do not possess the ability to make abstract assessments of its ideological direction or the extent to which it is fulfilling its democratic function. Rather, they can simply assess whether they perceive it to favor groups about which they already possess strong attitudes. While the manuscript focuses on controversial rulings throughout, its insights about public opinion have implications for recent controversies concerning the Court’s membership and direction, particularly given the high-profile role that social groups and lobbying organizations have during nomination battles.

Finally, the model makes a significant normative contribution in pointing to the tension between the Court’s protection of unpopular groups and the basic legitimacy required for decisions to be accepted and implemented. This speaks directly to backlash in the modern era.

**WHY CARE ABOUT GROUP-BASED LEGITIMACY?**

**IMPLICATIONS ON THE BENCH**

Legitimacy, as the acknowledgment of an institution’s authority to render decisions for political society (see Easton 1965, 1975) is, in some sense, an intangible resource. Does it matter whether minority rights decisions imperil popular support for an unelected institution?

Undoubtedly, the answer is yes. Justices are strategic actors (Epstein and Knight 1997) who prefer to see their decisions implemented. When its legitimacy is threatened, the Court adjusts both its decisions and opinions in order to bring about implementation and compliance (e.g., Black et al. 2016a, 2016b; Hall 2014). If the protection of minority rights can imperil the Court’s legitimacy, this provides incentives for the Court to modify its behavior. Specifically, the Court may become a less demanding guarantor of minority rights. The aftermath of Green provides an example. Observing the backlash to its integration framework, the Supreme Court voted in 1974 to curtail proactive integration efforts (Milliken v. Bradley). In the final chapter, I subject this contention – that a group-based component of legitimacy leads the Court to become a less aggressive protector of minority rights – to systematic empirical testing. I demonstrate that group-based legitimacy alters the behavior of the Court, rebalancing the scales between majority will and minority rights in favor of the former.

**THE PLAN OF THE BOOK**

I test key insights of the theory with a multiple method approach, using evidence from representative surveys, including panel data, as well as numerous
experimental tests. The tests involve a wide range of social groups, including racial, religious, and ethnic minorities, political protestors, and distinct socio-economic strata. The groups also vary in their ideological characteristics across the left and right.

The book proceeds as follows. In Chapter 2, I discuss the theoretical framework, describing a model of Supreme Court legitimacy rooted in attitudes toward strategic social groups. This is the group antipathy model. I begin by reviewing two well-developed literatures on which the model builds. First, I consider existing theories of Supreme Court legitimacy, which generally focus on the obdurate nature of diffuse support (Caldeira and Gibson 1992; Gibson, Caldeira, and Spence 2003b; Gibson and Nelson 2014, 2015) or, more recently, its ideological, political, and partisan bases (Bartels and Johnston 2013; Christenson and Glick 2015; Johnston, Hillygus, and Bartels 2014). While these theories significantly advance our understanding of institutional support, they do not explicitly grapple with whether a fundamental judicial responsibility – the protection of unpopular groups – has implications for attitudes toward the Court. Second, I turn to the behavioral literature concerning social groups. The fundamental insight of this work is that Americans’ understanding of politics is group-centric. As one study notes, “citizens can draw an impressively accurate map of politics … by relying on their political affect, their likes and dislikes of politically strategic groups” (Brady and Sniderman 1985, 1061; see also Conover 1988; Converse 1964; Iyengar, Sood, and Lelkes 2012; Nelson and Kinder 1996). Building on these insights, I detail the novel model of Supreme Court legitimacy in which many citizens evaluate the institution based on the extent to which they perceive it as an ally of groups they dislike. I generate hypotheses about how the Court’s support for important social groups will impact its legitimacy under theoretically specified conditions. To illustrate these insights more fully, I offer a typology of judicial actions based on the group antipathy model, detailing their implications for legitimacy.

In Chapter 3, I begin my empirical examination of the group antipathy account, focusing on how the Court’s protection of gay and immigrant rights affected its legitimacy over the course of 2012 and 2013. This time frame allows me to examine cases in which the theory predicts a link between group antipathy and institutional legitimacy, as the Court issued three high-profile rulings concerning these groups (Arizona v. United States [2012], Hollingsworth v. Perry [2013], and United States v. Windsor [2013]). I examine the salience of the rulings and the substance of the group cues they provide to the public, which indicate that the Court was expanding its protection of certain minority rights. I then leverage survey data to explore whether and how antipathy toward gays and immigrants shapes Supreme Court legitimacy. Robust evidence demonstrates that the Court’s rulings damaged its legitimacy among citizens with negative feelings toward gays and immigrants and that these effects were not the product of ideological considerations alone.
In Chapter 4, I subject the group antipathy model to an additional empirical examination, this time focused on a very different group: big business organizations. While certainly not a traditional “minority group,” big business represents a salient social grouping that many Americans use to organize their understanding of the political world and, as I demonstrate, one that they view in quite unfavorable terms. I am therefore able to test the model in a different context from that in the prior chapter. I examine legitimacy in the post–Citizens United (2010) era, following a ruling that Justice John Paul Stevens criticized as failing to “prevent corporations from undermining self-government.” Using survey data, I show that Americans’ negative attitudes toward big business predict opposition to the Court—and specifically its institutional legitimacy—in the modern era. Are perceptions of the Court’s “pro-business” orientation driving this pattern? I gain further empirical traction on this question using a survey experiment administered to a national sample of US adults, randomly varying exposure to information that the Court is “pro-business” and finding support for my argument. I discuss a unique implication of this finding: the fact that the Court’s standing suffers when it rules in favor of groups disliked by liberals (as well as those disliked by conservatives).

Chapter 5 complements and expands upon the empirical evidence presented in Chapters 3 and 4. Building on the previous cross-sectional and panel analyses, Chapter 5 uses four experiments, using representative and convenience samples, to isolate group-specific effects. This allows me to manipulate rather than measure the Court’s support for a wide variety of social and political groups in society. These studies vary in the groups they concern: I aim for a diverse set of racial, ethnic, religious, and political segments from both sides of the political aisle. The studies also vary in the manipulations they employ: in one, I present subjects with information about the proportion of decisions made by the Court to favor a particular group, while in others, I describe identical decisions, varying only the groups they stand to benefit. With this diversity—in samples, groups, and manipulations—I am able to offer robust evidence for the group-based model.

Chapter 6 explores the ideological implications of the group antipathy model, demonstrating how citizens utilize group cues to infer the Supreme Court’s ideological preferences. In a series of experiments, I demonstrate that citizens will infer that the Court is either liberal or conservative from a single decision depending upon the groups that benefit. For example, conventional wisdom is that the protection of free speech suggests a liberal Court, but I show that this perception only occurs when the speech comes from prochoice protesters, religious minorities, and the like. The same speech decisions, when they involve prolife groups or other conservative organizations, lead to the opposite perception of a conservative Court. Chapter 6 concludes by examining the complex relationship between groups, ideological perceptions, and legitimacy to show how the Court builds support.
The Plan of the Book

In Chapter 7, I explore additional implications of the group antipathy model as it relates to judicial behavior. Since the Court cares deeply about its legitimacy, it has reason to strategically adjust its behavior in cases that could negatively impact diffuse support. I derive empirical indicators of group-based cases, demonstrating that the Court puts only a small number of these on its docket at any given time. Moreover, the Court more frequently rules in line with majority preferences when a case is salient and concerns an important social group, indicating a measure of strategic behavior. The implication: the Court’s willingness to protect so-called fundamental rights actually hinges on a strategic calculus concerning its legitimacy. I discuss future directions for research on strategic responsiveness in light of the group antipathy model.

The concluding chapter continues this discussion, this time focusing on the counter-majoritarian dilemma, or the trade-offs faced by courts that protect minority rights but depend on popular support, in principle and practice. I proffer the book’s central contributions in light of enduring debates in this literature (e.g., Bickel 1986; Hall 2016; Rosenberg 2008). I also explore the contributions to research on political behavior, institutional legitimacy, and judicial decision-making.

One important implication of my findings is that they offer a clear incentive for Supreme Court justices to de-emphasize their traditional role as a guardian of minority rights. When Americans penalize the modern Court for protecting the rights of unpopular groups, and these penalties come in the form of institutional illegitimacy – which can undermine decision implementation and make the Court vulnerable to politicized attacks – the institution may be forced to abandon this crucial role. I close with a discussion of other implications and future directions for research.

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Some seven decades after Alexander Hamilton defended the judiciary as an essential safeguard of rights and liberties, the United States Congress considered supplying the courts an even more powerful tool to protect these privileges. A series of raucous debates had erupted over a proposal that would ultimately become the Fourteenth Amendment to the United States Constitution. Senator Jacob Howard of Michigan rose to introduce the Amendment. He depicted the proposal as one that, with the help of the courts, “forever disable[d] every [state] from passing laws entrenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction” (quoted in Judd 1905, 339–340). Howard noted how the Amendment targeted disadvantaged groups in society for protection – namely African Americans and former slaves, but perhaps others as well. “It establishes,” he praised, “equality before the law, and it gives to the humblest, the poorest, the most despised of the race, the same
rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty."

In spite of the Amendment’s ultimate ratification, Howard’s proposal met with derision in some quarters. Senator Edgar Cowan of Pennsylvania responded with vitriol. Concerned about the proposal’s citizenship provision, he listed the potential beneficiaries. “Is the child of the Chinese immigrant in California a citizen? Is the child of a Gypsy born in Pennsylvania a citizen?” Moreover, Cowen asked, are US citizens to remain quiescent while they are overrun by a flood of immigration of the Mongol race? . . . There is a race in contact with this country which, in all characteristics except that of simply making fierce war, is not only our equal, but perhaps our superior. I mean the yellow race; the Mongol race . . . Therefore I think that before we assert broadly that everybody who shall be born in the United States shall be taken to be a citizen of the United States, we ought to exclude others besides Indians. (quoted in Library of Congress n.d., 2890)

Cowan’s charged racial language is not the only remarkable aspect of this exchange. Notice that both supporters and opponents of the Fourteenth Amendment specifically emphasized disadvantaged or disliked segments of society. For Cowan, the Amendment did not present a problem because of the ideals it effectuated nor its protection of African American rights. Rather, it was troublesome because it would allow the judiciary to protect other groups not fit to be a part of the American experiment – Mongols, immigrants, gypsies, and the like.

The Pennsylvania Senator did not speak for all Americans, and many of his views have faded into irrelevance. But the Supreme Court has, at least to an extent, proven willing to protect the rights of all manner of unpopular groups in the subsequent century and a half. The question that this book seeks to answer is whether Americans shape their attitudes toward the modern institution as a result.