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## Refilling the Reservoir: How the Supreme Court has Responded to Challenges to its Legitimacy

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# Refilling the Reservoir: How the Supreme Court has Responded to Challenges to its Legitimacy

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POLI 404

To protect the United States Supreme Court's institutional status, justices on the bench must grapple with threats to the Court's authority. How do members of the Supreme Court preserve their legitimacy? This thesis employs a historical analysis to evaluate responses to legitimacy challenges over time. Similar challenges impact the Supreme Court across various eras. Judicial responses build upon each other, and develop a stronger judiciary as time passes. In this light, I emphasize the historical continuities within the actions of the Roberts Court. There are many prior tools the current institution may implement to refill its reservoir of public support.

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# Introduction

In July of 2018, the United States Supreme Court faced an unusual yet familiar challenge. Brett Kavanaugh, a DC Circuit Court of Appeals Justice at the time, became President Trump's nominee to replace Associate Supreme Court Justice Anthony Kennedy (Tatum 2018). A few months following Kavanaugh's nomination, Senator Dianne Feinstein publicized allegations from an anonymous source stating that Kavanaugh had sexually assaulted a woman in high school (Farrow and Mayer 2018). The source, later revealed as Dr. Christine Blasey Ford, eventually stepped forward to confirm her accusation and testify during Kavanaugh's confirmation hearing (Tatum 2018).

Feinstein's revelation provoked immense outrage across political lines. On the left, people were furious that someone accused of sexual assault would gain such expansive powers over women's rights. How could allegations of sexual assault not disqualify a candidate for the highest court of the land? Did women's rights issues mean nothing to politicians (Ball and Berenson 2018)? On the right, people could not believe that an allegation would bear such weight without evidence and due process. Were people not "presumed innocent until proven guilty" (Rothman 2018)? Whatever happened to the legal protections afforded to people through our Bill of Rights? No matter what political background defined people's opinions, many questioned the role of the Court and justices as a result of Kavanaugh's confirmation process. The circumstances of Kavanaugh's

nomination brought forth a critical debate involving the Court's impartiality throughout the United States (Page 2018). Furthermore, the scenario captured the attention of the media for quite some time.

Kavanaugh's nomination and Feinstein's revelation created a situation where the Supreme Court would inevitably lose. Regardless of whether he was confirmed, Kavanaugh's confirmation process would likely stir some negative opinions of the Supreme Court as an institution. One side would win, yet the other would lose. How would people who approved of Kavanaugh react to the Court if he was denied a place on it? How would people who disapproved of him feel if he gained such a critical role over women's rights? The bind created through Kavanaugh's confirmation process indicated high levels of polarization, and questioned the judiciary's ability to function in such an environment. Data conducted by YouGov noted that the issue was highly polarized, with 89% of Strong Democrats opposing Kavanaugh's nomination, 86% of Strong Republicans in favor of Kavanaugh's nomination, and Independents falling near the middle of the scale (Brady 2018). Because the issue was this partisan, it seemed impossible for the Court to find an answer to resolve the losing party's qualms. Kavanaugh's nomination exposed holes in the justices' confirmation process, threatening the role of the justices. There was no solution that worked well to alleviate doubts people held about the Court's ability to rise above politics.

If the Court faced either option, it would suffer from an impending threat to its legitimacy. The Supreme Court's legitimacy, defined as the "consensus on whether [the] institution is worthy of our moral reason-based support" (Buchanan 2018), is what allows

the Supreme Court to continue writing decisions. The words of the Court only matter as long as people are willing to listen to them. This is the ultimate challenge of legitimacy for the Supreme Court; the Court cannot reframe its legitimacy once it completely vanishes. After the legitimacy of the Court is under suspicion, the justices must find a way to recover authority so the Court may proceed with its duties. For example, after Kavanaugh was confirmed, Justice Elena Kagan restated fears about the Supreme Court losing legitimacy. In her words, “[p]art of the [C]ourt’s legitimacy depends on people not seeing the [C]ourt in the way that people see the rest of the governing structures of this country now. . . . In other words, people thinking of the [C]ourt as not politically divided in the same way, as not an extension of politics, but instead somehow above the fray” (Page 2018). Debates over polarization have a way of impacting the Court’s so-called impartial image it wants to project onto the public.

The impartiality which Justice Kagan references matters because the Court relies on it for legitimacy. For the sake of appearing fair, the Supreme Court has an obligation to remain impartial on matters before the bench. If the justices believe their impartiality may be “reasonably questioned,” they have a duty to recuse themselves for a given case (Ifill 2002). As Melissa Loewenstern explains, citing Archibald Cox, “the Supreme Court’s decisions ‘are legitimate only when [the Court] seeks to dissociate itself from individual or group interests, and to judge by disinterested and more objective standards’” (Loewenstern 2003). If the justices serving on the bench appear partial, then they harm the credibility of the decisions they issue. To ensure the Court remains legitimate, the justices aim for impartiality in their decisions and their actions. This is

especially certain for the Chief Justice, whose role concerns the entirety of the Court (Biskupic 2019).

What is the big impact of legitimacy? Why are the justices so preoccupied with it, and why does it matter in the context of the judiciary? Legitimacy gives the judiciary the power to move people with words, to confer authority onto substantive issues and let the justices hold power in their decisions (Gibson, Lodge, and Woodson 2014; Clawson, Kegler, and Waltenburg 2001). People might take the Court's legitimacy for granted, but for the justices on the bench, legitimacy constitutes their profession. The justices remain concerned with judicial legitimacy because the institution they work for depends on it to thrive. Moments threatening the Court's powers could impact the Court's influence. Challenges towards the Court's authority serve as challenges to the Court's legitimacy, by consequence. Preserving the authority of the Supreme Court is a priority for the justices as they confront different challenges to the branch's decisions.

The situation arising out of Kavanaugh's nomination made me question how the Court responds to such challenges. In these dilemmas of legitimacy, it seems as though the Court has few options to preserve its authority. How does the Court respond to challenges to its legitimacy? More specifically, what can the Court do besides continue to write and express the same opinions that are in question in the first place? This project explores the Court's methods for asserting its authority while under duress. There may be a single, principal tool the Court has legal permission to use, but that does not mean there is only one way to apply it. As the Court grapples with disputes over its powers, it



ultimately faces the inherent question of legitimacy itself, including the flaws to legitimacy as a concept.

To proceed about this set of questions, I will approach the topic of judicial legitimacy in a few different ways. First, I will set up a background to judicial legitimacy and why it matters. Chapter 1 will cover an in-depth analysis of the theories of legitimacy and the issues that arise from this topic. Next, I will move into the cases themselves to show the Court's specific methodology. Chapters 2 through 6 develop five specific time periods where the Court faced similar challenges to judicial legitimacy. Each chapter covers historical factors influencing the challenges, as well as the Court's responses. What steps has the Court already taken to recuperate from a decrease in legitimacy, and what were the specific outcomes? Finally, I will conclude with an analysis of the results and what they might mean for the near future. The scope of this project is the responses, yet its impact extends much further. My intention is to explain the significance of legitimacy-based responses from the judiciary.

# Chapter 1: The Challenges of Legitimacy: A Literature Review

## *Constitutional Background*

The Supreme Court is, at its core, a legal entity. It derives its power from the Constitution, and applies legal frameworks to carry out its duties (Gibson 2007, 23). As the Court is an institution so heavily based in upholding the law, it logically relies at least in part on the law to weigh legal issues. Other laws might manage the judiciary further, but there is one principal document responsible for justifying the judiciary's role. That legal justification comes first and foremost through the United States Constitution (Gibson and Nelson 2014). The Constitution establishes the Supreme Court's legal legitimacy, and serves a significant role in the Court's legitimacy as a whole.

As the main structure of government in the United States, the Constitution outlines the capacities of specific institutions and their respective powers. Article I describes Congress, the legislative branch with the "power of the purse" (Gibson and Nelson 2014). Congress directs funding when writing federal laws and statutes, and it ultimately develops our laws. Article II outlines the role of the executive, with the "power of the sword" (Gibson and Nelson 2014). The executive has the authority to both enforce Congressional laws and manage the details of such laws. Then comes Article III, with a noticeably smaller description of the Supreme Court and its roles in government. It

establishes a national judiciary, but leaves most of the details of the Court's role up to future interpretation, although there are some implicit guidelines on how far the justices might interpret judicial authority (Farganis 2012, 207).

Compared to the descriptions of the other branches, the Constitution's analysis of judicial power feels "close" to an afterthought, or something meant to be developed later. (Gillman, Graber, and Whittington 2017, 56). To start, the Constitution's description of the Court appears third in the series of articles describing the three branches. Placing Article III as third makes the Court sound weaker than the other branches (U.S. Const. 1788). Furthermore, the first two articles carried lengthy sections on the strengths and duties of the other branches of government. They delved into clear clauses for legislative and executive powers, providing a descriptive construction of the first two pillars of government. By contrast, the third article offered little explanation of what the judiciary's exact duties are meant to be. Article III of the Constitution frequently refers to the "judicial power" of the institution (U.S. Const. 1788). Nonetheless, nowhere does the document explicitly outline what this power entails, thus leaving the role of judicial power up to societal interpretation (Fallon 2018). The Supreme Court may have "Supreme" in its name, but there is a comprehensive gap present within our Constitution, one which refuses to treat the Court with the same deference as the other branches. The Supreme Court's legal basis is one which questions the institution's legitimacy by its nature.

The Constitution's missing explanation for "judicial power" has posed a dilemma for Supreme Court scholarship over time. The authority of the Supreme Court supposedly

“extend[s] to all [c]ases, in [l]aw and [e]quity” (U.S. Const. 1788). Yet why does the extent of the Court’s power matter if the definition of that power itself remains unclear? In the initial decades following the ratification of the Constitution, the Court grappled with questions over its own legitimacy, due to inherent flaws within the Constitution. In order to prove its right to impart decisions, it first needed to clarify which topics the Constitution permitted it to address (Crowe 2012). In this regard, much of the responsibility for depicting the Court’s institutional legitimacy fell on the shoulders of the Court itself. If the justices did not collectively defend their capacity to decide on legal matters, then who else would do so? Executive, legislative, and state powers seized opportunities to question judicial power, and the justices were left with the task of defending the judiciary (Barnett 2007). The justices are small in their singular responses to challenges, but together, underneath the judicial authority of decision-writing, they carry with them the capacity of the third branch. Without central opinions dictating the role of the Supreme Court, there would be less evidence available for scholars to interpret the Court’s legitimacy in the context of society.

Although the judiciary needed further development, it was already clear what some of its role would entail (Gillman, Graber, and Whittington 2017, 56). Over time, and through the opinions of the Court, judicial power became recognized as the capacity of the judiciary to interpret the laws of our nation. The abilities of the Court were further specified in *Marbury v. Madison* (1803), which outlined the most important tool for the Court: judicial review (Bartels and Johnston 2013). John Marshall’s decision crafted a version of the Supreme Court with expanded powers, as original extensions of the

Constitution did not conceive of a judiciary with this much control over both laws and other branches of government (Fallon 2018). Through legal precedent and decisive interpretation, Marshall was able to increase the Supreme Court's legitimacy by expanding on the constitutional meaning of "judicial power" (Graber 2003). As Marshall wrote, "[i]t is emphatically the province and duty of the judicial department to say what the law is" (*Marbury v. Madison* 1803). Marshall's framework left a strong precedent for the Court's authority over laws, and one which continues to this day.

While the Supreme Court has actively grappled with questions over its authority, one aspect of its legitimacy remains increasingly apparent: public perception shapes the powers of the Court. The Court's continued efforts to prove its power over our laws are attempts at persuasion. The other branches of government have certain weapons they may wield when someone raises a challenge to them. Through the power of the purse, Congress may withhold funds from certain areas or pass laws against those who doubt Congressional authority (Gibson and Nelson 2014). Therefore, Congress has tangible authority. With the power of the sword, the executive may enforce certain laws more harshly than others to assert its abilities (Gibson and Nelson 2014). The executive, then, may directly impact real world problems. The judiciary, however, must depend upon the strength of its words to defend itself. As Alexander Hamilton wrote in "Federalist 78," the Supreme Court has "neither FORCE nor WILL, but merely [judgement]; and must ultimately depend upon the aid of the executive arm even for the efficacy of its [judgements]" (Hamilton 1788). There is a limited set of tools available to the Court in the first place, tools which affect the Court's supremacy in the eyes of the other branches.

Hamilton's reflection of the Supreme Court acknowledges a critical paradox for the legitimacy of the Supreme Court. The principal tool it would seem that the Court can use to counter attacks is the same means under question in the first place: the Court's decision-writing process. If someone refuses to listen to the Court, then that individual is raising a challenge to the Court's ability to rule on our laws. Ultimately, then, the way the Court fights back against this challenge is through a mechanism that presupposes people who doubt the Supreme Court will come to listen to the Court again in the future. It seems strange how the Court can simply expect other parties to begin to hear its opinions again. Yet, so far, there have been no challenges to the Supreme Court's authority that are disastrous enough to completely destroy the legitimacy of the Supreme Court. Gibson and Nelson write, "the Supreme Court does enjoy a 'reservoir of goodwill,' but that reservoir is far from bottomless" (Gibson and Nelson 2014). A bottom to the reservoir, a point in which support could dry up, does exist; yet the Court continues to enjoy enough support to maintain itself over time. I would even go so far as to say no challenges have been strong enough to serve as a full threat to the Court's existence, especially in the modern age. This paradox of legitimacy occurring in the sphere of public support plays a significant role in discussions of Court legitimacy.

### *Theories of Legitimacy*

Two crucial sides to the discussion on the Supreme Court's legitimacy appear in the section above. First is the legal angle. As an entity of the law, the Court partially

relies on its legal justifications for legitimacy. A law-centric institution must find its roots within the law to be able to wield the law as a tool. There must be a clear legal justification for the Court to continue to exercise its judicial power. The second is the public opinion angle. To reassert its authority, the Court feels the need to prove itself time and time again as an institution worthy of the people's approval, even if the people do not care enough to listen. Disputes over institutional legitimacy often bring in a public opinion-based analysis of the Supreme Court (Baird and Gangl 2006). If the Court loses the respect of the people, then the institution loses its ability to write on critical social decisions.

To theorize the parts played by these two sides of legitimacy, I follow two theoretical subtypes of political legitimacy which already exist within the literature. The first subtype of political legitimacy is *normative legitimacy*, or a “concept of political legitimacy [that] refers to some benchmark of acceptability or justification” (Peter 2017). This definition of legitimacy looks to the standards and legal justifications for political power, such as our Constitution. Between judicial review from *Marbury v Madison* (1803), Congressional acts over the judiciary, and judicial power granted through Article III of the Constitution, the current Court has an arguably strong legal justification for its right to exist and deliberate over legal matters. As noted above, though, not every aspect of judicial authority appears within the Constitution. Thus, the judiciary needed to rely on Congressional and judicial interpretations of its power to develop its role over time.

The second subtype of political legitimacy is *descriptive legitimacy*, or the “people's beliefs about political authority and, sometimes, political obligations” (Peter

2017). This type of political legitimacy offers a de facto take on the Court, and one which more directly matches the Court's reality. The Supreme Court must strategically maneuver through public opinion, as its actions or perceived biases can draw "vicious and legitimacy-threatening criticism" (Gibson 2007). Any misstep which occurs within the Supreme Court has the potential to create a political catastrophe, one which raises questions not just about the role of the Court as an institution, but how it acquired its role. If a threat is severe enough, it may also fuel questions about the validity of the Constitution and the other branches. This is why the Court appears "keenly" aware of its legitimacy as of late (Gibson and Nelson 2014). As of 2012, Dion Farganis notes that Supreme Court opinions only reference institutional legitimacy 9 times in the 164 years before *Brown v. Board* (1954), but over 71 references to legitimacy appeared in the decades following *Brown* (Farganis 2012, 207). The Court is becoming increasingly aware about the role that it plays with regard to public opinion.

Another way to characterize descriptive legitimacy is through a theory called the reservoir of goodwill. This term appears briefly above, but it necessitates elaboration. When discussing an institution's legitimacy, scholars often refer to the metaphor of a reservoir (Caldeira and Gibson 1992; Gibson and Caldeira 2009; Gibson and Nelson 2014; Grosskopf and Mondak 1998). James Gibson, one of the most extensive writers on legitimacy of the Supreme Court, frequently references this theoretical framework throughout his works. In this metaphor, the body of water symbolizes the general support required for maintaining the political body. Just as water depletes from the "reservoir of goodwill," an institution can lose the respect and power it relies on to function (Gibson



and Caldeira 2009). However, although the reservoir of goodwill can deplete over time, it may also increase in size as public support for the institution refills. The water within the reservoir acts as a measurement for the amount of descriptive legitimacy, or public support, which the Court maintains. It is the larger picture of descriptive legitimacy, which undergoes smaller changes over time.

For this metaphor for descriptive legitimacy, it is key to note the fluctuations that appear within the reservoir of support keeping the Supreme Court afloat. Public opinion may continuously reinforce the Court enough to keep it existing, but support for the Court changes over time, largely as a result of the decisions the Court renders (Ball and Berenson 2018). If the Court decides a case using ideas that go against the vein of public opinion, it will often preemptively justify why the Court's view should be preferred. Public opinion, then, occasionally changes to align with the judicial perspective, especially in highly salient cases (Clawson, Kegler, and Waltenburg 2001). Considering that the public has not posed enough of a risk to drain the reservoir completely, the Court seems more afraid of its own legitimacy than anyone else. Even though it is highly unlikely that the Court would face a threat severe enough that it would establish a constitutional crisis (Grosskopf and Mondak 1998; Gibson 2007), the judiciary often reacts as though every challenge warrants a significant response (Farganis 2012, 213). The Court defends itself time and time again as an entity with the right to weigh on national laws.

Descriptive legitimacy and normative legitimacy link together when challenges in one area affect the Court's legitimacy in the other. While it is more rare for a normative

attack to affect public opinion, a descriptive attack could have serious implications for the normative standards protecting the Supreme Court. The flexibility of legal standards and their impact on Supreme Court legitimacy make it “crucial for the Court to maintain a reputation from the public as impartial, trustworthy, and above the politics and bargaining characterizing Congress and the presidency” (Bartels and Johnston 2013). If the reputation of the Supreme Court gets called into question, by the contrapositive, so do the standards which permit it to operate in its current capacity. To go further into the impacts of normative and descriptive legitimacy, the next two subsections will detail specifics of the two factors. The literature supports a separation of the two categories, even if it is not always explicit. Thus, a separation will occur for the rest of this project.

### *A Normative Analysis of Legitimacy*

Analyzing the Court’s normative legitimacy sheds some light on a current paradox for the Court’s reality. Scholarship both explains that the normative legitimacy of the Court is strong enough to sustain it through attacks on the Court’s legitimacy (Grosskopf and Mondak 1998), yet at the same time, the Court is constitutionally the weakest or “least dangerous” of the three branches (Hamilton 1788; Gibson and Nelson 2014). On one hand, the judiciary has the potential to control society through its words. On the other hand, the strength of the legal, judicial power still gets questioned. The strong justifications for the Court’s right to write stem from constitutional and legal precedents, but the Constitution itself questions the Court’s capacity compared to the

other branches. These contradictions maintain themselves in discussions over judicial legitimacy, developing a perplexing paradox. So which side is right? Is the Court strong or weak on a normative level?

The Court's normative legitimacy is strong, but part of that strength comes from the Court's acknowledgment of its own weaknesses. One of the reasons why the Court need not fear normative attacks in the modern era is because of the fortified precedent the Court has developed for itself after years of decisions, especially after the line of precedent culminating in *Marbury* (Graber 2003). Nonetheless, occasionally the Court's precedent itself will use terminology that implies the Court is weak, either for strategy or for acknowledgement (*In re Neagle* 1890). Even though the Supreme Court is considered the least dangerous branch, it created a powerful source of precedent that allows it to maintain legitimacy. Sometimes it is more beneficial for the Supreme Court to maintain an unassuming position compared to the other branches.

### *A Descriptive Analysis of Legitimacy*

Public opinion is a term which seems self-explanatory, but there are significant nuances to its construction which warrant further discussion. Is "opinion" measurable from person to person, and under what metrics? How can beliefs be quantified on an objective scale? What does "the public" mean, and who does society count within this term? Each of these questions complicate the notion of descriptive legitimacy, and make it difficult to measure without error. This project recognizes some of the faults within

public opinion, and their pertinence to legitimacy. As such, the primary goal of the thesis emphasizes responses rather than public opinion measurements. The following paragraphs will elaborate on tools for measuring public opinion which exist in the literature, to provide a background on existing measurements for descriptive legitimacy. Then, this section will extend further into some of the issues with trying to quantify descriptive legitimacy for the Supreme Court.

One way to characterize descriptive legitimacy is through analyzing the different types of support. The literature refers to two kinds of support for institutions: specific support and diffuse support. Diffuse support refers to the general attitudes people hold of an institution. On the other hand, specific support concerns the attitudes people have about particular policies or outcomes (Caldeira and Gibson 1992). In other words, diffuse support outlines the legitimacy of the Court as a whole, whereas specific support regards the public opinion of the Court for a specific event. Diffuse support is the reservoir of goodwill. The Supreme Court relies on diffuse support to keep it afloat despite attacks from specific instances. This is the relationship between challenges to the Court's legitimacy and the Court's legitimacy on a larger scale. The challenges come from negative specific support, and their effect on legitimacy is their effect on the reservoir.

Several scholars question the exact impact that specific support has on diffuse support, and develop different theories to analyze results. However, limitations remain for analyses of descriptive legitimacy. Grosskopf and Mondak are a pair of scholars who developed a method for measuring public opinion. They based their measurements on a few different factors. First, they tracked media coverage of an issue, and opinion polls

demonstrating awareness of a case. Then, they pursued the matter with three *Harris* polls, and ran an ordered logistic regression analysis on the data (Grosskopf and Mondak 1998). The limitations of this construction stem from the dependence on polls to accurately represent the entirety of public opinion. Baird and Gangl conducted a simulated study of Supreme Court decisions, where they separated respondents and gave different groups various vignettes simulating Supreme Court decisions (Baird and Gangl 2006). The limitations of this research method are similar to those of the previous one — it is difficult to tell how representative the sample is of the total population. Hibbing and Theiss-Morse conducted a mass telephone survey to collect opinion data (Hibbing and Theiss-Morse 2001). Although there are various ways to collect opinions for research, it still remains a challenge to quantify subjective beliefs into objective measurements. Regardless, there is data out there through these measurements to represent public opinion, as opinion remains one of the most important factors in understanding legitimacy.

The beliefs of the people play such a critical role in academic conversations over the Court's legitimacy that some authors theorize that public support creates an economy. Grosskopf and Mondak, basing their perspective on the works of Jesse Choper, write that “[s]upport for the Supreme Court acts as a form of political capital” (Choper 1980; Grosskopf and Mondak 1998). Through this framework, the Court can “spend” its reservoir of support to stand behind more controversial opinions (Grosskopf and Mondak 1998). Their way of framing support for the Court has a few intriguing implications: first, it suggests that the Court may willingly deplete its own reservoir of support. Unlike some other theories of legitimacy, which imply that the Court tries to increase its legitimacy at

all costs (Gibson and Caldeira 2009), this theory suggests that the Court may benefit from a minute decrease in its reservoir of public support. By establishing this framework, Grosskopf and Mondak embrace the political side of the Supreme Court. They implicitly argue that the Court does not work to distance itself from partisanship – rather it embraces the political tools it can apply in partisan conflicts (Grosskopf and Mondak 1998). If this theory were true, these implications would make for a highly political, interesting structure of government.

One problem remains true throughout discussions of public opinion in the United States. The US has a terrible history of inequity and discrimination. Inequities within the structure of the United States call into question descriptive and normative legitimacy as frameworks and categories. Such an idealistic view of the Court that we see in political and legal philosophy often misses the way that theories are applied in the world. “Public” opinion depends on the nation’s definition of the public, and the US has a history for disregarding people throughout its existence as a nation. As Juan Williams writes for *William and Mary’s Law Review*,

“[Justice Thurgood] Marshall generated national headlines by telling his audience that the Constitution ‘was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government and its respect for the individual freedoms and human rights we hold as fundamental today’” (Williams 1992).

The Supreme Court Justice, Thurgood Marshall, was referring to the fact that the original Constitution had ten clauses which “directly or indirectly recognized or secured slavery” (Kaczorowski 2004). The same document responsible for giving authority to the Supreme

Court rescinded rights from numerous individuals and prevented them from being seen as members of the public.

Public support is necessary to determine judicial opinion, yet as the previous paragraphs explain, it is difficult to measure. As Christian von Haldenwang writes, “[o]bviously, a legitimate political order should enjoy widespread support” (von Haldenwang 2017), but it is not just about the support of the majority that counts in a “widespread” analysis. Support is going to be intersectional. Therefore, it is important to note differences in perception of the Court, as a direct result of how the Court has reacted to people over time. Inequities were present in the Constitution and in our laws in the first place. The Court has grappled with these problems over time due to the fact that they are written into the laws themselves. This influences specific parts of the Court’s descriptive legitimacy.

### *Methodology*

For my research, I applied elements from this literature review to a historical, excerpt-based analysis of the Supreme Court. The terms stated above, such as normative and descriptive legitimacy, provide a wider perspective on judicial history. Similar challenges occur during specific, legitimacy-framed periods of the Supreme Court. For instance, over several decades, the Court may experience similar threats to its role as an impartial branch in government. Separating temporal challenges by common themes

allows for greater opportunities to analyze and predict the reasoning behind judicial responses to legitimacy challenges.

The case selection relied heavily on elements already present within scholarship. I examined “cases,” both in the judicial and the analytical sense, as instances which threatened the authority, or power, of the Supreme Court. The challenges mostly related to the Court cases themselves, but occasionally included additional normative factors, such as the confirmation process for justices. For the Supreme Court cases, the challenges to legitimacy could occur before the case, within the case content, within the justices’ opinions, or in the aftermath of the case. The biggest influences on my case selection were Crowe’s book *Building the Judiciary: Law, Courts, and the Politics of Institutional Development*, Gibson and Nelson’s 2014 article “The Legitimacy of the US Supreme Court: Conventional Wisdoms and Recent Challenges Thereto,” and my experiences as a student and preceptor in Patrick Schmidt’s Constitutional Law class, using texts from David O’Brien, and Gillman, Graber, and Whittington (Crowe 2012; Gibson and Nelson 2014; O’Brien 2017; Gillman, Graber, and Whittington 2017). As I conducted further research into the topic area, I added more cases onto my initial case selection.

Below is a list of some of the cases I considered in my preliminary research (Table 1). I used this table as a guide for time groupings, as well as for future research. The case table is, by no means, exhaustive. Rather, it demonstrates an excerpt of some major cases where authority of the Court came into question. Through similarities demonstrated in the table, I classified cases by common temporal trends.



Table 1: Cases Representing Challenges to Legitimacy

Case	Facts	Challenge to Legitimacy	Response	Impact
<i>Chisholm v. GA</i> (1793)	Chisholm sued Georgia for payment on goods	GA argued they were a sovereign state that did not need to submit to a decision from a federal body (Supreme Court)	Court clarified that the individual states still fall under federal judiciary's scope of power	First significant case of the Court's history — GA was still bound to federal oversight. Provoked a SEVERE reaction from public and led to 11th Amendment
<i>Ware v. Hylton</i> (1796) and <i>Hylton v. US</i> (1796)	Two cases decided a day apart on federal and state laws involving money/taxing	Can the judiciary review state laws?	Yes, state law was struck down	Provoked antifederalist fears and set the stage for <i>Marbury</i> — the Court could defer to federal laws/powers to overturn (state) laws
<i>Calder v. Bull</i> (1798)	Was a CT tax law in violation of constitutional prohibition on ex post facto laws?	Can the judiciary review state laws?	Yes, but state law was permitted	Supreme Court provided the answer necessary to expand its power, but did so in a way to avoid criticism
<b><i>Marbury v. Madison</i> (1803)</b>	Adams to Jefferson presidency, judgeships were not delivered (DUAL ROLE OF MARSHALL), Role of judiciary as described in Judiciary Act(s)	Can the judiciary review federal laws if they conflict with the Constitution?	Yes, this falls within Supreme Court power	MAJOR case for judicial power — defined scope of Article III provisions in a way that propelled Marshall's Federalist visions forward
<i>US v. The William</i> (1808)	Several ships were seized after violating Jeffersonian embargo	Scope of judicial review after <i>Marbury</i>	(From federal district court) judicial authority extended past Supreme Court to other courts	Judicial review is not the exclusive power of the Supreme Court
<i>Martin v. Hunter's Lessee</i> (1816)	Virginia case over land inheritance and dispute. Land confiscation violates US and British peace treaties	Can the Supreme Court issue a <i>writ of mandamus</i> to force Virginia's Court of Appeals to reconsider its decision through the Judiciary Act of 1789?	Yes — Supreme Court can control higher state courts	Virginia (begrudgingly) followed through and Congress sided with the Supreme Ct., refusing to repeal that section of the Judiciary Act
<i>McCulloch v. MD</i> (1819)	Federal ability to make a (second) national bank, and states' ability to tax it	Extent to which the Court can extend powers of the other branches, and rule on matters concerning the other branches	Supreme Court can weigh in on this case, and give Congress expanded powers through "Necessary and Proper" Clause	Supreme Court has the duty to determine the powers of other branches of government when in conflict with laws

<i>Cohens v. VA</i> (1821)	Cohen brothers sold lottery tickets between DC and VA	Are states final arbiters of conflicts between state and federal governments? Or does this power lie in another entity (the courts)	No — this falls within judicial power	A “keystone” for judicial power (Crowe pg. 94)
<b><i>Worcester v. GA</i> (1832)</b>	Ability of Georgia to enter into Cherokee lands (as designated by treaties)	(Posed after the fact) — ability of the Court to enforce their own decisions (Jackson’s quote)	Court continues writing decisions, as if nothing happened	Jackson’s words made arguably the most threatening attack on the Court’s legitimacy
<b><i>Dred Scott v. Sanford</i> (1857)<sup>1</sup></b>	Dred Scott, a slave, argued for his freedom before the Court after crossing lines into a free state	How does the Court balance highly polarized Court cases with constitutionality, especially when the Constitution diminishes some people’s rights (similarly to <i>Prigg</i> )?	Court balanced constitutionality with keeping peace between Northern and Southern states	Court managed to maneuver through public opinion, but this came at the cost of writing a decision that eventually was viewed as one of the worst ones in the history of precedent regarding human rights issues
<i>Prize Cases</i> (1863)	Lincoln’s blockade of Southern ships during the Civil War; ships were looted for “prizes”/bounties	How the political makeup of the Court affects its decisions; role of the Court during war/martial law	Decided a favorable outcome for Lincoln. (Less explicit as a response)	Quietly affected how people perceived the Court
<i>Hepburn v. Griswold</i> (1870) and <i>Legal Tender Cases</i> (1871)	Two cases over federal forms of money to replace different state monetary units	Court’s ability to maintain precedent and expand governmental powers	Legal tender cases overturned <i>Hepburn</i> , reverting back to <i>McCulloch</i> ’s precedent for expansive powers	Anytime a decision overturns another, the new one carries just as much force as any other case would
<b><i>In re Neagle</i> (1890)</b>	A Supreme Court justice is appointed a bodyguard by the president because of an extensive feud with a former friend	*Self-challenge* Does the Court depend on the other branches for enforcement of its powers?	Yes — judiciary relies on the executive to protect it; it is a weak branch	Judiciary themselves consider their powers weak without support from the other branches
<i>Plessy v. Ferguson</i> (1895)	Jim Crow laws, especially when race is so much of a spectrum	Court’s role in deciding cases based on public opinion and constitutionality	8-1 decision against Plessy; Harlan’s dissent (which still was problematic, but at least it argued for an increase in rights)	In the future, looked down upon as a disgrace of the Court, but unfortunately this decision matched what public opinion thought at the time
<i>Lochner v. NY</i> (1905)	Bakers/working	(From a	Case eventually	Lochner Era continues

<sup>1</sup> For the sake of accuracy, I will be referring to the *Dred Scott* case as “*Dred Scott v. Sanford*” (1857). The Court reporter mis-typed Sanford’s name on the case document as “Sandford” (Gillman, Graber, and Whittington 2017, 215), and scholarship refers to the case in both ways (Crowe 2012; Gillman, Graber, and Whittington 2017).

	conditions; state ability to regulate labor under police powers	future-based perspective) — validity of the Court considering this decision	overturned	until New Deal Era
<i>Schechter v. US</i> (1935)	NIRA — New Deal policy about Congress delegating powers to executive and industries. Schechter brothers violated fair competition standards	Role of the Court in New Deal times/era of transition	Supreme Court refuses to budge for FDR's New Deal policies	FDR proposes a plan to pack the Supreme Court
<i>NLRB v. Jones &amp; Laughlin Steel Co.</i> (1937)	New Deal policy concerning regulations	Role of the Court in New Deal times/era of transition	Supreme Court changes its opinion, allows FDR's expansive policies and saves itself from FDR's Court-packing plan	The Court continues as it was without additional members added by a Court-packing plan
<i>Korematsu v. US</i> (1944)	Japanese internment camps	(Future-based) How the Court handles discrimination	Argued that this was within the power of the federal government	Became another notorious case of shame for the Court
<b><i>Brown v. Board</i> (1954)</b>	Racial segregation in schools	The Supreme Court led the trend against public opinion — how the Court handles its legitimacy when it is right and the public is wrong	Unanimous decision for desegregating schools — the impact of changing the Chief Justice	Supreme Court guided public opinion on this matter
<i>Brown v. Board II</i> (1955)	Racial segregation in schools	The Supreme Court led the trend against public opinion — how the Court handles its legitimacy when it is right and the public is wrong	Unanimous decision for desegregating schools	Supreme Court guided public opinion on this matter
<b><i>Cooper v. Aaron</i> (1958)</b>	Racial segregation in schools	The Supreme Court led the trend against public opinion — how the Court handles its legitimacy when it is right and the public is wrong (and no one's been listening). Is the Court's word the law?	Unanimous decision for desegregating schools — written in a different way than unanimous, & Frankfurter's concurrence	Supreme Court reasserted its authority, and the justices proclaimed that the Court's decisions become the law
<i>Griswold v. CT</i> (1965)	Contraceptives	Does the Court only need to stick to outlined principles	Penumbra rights = implied by other provisions (including	The Court granted another liberal decision in favor of

		in the Constitution?	privacy) as a part of substantive due process	rights, arguing that the right to privacy covered contraceptives too. Set the stage for <i>Roe v. Wade</i> (1973)
<i>US v. US District Court</i> (1972)	Surveillance of US citizens without a warrant	How far does judicial power extend?	Surveillance needs a warrant signed by a judge to be constitutional. Carried through the importance of the judiciary	The courts continued to advocate for themselves in nearly every opportunity
<b><i>Roe v. Wade</i> (1973)</b>	Abortion legality	Does the Court only need to stick to outlined principles in the Constitution? How does the Court withstand attacks from public opinion?	Penumbral rights = implied by other provisions (including privacy) as a part of substantive due process. Abortion falls within this scope	Conservatives use this as a key issue for why they need the presidency to control the Court
<i>US v. Nixon</i> (1974)	Nixon's tapes post-Watergate: whether or not he needed to release them to the Court for the criminal trials of his conspirators	How far does judicial power extend?	Carried through the importance of the judiciary on a separate issue	The courts continued to advocate for themselves in nearly every opportunity
<i>US v. Richardson</i> (1974)	Taxpayer's interest in government spending of taxes	The continuation of <i>Marbury</i> after industrial times	Powell's concurrence — potent power of <i>Marbury</i> (Lasser pg. 3)	The legacy of <i>Marbury</i> still continues today
<b><i>INS v. Chadha</i> (1983)</b>	Immigration case affected by legislative veto	Judicial elimination of legislative veto (used in over 200 cases) is practically ignored	Judiciary does not push back against people ignoring its decision for the sake of efficiency	The judiciary both managed to show that the issue was not constitutional while also allowing something procedural to continue for the sake of efficiency
<b><i>Planned Parenthood v. Casey</i> (1992)</b>	Abortion case	The constitutionality of the precedent of <i>Roe v. Wade</i> (1973)	<i>Roe v. Wade</i> (1973) is the law as precedent; "[t]he Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle . . . Thus, the Court's legitimacy depends on making legally principled decisions	Justices are aware of their own legitimacy, and must balance keeping precedent with maintaining public support

			under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation" (Concurring opinion)	
<b><i>Gonzales v. Raich</i> (2005)</b>	Medical marijuana provision by CA in conflict with federal law prohibiting marijuana	Consistency of judges; what to do when federal laws and state laws conflict	Struck down medical marijuana laws in CA, but stayed quiet when these types of laws resurfaced later (CO recreational marijuana legalization followed by others)	States as testing labs — the Court can let political bodies ignore its previous decisions
<i>Citizens United v. FEC</i> (2010)	Super PACs	Ability of the Court to render a bipartisan decision in a polarized matter	5-4 decision by Roberts giving victory to conservatives — campaign finance = speech	Gave the illusion of impartiality
<i>NFIB v. Sebelius</i> (2012)	Highly contentious Obamacare case	Ability of the Court to render a bipartisan decision in a polarized matter	4-1-4 decision with Roberts's opinion switching/allowing a partial liberal victory	Gave the illusion of impartiality
<i>Obergefell v. Hodges</i> (2015)	Gay marriage case	Ability of the Court to render a bipartisan decision in a polarized matter — how the Court can appease polarized opinions while also administering rights	5-4 decision with Kennedy switching sides	Gave the illusion of impartiality
<i>Trump v. Hawaii</i> (2018)	Trump's travel ban	Ability of the Court to render a bipartisan decision in a polarized matter (post-Trump's election)	5-4 decision by Roberts giving victory to conservatives — injunction removed, but Korematsu also officially overturned	Gave the illusion of impartiality
<i>Sessions v. Dimaya</i> (2018)	Immigration case — deportation of lawful permanent residents	Ability of the Court to render a bipartisan decision in a polarized matter (post-Trump's election)	5-4 decision with Gorsuch's opinion switching/allowing a liberal victory	Gave the illusion of impartiality
<i>Rucho v. Common Cause</i> (2019)	Partisan Gerrymandering	Ability of the Court to render a bipartisan decision in a polarized matter	Tense 5-4 decision along party lines	Outrage toward the Supreme Court

		(post-Trump's election)		
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Now that I have outlined the extent to which I selected cases as challenges to legitimacy, I will begin my historical analysis of the five periods I designated for the United States Supreme Court. These temporal groupings are based on similar challenges to legitimacy, and often extend across vast swaths of time otherwise reserved for more specific judicial contexts. I found five distinguishable legitimacy periods throughout my research. The first, the Early National Period, was a time when the Court constructed its own authority. This period ran from the late 1780s to the early 1830s, and is the subject of the following chapter. The next period, the Civil War Era, includes three smaller periods, each surrounding unity during the Civil War. The smaller periods are the Antebellum, the Civil War itself, and the Reconstruction Period. The third era of legitimacy challenges, the New Deal Transition Period, ran from the end of the Lochner Era to the beginning of the New Deal Era. It covered the Court's resistance to a massive progressive shift from the public and other branches. The fourth period is the Desegregation Period, from the 1950s to the 1960s. During that time, the Warren Court faced similar threats to its stance on desegregation. Finally, there is the Modern Court Era, a time spanning across the Rehnquist and Roberts Courts. The Modern Court Era has included a number of threats from partisanship in the midst of polarization and new technologies. I will now begin my analysis with Chapter 2, on the first period for legitimacy: the Early National Period.

# Chapter 2: Leadership in the Early National Period

The Early National Period is distinguishable through the frequent normative challenges the Supreme Court faced towards its authority.<sup>2</sup> Normative, authority-based issues, when severe enough, morphed into descriptive, public attacks, as demonstrated in *Chisholm v. Georgia* (1793). This period extends from the creation of the Constitution to somewhere in the mid-1830s, as Marshall's tenure ended and Jackson assumed the presidency. During the Early National Period, the justices served Federalist purposes by seeking expansion of the federal judiciary. Each challenge offered the bench a chance to gain further powers. The justices of the Early National Period worked together against normative challenges to build themselves up.

Despite the implied unity behind the decisions of "the Court," the Court is composed of individual justices. Each justice makes contributions to the decision of the Court as a whole. Yet, ultimately, it is the contribution of the leader, the Chief Justice, that frequently bears the most weight in a decision. In their decisions, the Chief Justices in the Early National Period dictated the importance of the Court for the sake of legitimacy. They remain responsible for the expansive interpretation of the judiciary that we witness today. John Jay, the first Chief Justice, and John Marshall, the fourth Chief Justice, were key figures in the early debates over the judicial authority (Barnett 2007).

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<sup>2</sup> This chapter is heavily based on a paper I wrote in junior year, titled "Marbury v. Madison: A Play of Politics" for the class "From Confederation to Confederacy: US History from Independence to Civil War," taught by Professor Linda Sturtz.

These two leaders developed the strength of the national judiciary through a few critical decisions, ones which determined the normative role of the Court over time.

### *Historical Factors*

In its initial stages, the role of the United States judiciary was unclear. The Constitution spoke of an extensive “judicial power,” yet it did not specify its context (U.S. Const. 1788). The Supreme Court’s Early National Period was a time for defining the role of the judiciary. As political feuds broke out between the federalists and antifederalists, who later formed the Federalist and Democratic-Republican parties, the Court had to balance political opinions with judicial authority at the same time (Graber 1998).<sup>3</sup> Thus, even with Federalist justices serving on the Supreme Court, the Court still had to resolve governmental disputes under the guise of fairness. The justices could not overtly favor Federalist principles within Court cases without threatening their capacity to decide on these matters in the first place.

The federalists, a group including Hamilton, Washington, Marshall, Jay, Madison, and Adams, advocated for centralized national government during the time surrounding the Revolutionary War (Graber 1998). They wanted to increase taxes, expand industry, and unite the individual states under the rule of a cohesive federal power. A few members of the federalists, John Jay, James Madison, and Alexander Hamilton, authored the

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<sup>3</sup> For the sake of clarifying the different meanings of “Federalist,” I will refer to the federalist movement from the Revolutionary War period with a lowercase “f,” and the Federalist political party that grew from it with a capital “F.” I am also using “Democratic-Republicans” to refer to Jefferson’s party, which appears under many names in texts.



*Federalist Papers* through the pseudonym “Publius,” referring to a voice “of the people” in Latin (Lee III 1997). On the other side stood the antifederalists. The antifederalists, including Jefferson, wanted agrarian-based, local governance through state sovereignty (Moskowitz 2017). They were apprehensive of centering vast power into a single, national structure. After escaping the tyranny of the British monarchy, they did not want to fall into yet another oppressive scheme of government. Given that representatives “are no less human or corruptible than their electors,” antifederalists viewed federalist efforts as an imitation of the British, tyrannical rule they just escaped (Johnson 2004). Thus, a few members of the antifederalists argued against the *Federalist Papers* with the *Anti-Federalist Papers*, authored by “Brutus” and others (Lee III 1997). Even after the Revolutionary War ended, the ideas behind each party continued into the lines of thought guiding political parties and conversations, as the groups became the Federalists and Democratic-Republicans.

In the late 1790s, the Federalists suffered from a massive rift in the political party. Hamiltonian Federalists and Adams Federalists parted ways over several disputes in the late 1790s. Divisive lines appeared “between Federalist politicians who were primarily concerned with promoting business enterprise and Federalist politicians who were more concerned with the needs of commercial agriculture” (Graber 1998). Hamilton represented one cohort and Adams the other. The two already disliked each other after the 1796 election, when Hamilton made it apparent he preferred Adams’s opponent, Pinckney, over Adams (Haupt 2013, 148). Yet Hamilton and Adams hated each other more as the split worsened among their followers over time (Graber 1998). The division

tore at the otherwise unified Federalist party, and gave the Democratic-Republicans a chance to fight back against Federalist control. Disputes over war and the Alien and Sedition Acts of 1798 continued to weaken Adams's presidency, leaving him open to a challenge in 1800 (Bradburn 2008). All these factors cost Adams his bid for re-election and put Jefferson into the presidency (Kerber 1970). Therefore, it is important to note that not only did divisions worsen between Federalists and Democratic-Republicans, but other rifts seeped into the distinct political parties themselves.

While the Federalists were dealing with their own divisions, a larger dispute arose between the Federalists and the Democratic-Republicans. The first election of the 19th century marked the first time that the presidency "peacefully" switched from the control of the Federalists to the control of the Democratic-Republicans (*History.com* Editors 2019). All of the tension that had been building between antifederalist and federalist ideology finally boiled over when the Federalists lost the election. Furthermore, the Federalists in the House were the ones who got to pick which Democratic-Republican candidate they preferred out of Aaron Burr and Thomas Jefferson (Coblentz 2006), so in a way, they still had the final word over the election. It is ironic that the description of the transition is "peaceful" considering the "[v]icious partisan warfare [that] characterized the campaign of 1800" (*History.com* Editors 2019). Shortly after Jefferson's victory, the Adams administration "rushed to consolidate power" in the last period before Jefferson's presidency began (Moskowitz 2017).

The parties and presidents continued changing throughout the Early National Period, yet the same guiding principles for the Federalists and Democratic-Republicans

extended into newer forms of politics. Regardless of which political parties dominated the political sphere at a given time, they each reflected similar disputes over national and state governance. As Graber explains, “Jeffersonians give birth to Jacksonians, and the proto-Whigs who supported John Quincy Adams in 1824 and 1828 are the direct political descendants of the Federalists who supported John Adams in 1796 and 1800” (Graber 1998). Throughout the Early National Period, there continued to be arguments over where power should lie within our governmental structure. This is why the Supreme Court faced more severe normative challenges to legitimacy during this epoch. Each challenge raised to the Court’s ability to decide a matter was based on the existing constitutional precedent to do so. If the justices argued against their capacity to render certain decisions, they would appear weak, as if their words did not matter. This is why the Court kept pushing for expansive abilities in the first several decades of its existence. Legitimacy was linked to Federalist extensions of judicial power in the Early National Period.

### *Challenges to Supreme Court Legitimacy*

Decisions in the Early National Period carefully maneuvered across a rift in political thinking. The constant struggle between federalist and antifederalist thought persisted well after the end of the Revolutionary War. Most of the challenges that the Court faced in the Early National Period concerned the level of power the national government should hold during this “experiment of [C]onstitutional [D]emocracy”

(Crowe 2012). Thus, by extension, several of the decisions from the Supreme Court implicitly or explicitly questioned the level of power the Supreme Court should hold as a federal entity. As the Court ruled on matters surrounding its own powers, it found creative ways to broaden its abilities while seeming unbiased.

Cases arising between the federal government and individual states posed one of the largest risks to the federal judiciary. This is because antifederalist and Jeffersonian principles advocated for state rights. In *Chisholm v. Georgia* (1793), one of the first major cases of the Court, Georgia argued that it did not need to appear before the Supreme Court because it was a sovereign state, and therefore not subject to the rulings of federal control (Gillman, Graber, and Whittington 2017, 159). The dispute over who holds power, the federal government or the states, found its way to the federal judiciary. The Supreme Court is not only a federal court, it is the highest court in the land. For a state court to argue against the authority of federal courts posed a risk to the Supreme Court and the other federal branches. The judiciary needed to emphasize its larger role in response to Georgia, or else it would lose its ability to weigh on larger cases. This is why the preliminary challenge of *Chisholm* was so severe.

Then there was a series of smaller cases, each building up to a more serious question of judicial review. *Ware v. Hylton* (1796), *Hylton v. US* (1796), *Calder v. Bull* (1798), and *Cooper v. Telfair* (1800) were also challenges to judicial authority, but the impact they had on legitimacy was smaller than that of *Chisholm* or *Marbury*. The early justices assumed some version of judicial review would be within their scope of powers, but they did not know what entirely that would entail (Fallon 2003, Footnote 5). The four

cases, *Ware*, *Hylton*, *Calder*, and *Cooper*, pushed the Court to elaborate further on its own capacity. The legitimacy challenges were inherent, as the cases concerned questions over the judiciary itself. The Supreme Court, then, could build on each case as they appeared, and use them to implicitly fuel judicial review arguments (Currie 1982, 655). The challenges paved the way for a greater one to develop in the beginning of the 19th Century, with a case about the 1800 election.

The events that followed Jefferson's election appeared before the Supreme Court in *Marbury v. Madison* (1803). *Marbury* was a political minefield. Not only did the case concern the first time a president lost his reelection bid, it was the first time the incumbent party lost to a new party. In the final day before the Jeffersonian presidency began, John Adams created 42 Justice of the Peace positions to be filled by Federalist judges (Moskowitz 2017). The justices would each have five-year terms, so long as they received the seal of approval from Adams's current Secretary of State, John Marshall (Bloch 2001). Marshall was only able to approve 25 of the judgeships before Jefferson assumed the presidency (Moskowitz 2017). After Jefferson took control, he replaced John Marshall with James Madison as the Secretary of State, who immediately stopped delivering judgeships (Balkin and Levinson 2003). Of the 17 people who did not receive their commission, only four were enraged, including William Marbury (Moskowitz 2017). Marbury brought this dispute to the Supreme Court, requesting a *writ of mandamus* from the Court, or an order commanding Madison to deliver the judgeships (Moskowitz 2017). Marbury's choice to ask the Supreme Court was odd since he could have also brought it to the DC Circuit Court, and likely received a more favorable

outcome (Bloch 2001). Perhaps one of the reasons why he brought the suit directly to the Supreme Court is because of the Federalist, former Secretary of State John Marshall, who now served as the Chief Justice of the Supreme Court (Bloch 2001).

The question before the Supreme Court in *Marbury* was based on the facts of the case. Did Marbury deserve his judgeship commission? According to the facts of the case, the commission was signed and sealed, just not delivered (Balkin and Levinson 2003). Time was what ultimately prevented commission delivery. However, there was another question hiding within that issue, one which implicitly challenged the legitimacy of the Court. That second question was whether or not the Supreme Court was the right actor to remedy the situation (*Marbury v. Madison* 1803). As Balkin and Levinson also acknowledge,

“there is more than one way to state what happened in *Marbury*, and thus what constitute its ‘facts.’ Depending on what one thinks the facts of *Marbury* are, the case is either, on the one hand, a symbol of judicial independence and the separation of law from politics, or, on the other, a revealing case study in the inevitable influence of politics on judicial decisionmaking demonstrating the inability of courts fully to separate law from politics even as they repeatedly attempt to disguise this fact in their own judicial rhetoric” (Balkin and Levinson 2003).

There are several pieces to *Marbury v. Madison* (1803), including factors which threatened the legitimacy of the Court. The Court had three principal tasks: first, it had to appear free from Federalist bias; second, it had to assert its authority; finally, it had to accomplish both of the latter tasks in a way that would make people listen. Each of these in itself seemed impossible, but the combination of the three in *Marbury* made the case a

deadly constitutional conundrum. Any misstep could have severe effects on how people would interpret the Court's constitutional role in government.

### *The Court's Responses*

In the Early National Period, the challenges were connected by a common, normative thread with descriptive implications. The justices' responses, however, had more variation as the Court learned from its previous mistakes. Under the first four chiefs, the responses of the judiciary altered between pushing forward and strategic retreat. After early Supreme Court cases failed to develop greater judicial powers, the judiciary applied gradual responses, retreating and advancing further as necessary. This strategy permitted Federalists to succeed in the judiciary. As time increased, the Supreme Court became more forceful with the ways it developed judicial power out of challenges to normative legitimacy.

The Supreme Court's response in *Chisholm* was strong advocacy for its own power. It ruled that states did indeed need to respect the authority of the Court and appear in suits brought forward by private citizens (Crowe 2012). Each of the justices in the majority wrote an opinion on this case, with Chief Justice John Jay's opinion praising "popular sovereignty" (Barnett 2007, 1734). According to Jay, our democracy was meant to respect the will of the people as the sovereign of our nation. The United States was built on principles of democratic rule, therefore its branches of government ought to adhere to those same rules. This response made Jay seem like he was not advocating for

increased power because of his own role. Rather, he thought the people would stand behind his own Federalist principles.

While *Chisholm*'s attempt to expand Court authority narrowed the Supreme Court's power in scope, the cases shortly thereafter were more successful in enhancing judicial powers. *Ware v. Hylton* (1796), *Hylton v. US* (1796), and *Calder v. Bull* (1798) developed future arguments for judicial review, and set the stage for *Marbury v. Madison* (1803). These smaller cases concerned the Court's ability to review state and federal laws, and some scholars, including Mark Graber, believe that these cases were among the first examples of judicial review appearing in United States case law (Graber 2003). The accumulating precedent for the Court's expanding powers began to send the message that the Court would do whatever necessary not just to protect its powers, but to increase them. Through judicial responses to other cases, the Court demonstrated that it acted as a Federalist stronghold by nature, as it worked to increase federal control over the states.

In responding to *Marbury v. Madison* (1803), John Marshall had a difficult job. Due to his personal ties to the case, his Federalist opinions, and his purportedly unbiased role as a justice, it seemed impossible to render a decision on this matter. If Marshall deferred to *Marbury* and the Federalists, it would make him seem like a political transplant. As Professor William van Alstyne explains, "[t]hough [Marshall] wrote for a unanimous court . . . he was widely criticized to the point of concern lest he be impeached" for his political role in the case (Van Alstyne 1969). Yet if Marshall refused the *mandamus*, it would imply that the Court never had the power to deliver the



judgeships in the first place. Either option he picked would propagate harmful images of the Court.

There was also the pre-existing hatred between Jefferson and Marshall to consider. Marshall felt an “almost insuperable objection” towards his distant relative, and thought Jefferson was “totally unfit for the chief magistracy of a nation” (Marshall 1801; Urofsky 2006). The feeling was mutual. Jefferson made it clear to Marshall that if the Supreme Court forced the executive branch to comply and deliver the judgeship, then Jefferson would override the command and ignore the judiciary. Professor Winfield Rose, from Murray State University, specifies,

“[n]otwithstanding that Marshall should have recused himself, he knew that if he issued the writ Jefferson would, at a minimum, direct Madison not to comply, and thereby embarrass him and the Court” (Rose 2003).

Jefferson waged a “war on the judiciary” after the efforts Adams took to put more Federalists in power (Rose 2003). Delivering the *writ of mandamus* would risk making the Court look weak, but so would refusing to do so. Either way, the Supreme Court stood to lose some of the authority it relied on to keep writing decisions.

This is why John Marshall’s response in *Marbury* expresses such a high level of legal mastery. Marshall not only managed to refrain from looking weak as the Chief Justice, but he enhanced the power of the Supreme Court for centuries to come. He avoided siding with the Federalists, yet he also avoided giving Thomas Jefferson a victory over the judicial branch (Rose 2003). In every possible way, Marshall delivered a winning decision. Marshall first stated that William Marbury was entitled to a commission. Marbury was nominated and appointed, his commission sealed and signed.

Thus, the executive withholding of a commission was “an act . . . violative of a vested legal right” (*Marbury v. Madison* 1803). Through his construction of a legal right to a judgeship, Marshall was able to recognize the standing of his political ally.

Where Marshall diverged from Marbury was with the role of the Supreme Court. Marshall argued that although Marbury deserved remedy for the undelivered judgeship, the Supreme Court was not the right entity to provide it (*Marbury v. Madison* 1803). This is because the specific section of the Act that granted the Court this authority was inconsistent with the Constitution. Congress passed the Judiciary Act of 1789, which, as Mark Graber writes, “did far more than *Marbury v. Madison* to establish judicial power in the United States” (Graber 2003). Marshall made a statement on the Court’s power by sacrificing the Court’s authority to issue a *mandamus* on the executive. In its place, the Court gained the stronger power of judicial review. It was a “strategic retreat” enacted to “enable the Supreme Court to nullify legislation for the first time,” in an expansive measure that fit with Marshall’s political ideology (Lemieux 2003; Graber 1998). Even if *Marbury v. Madison* (1803) was not the first Supreme Court case to use judicial review, it became known as the most important case for this judicial power due to the constitutional lessons it provides.

### *Impact of the Responses*

The general impact of each Chief Justice’s responses is the same — the judiciary provided stepping stones for the Court to build authority after each normative challenge.

Jay's response was strong, although it appeared at the wrong time. Incremental increases in power between Chief Justice Jay and Chief Justice Marshall eventually allowed Marshall to construct a judiciary with greater legitimacy. The justices' responses to threats served as precedent for one another, until *Marbury v. Madison* (1803) opened the doors for stronger federal control.

In defiance to Jay's call for "popular sovereignty," the popular response to the Court's decision in *Chisholm* was massive public outrage. Citizens within the states feared the power of this looming federal entity. How could states maintain their sovereignty if they had to bend to the will of other powers? Georgia's response to the Supreme Court was mild because it saw another way out of this predicament. The State adhered to the Court's ruling while fighting against it with another constitutional tool, the amendment making process. *Chisholm's* holding was reversed a mere two years after the case, with the passage of the 11th Amendment (Barnett 2007, 1737). The same popular sovereignty that the Chief Justice worked to uphold wanted the Court to ironically have less power. Chief Justice Jay worked to maintain the authority of the Court. Yet the steps he took to do so ended up diminishing the legitimacy of this institution.

Luckily for Justice Jay, there was minimal impact of the 11th Amendment after its passage. The amendment was carefully worded to only apply to "two specific circumstances" (Barnett 2007, 1746). However, the minimal influence of the 11th Amendment was not something that Jay could know at the time of its passage. Chief Justice John Jay resigned in 1795 because he thought it was futile to fight for the legitimacy of the Court. After serving as the Chief Justice, Jay thought the "Supreme"

Court was “so defectively designed that it lacked ‘energy, weight, and dignity’” to support itself (Bloch 2001, Footnote 7). His misstep in *Chisholm* shaped the way he viewed the Court’s potential. If the public could not agree to federal judicial power, then how could the justices render effective decisions? Other cases had further precedent to back them up, but *Chisholm* created a backbone for future cases, albeit a weak one. This is why the Court both succeeded and failed to support its legitimacy in *Chisholm v. GA* (1793).

The Court’s efforts to increase its authority after *Chisholm v. GA* (1793) did not go unnoticed by the divided public, especially those who were once antifederalists. As Justin Crowe writes,

“*Ware* and *Hylton* suggested that the Anti-Federalists’ fear, articulated since the Philadelphia Convention, that the Court would wield its power unevenly by simultaneously deferring to federal law and attacking state law[,] was not without merit” (Crowe 2012, 55).

The Supreme Court accumulated power with each ability granted to it, just as antifederalists warned in “Anti-Federalist 78” from *Brutus XV*,

“[the authors of the Constitution] have made the judges independent, in the fullest sense of the word. There is no power above them, to control any of their decisions. There is no authority that can remove them, and they cannot be controlled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself” (Brutus 1788).

While there is currently a power capable of removing the justices from office (U.S. Const. 1788), the antifederalists were right to fear the capacity of the judiciary to expand its authority beyond its original provisions. Federalist leadership in the judiciary pushed federal conceptions of judicial authority, and this became more evident at the turn of the

19th century when Jefferson replaced Adams as president and *Marbury v. Madison* (1803) came into being (Moskowitz 2017).

The result of Marshall's unanimous opinion in *Marbury* was substantial. The opinion was worded in such a way that Jefferson had no direct option to counteract it. Jefferson became enraged with the tactics Marshall used. As Melvin Urofsky elaborates,

“Jefferson, of course, realized what the decision meant, and it infuriated him. Although neither the President nor the Democratic[-]Republican press ever commented on it publicly—since, after all, Jefferson had ‘won’—privately he decried the opinion for its ‘sophistry’ and what he called Marshall’s ‘twistifications.’ To Abigail Adams he wrote: ‘The opinion which gives to judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislature & executive also, in their spheres, would make the judiciary a despotic branch’” (Urofsky 2006).

Marshall gained victory over his enemy while preserving the security of his branch of government. The elegance of these “twistifications” Marshall employed made it impossible for his rivals to counter his decision. The legitimacy of the Court was both expanded and preserved, with little the executive could do about it. The public saw this as a win for Jefferson (Urofsky 2006), but truly it was a win for the Court. It showed the Supreme Court which tactics they could use to render decisions in the future. Scott Lemieux writes that “the strategic moves identified by scholars in *Marbury* have remained relevant even as the Court has gained legitimacy and authority” (Lemieux 2003). *Marbury* created tools that left an impact well beyond the scope of the Early National Period.

The obscure provision Marshall overturned in *Marbury* allowed for the Court to continue deciding cases with judicial review. Both in *Marbury v. Madison* (1803) and in

*Stuart v. Laird* (1803), a case decided shortly thereafter, the Court weighed the conflict not by the conflict itself, but by the Federal Judiciary Acts that allowed for the conflict to occur in the first place. This strategic measure was helpful because “the justices avoided directly challenging Jefferson or the [newly] Republican Congress” while simultaneously expanding Federalist ideals of strong government (Gillman, Graber, and Whittington 2017, 103). Regardless of whether acts expanded or limited the judiciary upon passage, the Court still reserved the right to weigh in on the constitutionality of them.

In later cases, the Supreme Court reasserted its right to rule on matters involving state governments and the lower judicial branches (*Fletcher v. Peck* 1810; *Martin v. Hunter’s Lessee* 1816), and lower courts also asserted their right to exercise judicial review in their respective jurisdictions (*US v. The William* 1808). These victories were possible after the fortified precedent of *Marbury v. Madison* (1803). The impact of *Marbury* extended well beyond the original scope of the case. It defined the entire Early National Period rather than existing within a single moment in time. Marshall’s leadership in the Early National Period’s partisan cases guided the Court in a more Federalist direction, even when these circumstances resulted in a loss for members of the Federalists.

Marshall also continued expanding the rights of the judiciary indirectly as he extended the rights of the other branches. In *McCulloch v. Maryland* (1819), Marshall offered a sweeping interpretation of Congressional powers through the Necessary and Proper Clause. Under Marshall’s framework “necessary” became more about what was “appropriate” rather than required to meet a certain end (*McCulloch v. Maryland* 1819).

*McCulloch* was not a case that directly challenged the legitimacy of the Supreme Court, but its effects reflected on the Court's political bias and authority. Marshall's attitude in *McCulloch* demonstrates the same perspective he took towards the cases defending the Supreme Court. Segal and Spaeth write that "Marshall voted the way he did because he was extremely liberal" (Segal and Spaeth 2002). He took nearly every opportunity possible to increase the national government's power. Even when Marshall was expanding the power of other national branches, he was, by extension, expanding the power of the Court as a national entity.

In the end, in standing up for the increase of judicial power, John Jay and John Marshall both defended and created authority for the Supreme Court. They recognized the pre-existing perception that the Court was weak, so they established a cohesive line of precedent that argued the opposite. They saw the value of constitutional interpretation, and pushed Federalist perspectives of laws and judicial activism to accomplish their goals as Chief Justices. This is why we have the ability to discuss Court legitimacy today. Without the efforts of the Chief Justices in the Early National Period, our Supreme Court would be much less legitimate as an institution.

## Chapter 3: Divisions, Rights, and Liberties in the Mid-1800s

The next period of legitimacy challenges is what I call the Civil War Era. This extensive section of time ran through three smaller eras: the Antebellum buildup to the Civil War (1830s-early 1860s), the Civil War itself (1861-1865), and the Reconstruction Period after the Civil War (late 1860s-1880s). Challenges during those times emphasized divisions between the North and the South over civil rights, the economy, and national identities. The buildup to the Civil War and reconstruction after the Civil War witnessed a similar pattern of responses from the justices, whereas the war period itself saw a slightly different response pattern. Judicial responses during the whole Civil War Era were strategic. The justices deferred to Southern preferences to keep the South from secession. Their strategies eventually came at the cost of public support, but they allowed the Court to keep its legal authority through awful means.

### *Historical Factors*

After the Early National Period, Andrew Jackson's presidency brought forth a new set of issues, for both the Supreme Court and the nation at large. Jackson's 1828 presidency marked an oppositional shift fueled by public support (Crowe 2012; Lasser



1988). To succeed in his appeals to the public, Andrew Jackson reintroduced the agrarian movement that Jefferson relied on. As Justin Crowe writes,

“Jacksonian Democrats, for instance, favored Indian removal and opposed the Bank of the United States. They generally preferred a strict constitutional reading to a broad one and a narrow sphere of federal government authority to an expansive one. They envisioned a society where the common man had power and respect and an America where Northern financiers held no more influence than Southern or Western farmers and laborers. Unlike John Marshall and the justices of the Supreme Court, they were not especially concerned with protecting private property or the sanctity of contracts; unlike the National Republicans that preceded them and the Whigs that had emerged to oppose them, they were against sweeping internal improvements and Henry Clay’s ‘American System.’ In many ways, Jacksonian Democrats renewed and updated the Jeffersonian tradition, shifting it away from the nationalism that had consumed it since the War of 1812 and back toward the small government, agricultural roots of the late 1790s and early 1800s” (Crowe 2012, 109).

Yet there was a certain twist to Jacksonian thought that made Jackson’s presidency distinct from the Early National Period. Conflicts between the individual states influenced his presidency in a new way. Pre-existing divides between the North and the South intensified at this time, as the nation was split between states which permitted slavery and states which did not. Western expansion only brought further dilemmas for state conflicts. Each state admitted to the union had to be defined as a slave state or non-slave state (Crowe 2012), and if the balance between the two was disrupted, it could feed into rebellion or secession (Lasser 1988). As the turbulence of Jackson’s presidency reached the forefront of politics, the issues surrounding society kept building toward impending conflict.

Jackson’s presidency may have contributed to tensions defining the Civil War Period, but it was by no means the only responsible factor. Other factors included the western expansion mentioned above, tensions over slavery, right-wing populism, and, last but not least, the end of the Federalist reign on the Supreme Court. As Marshall’s tenure

on the Supreme Court came to a close in 1835 (Paul 2018), there was a noticeable shift in the problems facing the Court. For one matter, under Marshall's tenure, Jackson questioned whether the Court could follow through with judicial decisions. President Andrew Jackson supposedly uttered the phrase "Marshall has made his decision, now let him enforce it" in the aftermath of *Worcester v. Georgia* (1832), but the exact comment is uncertain (Breyer 2007; Rosen 2017). Under Marshall's leadership, the Court stood in opposition to Jackson's executive authority. It was a barrier to presidential control.

Jackson's attitude toward the Court changed slightly after he altered its composition. The new Chief Justice, Roger Taney, received his appointment from President Jackson, and started serving on the bench in 1836 (Huebner 2010). As far as Supreme Court appointments go, Taney did well at representing Andrew Jackson's interests on the Court. He was an avid supporter of the former Tennessee governor, and a "loyal" judge to the President's interests (Huebner 2010). Jackson placed Taney on the bench, as he rightfully believed Chief Justice Taney would adhere to Jacksonian principles while setting precedent. Taney continued to push a Jacksonian perspective into the Court in the decades he served as the Chief Justice, even after Jackson's presidency ended.

Right-wing populism, an external factor in Jackson's presidency, contributed further to Jackson's approach to politics. One of Andrew Jackson's nicknames was "King Mob," due the way he harnessed populist rage in the South (Michael 2015). Jackson's campaign drew on the candidate's military past to evoke patriotic imagery of the common man and win the "hearts" of people across the nation (Nester 2013). Andrew Jackson's

gruff demeanor stood in stark contrast to the image people expected of elites in government. He used his personal imagery to stoke populist rage in his base. The President's base was "an alliance consisting of lower-class whites, Southern planters, and sections of the Northern elite," who were angry at the government (Michael 2015). Jackson was responsible for fueling populist anger that eventually grew into Civil War conflicts.

As the Civil War approached, the divisions stemming from Jackson's presidency had grown increasingly violent. The 1850s marked a contentious period, and as Paul Finkelman explains, "from 1848 to 1861 America was like a train speeding down the track, without an engineer or brakes" (Finkelman 2013). The dispute that eventually broke out seemed inevitable, considering the political discord that plagued the nation through the "long decade" (Finkelman 2013). Economic concerns and threats from expansion drove slaveholding states to rebellion, and Northern citizens hated enforcing Southern slave policies within their own borders (Rockman 2012; Finkelman 2013). As much as some people in the North and the South wanted to keep separate policies, economic and human rights concerns could not stay constrained by state borders. Divisions over slavery, morality, and the economy tore at the nation, intensifying throughout the 1850s.

In 1861, the building animosity between Northern and Southern states eventually boiled over as war broke out (Rockman 2012). The federal government's efforts to preserve the union in the previous decades were not enough to stop the conflict. This war was especially brutal for the United States, and arguably "the bloodiest war in American

history” (Choudhry 2012). Between 1861 and 1865, approximately 50,000 civilians and 620,000 soldiers died, marking more American soldier deaths than several other conflicts combined (Faust 2008). Northerners and Southerners who made up the armies “grappled with unfamiliar equipment” and low supplies on the battlefields (Broomall 2019, 35). Disease and violence spread in soldier encampments, and starvation ran rampant in the South (Faust 2008). As the conflict stretched on, its effects seeped into the facets of everyday life for soldiers and civilians alike.

When the Civil War came to a close, and the South surrendered, the different branches of government prioritized reconstructing the nation. The arduous task of rebuilding after the sheer damage of the war felt unachievable. How could unity be possible after the utter destruction of the Civil War? It would be a mistake to say the divides of the war dissipated with the conflict. The anger did not just disappear. It morphed, taking on different forms of discrimination and violence (Wong 2015). In the midst of this anger, all branches of government, but especially the legislative branch, faced the seemingly insuperable task of reuniting the nation (Foner 2012). Slave-holding states persisted in their efforts to strip former slaves of their human rights, as they passed laws limiting the rights of African Americans (Wong 2015). This led to the passage of Amendments 13, 14, and 15 – each of which provided federal intervention to protect the civil rights of freed slaves (Foner 2012). These amendments, then, affected the way the Supreme Court could interpret the Constitution.

## *Challenges to Supreme Court Legitimacy*

The political issues facing society in the Antebellum phase left a noticeable impact on the Supreme Court's docket. In the decades leading up to the 1860s, the Supreme Court justices balanced their role as decision makers with the challenges they faced to the "united" nature of the United States. The nation's split between Northern and Southern states continued to ebb into the Court's decision-rendering process. Significant cases had the potential to push Southern states closer to secession. As Justin Crowe explains,

"[b]y the time the first shots were fired on Fort Sumter in 1861, the judiciary—reorganized by Jacksonians, supported by antebellum Democrats, and dominated by slaveholding interests—was at the center of a firestorm over slavery and secession, over the rights of citizens and the nature of the Union" (Crowe 2012, 131).

If justices erred in their judicial opinions, it could cause severe consequences, both for the nation and for the Supreme Court. As a federal entity, with justices pulled from judicial circuits across the United States (Crowe 2012, 86-87), the Supreme Court had a vested interest in maintaining federal authority. Even Southern justices, with allegiances to the values they held, acted in national roles representing a united federal branch. Losing unity as a nation would make Southern justices lose their power as members of the Supreme Court. Jackson and Taney may have argued for less centralized governmental power, yet their actions within this time period often advocated for an increase in governmental authority. The era surrounding the Civil War was one that demanded greater governmental action (Foner 2012).

In the conflicts plaguing political divides, the Supreme Court became the arbiter of disputes between Northern and Southern states. The Democrats kept trying to force the Court to take on the question of slavery, arguing that it was a constitutional question rather than a matter lawmakers could decide (Crowe 2012, 135). This led to the development of *Groves v. Slaughter* (1841), *Prigg v. Pennsylvania* (1842), and *Dred Scott v. Sanford* (1857), some of the most infamous cases in the history of the Court. *Groves* was the first slavery case for the Taney Court (Lasser 1988), *Prigg* concerned the role Northern states played in catching slaves (*Prigg v. Pennsylvania* 1842), and *Dred Scott* questioned both whether slaves are citizens of the United States, and whether people are still considered slaves if they travel into free states (*Dred Scott v. Sanford* 1857). The latter two of these cases unfortunately led to harsh outcomes for civil rights. As Justin Crowe explains of the *Dred Scott* case,

“[i]ndeed, it was precisely this intersection of the slavery debate and the pressing need for improvements to existing judicial machinery that structured debates over institution building in the late 1850s and early 1860s. It was in those years, after repeated Democratic attempts to delegate the slavery question to the judiciary effectively produced *Dred Scott v. Sanford*, that the nascent Republican Party sought to break the Southern stranglehold on the Supreme Court” (Crowe 2012, 137).

*Dred Scott*'s 7-2 decision was the Supreme Court's answer to the slavery dispute.

Continuing the precedent from *Prigg*, *Dred Scott* showed the Supreme Court's willingness to issue decisions favoring Southern and slave-holding states (*Dred Scott v. Sanford* 1857). The Court denied rights to individuals when faced with a challenge, yet did so in a way that reasserted its ability to address critical constitutional crises. The Court negatively used civil rights issues to build normative, institutional legitimacy.

As the Civil War broke out, the Supreme Court handled multiple quarrels over powers in government. The Court still had to demonstrate its ability to function as an impartial entity when the nation was polarized enough to have a Civil War. However, as Jacksonian thought persisted on the bench, several of the Court's Civil War decisions admonished President Lincoln's expression of emergency powers. *Ex parte Merryman* (1861) and the *Prize Cases* (1863) reflected bitter disputes between Taney and Lincoln over the extent of federal power. To appease divides across the states, the Court often favored Southern states. Additionally, it is worth noting that Taney passed away in 1864, and Lincoln was able to maneuver the Court's political leanings to a more Republican perspective by the end of the war (Crowe 2012, 146). There were still a few decisions which questioned executive authority that the Court handed down shortly after the Civil War (*Ex parte Milligan* 1866; *Ex parte McCordle* 1869). Yet, for the most part, Lincoln positioned himself well to move Reconstruction Period politics forward in the Supreme Court after Taney's death.

The aftermath of the Civil War questioned how the nation should rebuild itself. Most of the Reconstruction Period's changes created opportunities for federal powers to expand. In order to fix damages incurred by the South, the three branches of government worked to collectively expand national powers. As Eric Foner writes,

“[t]he laws and amendments of Reconstruction opened the door for future Congresses and the federal courts to define and redefine the guarantee of equality, a process that has occupied the courts for the better part of the last half-century” (Foner 2012).

The motivation to expand federal powers can be seen in a couple of Court cases in particular. The *Legal Tender Cases* (1871), in overturning *Hepburn v. Griswold* (1870),

allowed the federal government to coin money across the United States. More emphasis appeared on the unity of states rather than individual state policies. The Court continued to experiment with reconstructive politics until this era drew to an end.

A critical component to judicial reconstruction efforts was how to address the rights slavery infringed upon. How could the government guarantee rights that should have been acknowledged in the first place? The appearance of three new amendments delivered additional protections. The 13th, 14th, and 15th Amendments sought to minimize discrimination that came from Congress and the states. Yet, as the Court would soon show, these amendments were not enough to protect individuals. They were merely compromises, in a nation where discrimination appeared on all sides. As Eric Foner elaborates,

“all the major accomplishments of the Reconstruction era, from the Civil Rights Act of 1866 to the Fourteenth and Fifteenth Amendments and the Civil Rights Act of 1875, were compromises, the work of numerous individuals and factions within the Republican Party. They reflected ambivalent attitudes, in Congress and society at large, about the scope of racial equality. They attempted a partial, not total, modification of the existing federal system” (Foner 2012).

Congress still did not do enough to protect former slaves from discrimination, but at least it recognized the need to adapt the Constitution in order to advocate for increased rights. These amendments changed the way the Court had to think about a wide variety of issues, from incorporation to individual liberties. Nonetheless, the Supreme Court eventually moved away from reconstructive politics after the 1887 end to the Reconstruction Period, and the Court argued against the Civil Rights Act of 1875 in the *Civil Rights Cases* (1883) (Foner 2012). The Court’s narrow construction of civil rights created precedent for this new area of the Constitution.



To sum up the challenges faced by the Supreme Court in the mid-1800s, these were issues concerning both rights and unity. The Supreme Court gained helpful tools for interpreting civil rights. The question was how the justices would choose to use them. The primary objective of the mid-1800s Supreme Court was to preserve national unity. However, the pattern of the cases above demonstrates how this goal often conflicted with preserving rights and liberties in light of slavery. Continued deference for unifying the country often led to a decrease in rights for African Americans. Only in cases concerning liberties of white, Southern soldiers did the Court prioritize individual liberties during the Civil War, as shown with the three Ex Parte cases surrounding Lincoln's presidency. The challenges were similar in nature; they each managed the Court's ability to survive divisions and partisan warfare. Each of these challenges demanded proper responses from a judiciary which was not prepared to deliver them.

### *The Court's Responses*

The responses to the similar challenges can be divided into three parts: pre-Civil War, Civil War, and post-Civil war. Judicial responses before and after the Civil War minimized individual rights and gave victory to Southerners. During the Civil War, judicial responses opposed President Lincoln, yet still advocated for unity by deferring to the South. Judicial responses during the Civil War Era minimized damages to legitimacy at first. They allowed the Court to survive past challenges as they happened. However, the responses eventually left a terrible legacy for the judiciary over time. As society

recognized the pain left by judicial decisions, it looked down on the methods from the Civil War Era.

The first clear pattern of judicial responses appears in *Prigg* and *Dred Scott*. The Supreme Court viewed civil rights as a threat to its legitimacy, as they would push the South to secession. The Court denied rights to people who deserved them, due to its hopes to unite a discriminatory nation. Both of these cases left a legacy which eventually hurt the reputation of the Supreme Court (Lasser 1988). Yet, at the time, the Court's decisions in these cases aimed to calm tensions between the North and the South. Whether intentional or unintentional, Taney's decisions in *Prigg* and *Dred Scott* were "strategic" (Baum 2006) – they referred back to constitutional provisions and applied specific facets of the law to the facts of the case. Considering that Taney once argued against slavery before (Huebner 2010), it is even possible that his decisions in *Prigg* and *Dred Scott* went against his own beliefs. These decisions affirmed the Court's authority to exercise judicial review while making the Constitution seem more palatable to white Southerners considering secession. The cases were a loss to Northern states, but not Northern interests. Taney worked towards national unity by appealing to explicit racism in the Constitution.

As mentioned above, the legitimacy crisis within *Dred Scott* came from a few different areas. First, there was a challenge to the Court's power to review constitutionality. The Court's response in *Prigg* and *Dred Scott* affirmed the Constitution's words through recognizing the Constitution's overt and implicit racist undertones. Second, there was the hidden challenge to the Court's authority as a national

entity. The justices of the Supreme Court temporarily preserved their legitimacy by working towards national unity. Therefore, they allowed for the Court to still exist as a national body drawn from Northern and Southern circuits. The third challenge was indirect, and more appeared several decades later, although it was acknowledged by a few politicians at the time (Lasser 1988). This was the awful legacy left behind by the *Dred Scott* case. The impact of this will appear later in Chapter 5's discussion on desegregation, but it was an issue the Court's response caused rather than solved. The pre-Civil War response of the Court to slavery prioritized legitimacy through unity over human and civil rights.

Next, as the Civil War took place, the Supreme Court worked towards unity by arguing against President Lincoln's actions. This time the justices fought for individual liberties, specifically the liberties of white soldiers fighting on behalf of the South. The three *Ex parte* cases mentioned above dealt with the rights of Southern individuals when the executive exercised emergency powers. In each of these cases, overreach of executive authority was turned down. In some ways, the Supreme Court justices seem strategic in their methods for reducing executive authority. During the war, the Court was briefly able to switch priorities, in hopes to appeal to Southern states. At the same time, the methods Taney used may only indicate the spite he held for Lincoln. As mentioned above, bitter disputes between the two were echoed in Taney's decisions in *Merryman* and the *Prize Cases* (Crowe 2012). Perhaps the cases from the Civil War itself were meant to preserve unity, but they may have held a different purpose instead.

Then, in the Reconstruction Period, the Court gave Southern states more freedoms at the cost of civil rights. Congress and the states may have ratified the 13th, 14th, and 15th Amendments, but the Supreme Court effectively reduced the impact of the 14th and 15th Amendments through the *Civil Rights Cases* (1883) and subsequent decisions. Republican reconstruction efforts prioritized “the development of a national industrial economy” at the expense of “displacing the party’s prior emphasis on protecting African Americans in the South” (Crowe 2012, 164). Republican efforts to manipulate the judiciary succeeded in reframing reconstruction. Unfortunately, it would be a long time before the Court would permit other entities to preserve civil rights for African Americans.

Throughout the Civil War Era, the Court extended a few legitimacy-preserving efforts started in the Early National Period. However, its methods for doing so were more implicit than direct. For instance, before and after the Civil War, the Supreme Court expanded federal powers. *Prigg v. PA* (1842) and the *Legal Tender Cases* (1871) were two of the strongest examples of the Court working to expand federal authority. This expansion, in turn, let the Supreme Court gain more power as a consequence. Granted, the Supreme Court did also restrict the executive’s powers during the Civil War. *Ex parte Milligan* (1866), *Ex parte Merryman* (1861), *Ex parte McCardle* (1869), and the *Prize Cases* (1863) demonstrate the Court’s willingness to limit executive authority during the Civil War itself. Yet the Court largely appealed to federal powers in the most crucial questions to legitimacy brought up through the Civil War. Chief Justice Taney was more of a Jacksonian and Jeffersonian in his principles as a justice (Huebner 2010), but some

of the work he did before the Civil War allowed for a more powerful Court and federal government.

### *Impact of the Responses*

The clearest impact to the Court's legitimacy in the Civil War Era exists in the cases directly concerning slavery. Looking back on these cases now, it is apparent how disappointing they are to our national history. The worst part of these cases is that they did not misinterpret the intention of the Constitution. The most important document in American legal history is one which explicitly excluded certain groups of people (*Prigg v. PA* 1842; U.S. Const. 1788). The 13th, 14th, and 15th Amendments sought to remedy the Constitution's direct racial discrimination. Yet because of limitations placed by the Supreme Court near the end of the Reconstruction Period, these amendments were not as successful as they seemed on the surface (Foner 2012).

Then there was the question of how the Court directly handled challenges to its normative legitimacy. Compared to the Early National Period, these challenges were less frequent, especially once Jacksonian and Southern justices controlled the Supreme Court in place of Marshall. When Jackson "deftly" found a way to disregard the Supreme Court in *Worcester*, he did so by avoiding direct conflict with the Court, and acted by getting around the decision. This method allowed the Court to avoid responding directly to Jackson's challenge, as "[t]he Supreme Court never had to issue an order requiring compliance and the crisis was defused" without further action (Rosen 2017). *Worcester* set a precedent for the Court to avoid direct challenges to its legitimacy. Even as the

Supreme Court justices changed over time, they could still apply Marshall's tools for avoiding challenges brought from the executive. Other challenges to Supreme Court legitimacy in the mid-1800s were less direct compared to the Early National Period. The Supreme Court's pursuit of national unity helped it avoid more devastating normative challenges to legitimacy, while its responses allowed it to appeal to Southerners in the public. The Court's efforts were misguided attempts to balance partisanship.

Now that official tools for incorporation existed within the Constitution, the Supreme Court gained greater authority over disputes occurring within the states. Before these three amendments, the Supreme Court had difficulties with extending federal Bill of Rights limitations to the states (*Barron v. Baltimore* 1833; Amar 1992). After the passage of the 14th Amendment in particular, the Supreme Court could "make the Bill of Rights applicable to the states" (*Adamson v. CA* 1947; Mykkeltvedt 1971). This meant that the Court gained the power to extend constitutional authority to more disputes over state actions. With the ties "legitimacy" holds to "power" and "authority" (Gibson, Lodge, and Woodson 2014), the Supreme Court's legitimacy expanded through the 14th Amendment's incorporation powers. As the Supreme Court's power grew, so did the authority it held through institutional norms, or normative legitimacy. This is how the Court's legitimacy continued expanding after the Civil War.

# Chapter 4: Expansion as the Supreme Court Transitions into the New Deal Era

The previous periods had an explicit link together, but the distinction between Chapters 3 and 4 spans across several decades. That is not to say that few important cases faced the Court between the 1880s and 1930s. After the Reconstruction Period, the Supreme Court encountered difficult cases dealing with critical social themes. These matters included prohibition, monopolistic corporations, and workers' rights (*US v. EC Knight* 1895; *Allgeyer v. Louisiana* 1897; *Lochner v. NY* 1905; *Stafford v. Wallace* 1922; *Adkins v. Children's Hospital* 1923). However, for several decades, few cases together questioned the Supreme Court's authority to the extent of previous eras, with the exception of *In re Neagle* (1890).<sup>4</sup> Despite *Neagle's* acknowledgement of the Court's powers, most of the cases between the 1880s and early 1900s concerned specific societal matters, rather than effects on Supreme Court legitimacy. This is the reason for the large shift in time between Chapters 3 and 4.

The transition into the New Deal Era brought about a shift in challenges to Supreme Court legitimacy. Larger questions about the role of the judiciary, the applicability of legal frameworks, and the most acceptable way to respond to the Great Depression loomed behind unassuming cases on the Supreme Court's docket (Crowe

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<sup>4</sup> In *Neagle*, the majority opinion stated that, of the three branches, "the judicial is the weakest for the purposes of self-protection and for the enforcement of the powers which it exercises" (*In re Neagle* 1890). *Neagle* served as an example of the Court strategically playing into weaknesses usually brought up by the other branches.

2012; Schiller 2007). The justices often found themselves in contention with President Franklin D. Roosevelt, and the Court faced a period of time where it was diametrically opposed to public opinion (Ho and Quinn 2010; Friedman 2009). This is why I am choosing to prioritize the transition into the New Deal Era, despite a few critical cases, like *Neagle*, on the docket between the 1880s and the 1930s. The descriptive challenges of public support for Roosevelt's presidency grew into a series of normative challenges for the legal capacity of the Supreme Court.

### *Historical Factors*

For a long period of time, otherwise known as “the Lochner Era,” the Court maintained a pro-business, pro-contract attitude. The Lochner Era, epitomized through a single case, *Lochner v. New York* (1905), was a departure from state police powers and national regulation in favor of individual rights. David Strauss, in demonstration of the contemporary hatred toward the epoch-defining case, writes,

“*Lochner*, which declared unconstitutional a New York maximum hours statute for bakers, is, of course, more than just a case. It symbolizes the era in which the Supreme Court invalidated nearly two hundred social welfare and regulatory measures, including minimum wage laws, laws designed to enable employees to unionize, and a federal statute establishing a pension system for railway workers” (Strauss 2003).

Before the New Deal Era, the Lochner Era created a series of precedent for protecting businesses from government regulation. The historical context here comes from industrial expansion and governmental confusion over how to deal with it. A constitutional dilemma arose over the extent to which industrialization recreated businesses (Siegel



1991). Several state governments worked to protect the health of workers in dangerous environments (*Allgeyer v. Louisiana* 1897; *Lochner v. New York* 1905; *Muller v. Oregon* 1908; Siegel 1991). However, most of these cases were struck down by the Court in favor of individual freedom of contract (Strauss 2003). The Lochner Era fed into a new, impending era — one which demanded greater governmental influence over both labor and the economy.

In the midst of the Lochner Era, the Great Depression struck the United States. In October 1929 came the “complete collapse of the stock market” (Hardman 1999). The Great Depression caused mass unemployment across the United States, with nearly a quarter of the labor force out of their jobs (Hillman 2008). As John Hardman explains, conditions in the United States looked dire by 1932.

“By 1932 United States industrial output had been cut in half. One fourth of the labor force -- about 15 million people -- was out of work, and there was no such thing as unemployment insurance. Hourly wages had dropped by about 50 percent. Hundreds of banks had failed. Prices for agricultural products dropped to their lowest level since the Civil War. There were more than 90,000 businesses that failed completely.

Statistics, however, can only partially give an account of the extraordinary hardships that millions of United States citizens endured. For nearly every unemployed person, there were dependents who needed to be fed and housed. Such massive poverty and hunger had never been known in the United States before” (Hardman 1999).

Franklin D. Roosevelt offered a solution to the Great Depression in his 1932 presidential campaign. Roosevelt sought to reform conditions in the United States by reforming the government itself (Schiller 2007). Roosevelt introduced economic policies with haste after winning the 1932 election in a landslide (Schiller 2007; Hardman 1999). He created

New Deal legislation to prompt economic and political changes so that the government would be able to tackle its recent sociopolitical crisis (Hillman 2008).

The Supreme Court's composition, however, served as a setback for Roosevelt. At the beginning of Roosevelt's presidency, the Court was composed of a near even split for justices. There were the conservative Four "Horsemen," Butler, Van Devanter, McReynolds, and Sutherland; the liberal Three "Musketeers," Brandeis, Cardozo, and Stone; and the two swing justices, Hughes and Roberts (Ho and Quinn 2010; Crowe 2012). The conservative members of the Court often dominated judicial politics, in what Justin Crowe terms a "titanic clash" between the Supreme Court and President Roosevelt (Crowe 2012, 225). Keith Whittington calls Roosevelt an "oppositional president" for the way he contrasted with other parts of government (Whittington 2007). Yet, truly, it was not Roosevelt who stood in opposition to everyone else in the mid-1930s. The conservative-driven Supreme Court existed in the midst of progressive politics elsewhere (Schiller 2007). A judiciary which continued to push Lochner Era precedent stood in the way of Roosevelt's expansive New Deal policies.

Through the New Deal, Roosevelt announced a series of policies concerning "monopolies, child labor, taxation, production, and manufacturing" (Crowe 2012). These topics were recognizable themes in the Lochner Era as well, but now there was more of a public push to see them accomplished (Friedman 2009). When the Court repeatedly shot those measures down, Roosevelt proposed a plan that would allow him to appoint and replace enough justices who would concur with him ideologically (Siegel 1991, Footnote 3; Badas 2019). As the justices faced the impending threat of Roosevelt's Court-packing

plan, and fear of public opinion towards it, they experienced ideological changes. Two justices in particular are often credited with moving the ideological spectrum of the Supreme Court enough to stall Roosevelt's Court-packing plan. They are Chief Justice Hughes and Associate Justice Roberts (Ho and Quinn 2010). Roosevelt's plan eventually became unnecessary, for reasons listed later in this section, but it served as a critical historical factor in the Court's transition from utilizing Lochner Era thought into accepting FDR's New Deal plans.

The effect of mass media heightened the importance of descriptive legitimacy during this time. Although inherently impossible to discern with complete accuracy, public opinion became comparatively easier to measure by the 1930s. Roosevelt's election proved the effectiveness of George Gallup's public opinion poll measurements. Previous polling data relied on measures such as car registration data and phone books, relying on quantity of respondents rather than quality (Ho and Quinn 2010). Gallup's polling methods, based on smaller polling percentages, correctly predicted a win for FDR when other methods did not (Ho and Quinn 2010; Caldeira 1987). Through applying Gallup's polling strategies, political results became easier to predict, and political scientists found more reliable ways to measure public opinion than biased polls (Caldeira 1987). FDR's election, and the data associated with it, made descriptive legitimacy more measurable than before.

By the New Deal Era, telecommunications and information accessibility had changed drastically. In the legitimacy challenges facing the Supreme Court during the Civil War Era, information access was limited to what people could read or see in person.

In the late 1890s, Guglielmo Marconi launched a wireless telegraphy system known as radio broadcasting (Bruton 2006). By 1927, Congress placed limits on radio broadcasting, given its influence in society. They clarified the radio was a tool for “public interest, convenience, or necessity,” and that broadcasters seem to enter a social contract with the public to broadcast (Snider, Barranca, and Debroy 2004). The radio came into being to convey information to the public. With public opinion serving such a key role in the meaning of “legitimacy,” telecommunicated mass media was an unprecedented transformation. It expanded information access so politicians could harness viewers across the nation with haste. No longer was information restricted by proximity. The communication transformation took national cohesion to a new frontier. Some argue that the expansion efforts of New Deal policy might not have been possible without the extensive reach of media (Caldeira 1987). Regarding the media, though, one thing is certain: it played a transformative role in FDR’s ability to reach out to the public, and in the public’s capacity to evaluate the Court.

### *Challenges to Supreme Court Legitimacy*

Challenges arose during the New Deal Transition Period because of the *Lochner* Era’s precedent. The Court remained stuck in its *Lochner* mindset when the rest of society had moved on. This truly marked a transition period, when not everyone shifted at the same time. The greatest challenge facing the Supreme Court was how to balance public opinion with recent precedent. The Supreme Court is an institution based in

adhering to legal standards, including ones set through precedent (Fowler and Jeon 2008). For the Court to follow public opinion trends, as well as pressure from Roosevelt, it would have to reverse decades of previous decisions in the process.

As the Great Depression started to affect society, the initial threat to the Court was minimal compared to the threat to come. The individual justices started to take notice of the severe issues impacting society, but these issues were less of a direct threat to the Supreme Court's legitimacy at first. The challenge built up slowly, and through a variety of new cases that kept piling on. As Justin Crowe explains,

“from World War I to World War II, through normalcy and the New Deal, the federal judiciary not only faced a caseload vastly greater than its capacity but also a diverse set of political actors that seemed decidedly hostile to its work” (Crowe 2012).

The challenges affecting society slowly built up over time, eventually overloading the Court with a series of cases on familiar topics. As the Supreme Court often relies on its former decisions (Fowler and Jeon 2008), it was able to continue deciding cases in the same manner for a few years, despite the national turmoil stemming from the Great Depression.

With President Roosevelt in office, some of the largest issues facing the Court became metaphorical landmines. The Lochner Era is distinguishable through its deference to corporate freedoms. As Stephen Siegel writes, in the “deviant period, known as the Lochner era, the Court underconstrued the scope of [C]ongressional power and overprotected private property” (Siegel 1991, 3). The types of cases which defined the Lochner era, those of businesses, private property, and contracts, kept appearing well into

the first years of Roosevelt's presidency. The difference, though, is that now these cases were risky endeavors for the Court, considering the shift in public opinion and the rise of Roosevelt's presidency (Caldeira 1987). A few examples of this include *A.L.A. Schechter Poultry Co. v. US* (1935), *West Coast Hotel v. Parrish* (1937), and *NLRB v. Jones and Laughlin Steel Company* (1937). Each of these cases shows an instance where the Supreme Court grappled with extending precedent or rewriting it. In *Schechter*, the Court emphasized precedent, whereas the justices started to shift by *West Coast Hotel v. Parrish* (1937) and *NLRB v. Jones and Laughlin Steel Company* (1937). Between 1932 and 1937, the Court witnessed how much opinion had changed from their previous decisions, both in the public and the other branches (Friedman 2009; Ho and Quinn 2010). The external shift, then, took time to influence judicial opinions.

The tension between the judiciary and Roosevelt became especially apparent in the case of *A.L.A. Schechter Poultry Co. v. US* (1935). *Schechter* is considered the Lochner Era Court's most heated dispute in the transition into the New Deal Era. For many of the justices, *Schechter* was not only a case over labor practices, it was a case regarding the abilities of the Court amidst a power-hungry executive branch. In a unanimous decision, Chief Justice Hughes penned a scathing retort of the National Industrial Recovery Act's (NIRA) delegation of powers. He stated that the "sweeping delegation of legislative power f[ound] no support in the decisions" the government typically relies on (*A.L.A. Schechter Poultry Co. v. US* 1935). The justices disagreed with the vast discretion offered to Roosevelt in the NIRA, which fell outside the scope of constitutional powers (Bressman 2000).

1937 was the year that the Supreme Court's attitude began to change. As mentioned above, Chief Justice Hughes and Associate Justice Roberts stopped siding with the ideological Four Horsemen in 1937. There is some debate over the specific case where this turning point happened, whether it was *West Coast Hotel v. Parrish* (1937) or *NLRB v. Jones and Laughlin Steel Company* (1937), but the case is clear that 1937 marked a major shift (Caldeira 1987; Ho and Quinn 2010). The Court began permitting Roosevelt's almost "imperialist" presidency (Whittington 2007, 168), and the justices let Roosevelt's New Deal policies bring about necessary changes. Judicial leniency allowed society to recover from the economic hardships of the Great Depression. The Court responded to Roosevelt's relentless New Deal reforms when they eventually realized the opposition and necessities they faced. From the Court-packing plan and public support for New Deal reforms, a "tacit deal" was formed between the Supreme Court and the American public, where the Court could keep its structure as long as its interpretations did not stray too far from the will of the people (Friedman 2009).

As mentioned above, the Court initially kept doing everything in its power to prevent Roosevelt from getting his way. The justices, especially the Four Horsemen, saw Roosevelt's expansive measures as a violation of limited federal powers in the Constitution, and several scholars agree with that interpretation today (Epstein 2006; Crowe 2012; Whittington 2007). Roosevelt's progressive policies largely intended to increase federal control. At the same time, he hoped to limit the influence of the conservative justices who had controlled the Court for a long period of time (Crowe 2012). The judiciary faced a severe challenge from the other branches of government in

the New Deal Transition Period. Roosevelt's challenge affected the judiciary's capacity to interpret the law by altering the composition of the judiciary itself. As Alex Badas explains,

“[m]embers of the Court also viewed the Court-packing plan as a threat to its institutional legitimacy. In an exceptional act, Chief Justice Charles Evans Hughes submitted a letter of testimony to the Senate against Roosevelt's plan. In the letter, Hughes dispelled Roosevelt's idea that the plan would increase the Court's efficiency and warned that the plan would in fact harm the Court” (Badas 2019).

This shows that the Court was indeed aware of the potential setback it faced as it decided cases after the Court-packing plan was introduced. The Court was forced to grapple with its public image as a result of the Court-packing plan.

Another challenge towards the justices came from a shift within the composition of the nine justices on the bench. Roosevelt had the chance to replace one of his most formidable dissenters during a key moment for the Court. In 1937, Justice Hugo Black, an avid endorser of FDR, replaced Justice Willis Van Devanter, one of the conservative Four Horsemen (Crowe 2012; McGovney 1937). Concerns over Hugo Black's capacity to execute the law arose, due to his social and economic philosophy (McGovney 1937). At a time of transition, when Roosevelt advocated for vast changes, this change had the ability to alter judicial cases going forward. Whoever sits on the bench has a voice in the decisions it renders. Roosevelt's capacity to change the Court's composition posed a severe normative threat to the conservative judiciary.

As the Court continued with its 1937 New Deal perspective, federal powers began expanding, arguably past constitutional limits. As Keith Whittington states, “[t]here is



little disagreement that American constitutional law was radically remade in the 1930s” (Whittington 2015). For the federal government to help people overcome the effects of the Great Depression, it had to create a version of the federal branches which could fully address that issue. As a result of deference to the states, the Constitution limited the federal government’s capacity to react to national crises (U.S. Const. 1788; Millhiser 2020). The New Deal Court’s docket still contained the same labor cases which pervaded the Lochner Era, but it also included a series of cases framed around national powers, such as *U.S. v. Curtiss-Wright Export Co.* (1936) and *NLRB v. Jones and Laughlin Steel Company* (1937). The Supreme Court justices eventually permitted the extension of the New Deal administrative state, arguably past constitutional allowances, during this time period.

### *The Court’s Responses*

The first response of the Supreme Court was consistency. The justices rendered markedly similar decisions to those of the Lochner Era. *Panama Refining Co. v. Ryan* (1935), *Schechter Poultry Co. v. US* (1935), *US v. Butler* (1936), and *Carter v. Carter Coal* (1936) demonstrate the same type of limited governmental influence that appears in the pre-Roosevelt Lochner Era. While the rest of society was moving away from Lochner Era thought, the Court still embraced it. A partial influence on the Court is the justices’ duty to adhere to precedent. As Fowler and Jeon write, “the justices of the Supreme Court are aware of the inherent weakness of the federal judiciary and place high value on

maintaining their institutional and decisional legitimacy through the use of precedent” (Fowler and Jeon 2008). For Supreme Court justices, applying precedent is often thought of as the key to maintaining legitimacy. In the New Deal Transition Period, the justices faced a time where the opposite was true. Judicial norms created a conflict where either the Supreme Court would have to overrule decades worth of legal precedent, or they would need to deny the will of the people. Over time, the justices chose the former rather than the latter (Friedman 2009). The justices saved themselves from a crisis of descriptive legitimacy through their actions over time.

In a few specific instances, the Court’s opinion provided a scathing defense of legal standards. In *Schechter*, the Supreme Court stood up to the external factors of Roosevelt’s New Deal legislation, such as the NIRA. To say that the decision in *Schechter* was not political is to ignore the fierceness with which the justices directed at the executive. Chief Justice Hughes termed the NIRA’s presidential deference as “unfettered” and “without precedent” (*Schechter Poultry Co. v. US* 1935). He could not believe the audacity of the discretion offered to someone so willing to rewrite the Constitution and previous judicial decisions. The difference between legal formalism and legal realism permeated New Deal discourse (Olken 2014). The Court had much to lose by overruling its precedent, thus it kept to precedent for a few more years. Questions of what the government was legally allowed to do in the face of national crisis forced the Court to decide between helping the people and sticking to the law.

Perhaps one reason for the Court’s consistency has to do with the tenure of justices outlasting that of the other branches. With the lifetime appointment of justices,

the Court inherently holds a longer extension of former opinions, which the president can use to his or her advantage (Moraski and Shipan 1999). It is possible that the transition into the New Deal Era was so rife with tension because the justices continued to force Lochner Era opinions into the beginning of the New Deal Era. As with Hugo Black and Franklin D. Roosevelt, presidents often appoint justices to extend their reach into another sphere of government (McGovney 1937; Moraski and Shipan 1999). This is the reason why FDR desperately wanted to replace so many of the justices serving on the bench when he took over the presidency. His Court-packing plan presumed that justices remain faithful to the person who appointed them. However, as is evident with Hughes and Roberts (Ho and Quinn 2010), not every justice is unwavering in their political views. They can change over time, especially when society warrants that they do so.

The second response of the Court was to switch sides, and thus recognize the arguments of progressive politicians. Often regarded as the “switch in time that saved nine,” the swing justices’ decision to side with the liberal justices allowed them to defuse opinions towards judicial politics between the 1920s and 1930s (Crowe 2012). Here is where it is key to restate that the Supreme Court’s decisions were controversial. The consistency of the bench stood in stark contrast to public opinion and the other branches of government (Friedman 2009). The Court’s oppositional role in politics created a challenge to its descriptive legitimacy, and one which necessitated a proper response. So long as the public stood against the Court, the Court remained in danger of draining its diffuse support. That response came through the media igniting public debates and the Court deciding to let certain pieces of New Deal legislation pass judicial scrutiny.

There is an important question that lingers amidst this analysis. Did the Supreme Court specifically stray from precedent because of public opinion? Or was there another reason behind this change? Without direct quotes from the two swing justices explicitly stating their intentions, one cannot guarantee their choice was strategic. The literature seems to more imply that yes, the switch was a strategic choice, as the Court saw the public's reaction to its unpopular decisions and knew it had to change (Ho and Quinn 2010; Crowe 2012; Friedman 2009; Badas 2019). However, it is possible that the change in decisions was less strategic and more coincidental. Here it is critical to note how few justices altered their previous stances. A mere two justices dictated the direction of the entire Court away from its former stances, and Roberts is credited with the greater shift of the two (Ho and Quinn 2010). When discussing the Supreme Court, it is, after all, a body composed of a handful of justices. The few impact the many in the legal world.

### *Impact of the Responses*

The impact of the first set of responses is that the Court was able to stick to legal precedent, as it was arguably obligated to through its constitutional role. The Four Horsemen, aided by swing justices Roberts and Hughes (Ho and Quinn 2010), kept the Court in line with old Lochner Era precedent. This fulfilled the typical role of the Court, as the arbiter of existing laws and precedent. Usually maintaining precedent is a strong part of preserving judicial legitimacy, so it is understandable why the justices attempted this method at first (Fowler and Jeon 2008). After the Great Depression, the justices still

thought that it was better to maintain the pro-business attitudes from the past few decades.

However, the first type of response caused a negative impact. It fueled the resentment which was building towards the Court among the public. With progressives gaining control of the legislature and presidency, the Court came across as a remnant of a different era. People voted in progressive candidates, issuing clear demands for change. Justin Crowe states that “the interwar and New Deal judiciary faced an unprecedented level of hostility from citizens, interest groups, and other branches of government” (Crowe 2012). Critical issues were impacting society, issues where the Court was hesitant to budge from existing standards. Desperate times demanded desperate measures, yet it took a while for the Court to catch up with the rest of society. The New Deal Era’s responses demonstrate the gradual lag the Court experiences behind public opinion when change is imminent but the Court stays the same.

When the justices moved to fall in line with public opinion, they challenged the very definition of the Court’s role. Was the Court truly restricted to its constitutional duties, or could it extend its abilities even further? The Supreme Court chose to make the necessary revision of its judicial powers, and it granted itself the ability to counter precedent in favor of social benefit. It was an “evolutionary” approach to legal theory (Olken 2014). As Samuel Olken writes,

“this transformation in part was shaped by the persistent influence of legal classicism, as the Justices grappled with the parameters of local economic regulation during a period that challenged their assumptions about the role of judicial review and the nature of constitutional limitations. Consideration of the interplay between legal classicism and the emergence of New Deal constitutional adaptivity on the Supreme Court underscores the evolutionary

nature of this jurisprudential shift and its essentially internal characteristics” (Olken 2014).

The New Deal Court expanded judicial capacity in shifting away from legal classicism and formalism. The judiciary enhanced its abilities, reinforced its legitimacy, and extended federal power all in choosing to allow FDR’s New Deal legislation to pass the Court’s tests of legality. As the New Deal Court demonstrates, necessity and realism are key factors in making judicial decisions.

If the Court is to adhere to public opinion, if this remains one of the goals and lessons construed by the New Deal Era, as Barry Friedman suggests (Friedman 2009), what does this mean for the body’s institutional legitimacy? The onslaught of attacks the Court faced from the public showcases the potential detriment of descriptive attacks on legitimacy. Because these attacks not only dissented with judicial opinions, but they concerned saving the condition of the United States, they elevated questions over the Court’s normative authority. The standards guiding judicial discretion were not exhaustive enough to cover what the Court needed to do to maintain its structural body (Olken 2014). The Court was forced to ignore some judicial norms in order to save more important ones. Only after catering to the wishes of the public did the Supreme Court find itself able to avoid a normative threat to its composition.

The Supreme Court’s judicial discretion in the face of the New Deal Era’s descriptive and normative challenges serves as a powerful example for judicial authority in the future. It showcases the potential impact of public opinion, and why it is so necessary for the Court to engage with the public to preserve its judicial integrity.

Normative and descriptive legitimacy are more thoroughly linked than one might expect. Public opinion is dangerous, as it may influence other branches to create normative challenges to judicial legitimacy, such as the Court-packing plan. The Court maneuvered through threats to its descriptive legitimacy, which in turn let it preserve its normative legitimacy. This is how the New Deal Transition Period represents the importance of judicial responses in the face of crises.

## Chapter 5: The Legacy of *Brown v. Board* and the Desegregation cases

The Supreme Court's resolute stance in *Brown v. Board* (1954) and its subsequent cases initiated a period of contention between the different branches. This period lasted for approximately a decade, and outlined an alternative perspective on Supreme Court legitimacy. During the earlier transition into the New Deal Era, the Supreme Court opposed those who enacted necessary changes to better the nation. However, in the mid-1950s, it was the Court who pushed the country forward while the rest of the government initially opposed changes. In the *Brown* epoch, members of the Supreme Court brought about change at the cost of specific support. In this chapter, I argue that the actions of *Brown's* doctrine increased diffuse support over time, allowing for the Supreme Court to acquire greater legitimacy.

I acknowledge that other challenges for judicial legitimacy took place between the New Deal transition period and the mid-1950s (*Korematsu v. US* 1944; *Youngstown Sheet & Tube Co. v. Sawyer* 1952). Nonetheless, the oppositional politics of the mid-1950s better captured the sentiment with which the Supreme Court addresses critical matters. When the Court risks public support in the name of what it deems right, it threatens its institutional capacity to render decisions. *Brown v. Board* (1954) and the precedent it created labeled the Supreme Court's authority as the authority of the law. It increased the Court's normative legitimacy until the Court's descriptive legitimacy followed in suit.



Furthermore, this era reasserted the role that unity on the bench can play during times of judicial dissent. There are several key reasons why this period left a vast impact on the legitimacy of the Supreme Court.

### *Historical Factors*

Before *Brown v. Board* (1954), the United States was exiting a post-war mindset. Under Roosevelt's leadership, World War II centralized power in the federal government. The Supreme Court handled cases about wartime powers, and between 1941 and 1946, the Court took on nineteen cases from the wartime office of a single regulatory agency (Comiskey 1994). The Court needed to discern what powers existed in the midst of the war, and what efforts would be necessary to build society after the war finished. When World War II ended, the United States found itself in a new position as a "critical world power" (Crowe 2012). The United States had more responsibilities in the sphere of international law, but it also had more responsibilities on the homefront. The judiciary played a crucial role in the national institution-building of Truman's presidency, and it supervised regulatory efforts which improved society at large (Crowe 2012). As inquiries over social institutions grew, so did concerns over civil rights and liberties. Who would get to benefit from social improvements in a society filled with inequities? The Court soon found itself facing a familiar social issue within its own borders, one which the Court was arguably responsible for over time.

The history of *Brown v. Board* (1954) is not merely a history of desegregation. As the justices acknowledged in their perspective of the case, it is a history affected by “legalized racial inequality[,] . . . slavery[,] and Jim Crow segregation” (Ogletree 2004). The utter denial of both human and civil rights for African Americans is intertwined with United States history. Our government is responsible for a myriad of atrocities based on racial discrimination. All of these racial biases constructed over time developed to become the issue of racial integration facing the Supreme Court in the 1950s. The Supreme Court has played a significant role in the legal construction of discrimination over time (*Prigg v. PA* 1842; *Dred Scott v. Sanford* 1857; *Civil Rights Cases* 1883; *Plessy v. Ferguson* 1896). In fact, the standard for separate but equal was a creation of the Court itself (*Plessy v. Ferguson* 1896). Legal precedent developed by the Supreme Court allowed for segregation to persist well after slavery. In a way, the case of *Brown v. Board* (1954) offered the Court a chance for redemption.

By the mid-1950s, these inequalities were exacerbated throughout many aspects of society. It was clear that *Plessy*’s idea of “separate but equal” was just another excuse to avoid true equity and reparations. Edlie Wong explains that through “upholding the constitutionality of de jure racial segregation, *Plessy* affirmed whiteness as the condition of full citizenship” (Wong 2015, 3). Jim Crow laws exacerbated the effects of *Plessy* for many decades, perpetuating blatant inequalities well after slavery was no longer legal (Klarman 2004). Segregated schools were built on inequalities from slavery, such as teacher preparation and family employment. Less effort was put into training African American teachers, and families relied on children to help with employment as a result of

the low wages from slavery (Fairclough and Tasker 2007). Children suffered from de facto discrimination through Jim Crow laws. Segregated schools served as another excuse to provide children with an unequal education system based on race.

The direction for *Brown v. Board* (1954) became apparent after three cases appeared on the Court's 1950 docket. The trio of cases, otherwise known as the "1950 Trilogy" implied a shift in the Court's opinion towards desegregation (Hutchinson 1980; *Sweatt v. Painter* 1950; *McLaurin v. Oklahoma State Regents* 1950; *Henderson v. United States* 1950). While the Supreme Court began to insinuate a change from "separate but equal" doctrine, other branches became more closed off to desegregating schools. As Herbert Brownell writes, "[d]uring the New Deal years, civil rights legislation had been blocked thirteen times by Senate filibusters" (Brownell 1995). Congressional reluctance continued well into the 1950s. Furthermore, after Truman's presidency subsided, the public elected the Republican Eisenhower for president, who was not an explicit supporter of desegregation like his predecessor Harry Truman (Brownell 1995; Layton 2007). The earlier judicial inclinations from the beginning of the 1950s pushed the Supreme Court towards desegregation, although other branches continued to hold the Supreme Court back.

*Brown* confronted the separate but equal doctrine as it pertained to the school systems. *Brown v. Board* (1954) compiled a few different cases from a variety of states (Rosenberg 2008). This made it stand out as a case with national applicability to segregation in the education system. Students faced discrepancies in their education as a result of separate but supposedly "equal" policies. African American students lacked

access to resources, opportunities, and rights under the segregated education system of the 1950s. “[T]he condition of most rural schools was about the same in 1940 as it had been in 1870” for African American schools, and only a few elite private schools saw any improvements at all (Fairclough and Tasker 2007). The treatment that students faced solely because of race did not disappear under segregation. Rather, it worsened; feeding into further inequalities and perpetuating the effects of slavery. *Brown v. Board* (1954) addressed these matters through a variety of locations and disputes. This case, which took two years for the Supreme Court to decide (Rosenberg 2008), served as the perfect platform to counter the inequalities of public education.

To move from the subject matter of *Brown v. Board* (1954) to the government approaching the case, the political dynamic of the early 1950s was largely against desegregation. The Supreme Court was the first branch of the federal government to follow through with such a strong stance against segregation during the 1950s, whereas the rest of the political body leaned in opposition (Brownell 1995). State governments, however, had a variety of rules. As Rosenberg writes in *The Hollow Hope*, “twenty-seven states either prohibited segregated schools outright or had no laws dealing with the question while twenty-one either required or allowed segregated schools” (Rosenberg 2008, 42). President Eisenhower at the very least thought that the mission of *Brown* would not come to fruition (Brandenburg 2004), at most he dissented with the position *Brown* eventually took towards desegregation (Cho 1998). Opposition came from all sides for the Court.

There was political and institutional resistance to segregation prior to *Brown*, but it did not gain further traction until the Court case took place. President Truman is noted to have fought for greater institutional protections for African Americans, but he did so at least in part to gain descriptive legitimacy across the world during the Cold War (Layton 2007, 244). Sending a message of tolerance reflected well on his authority, yet his actions did not necessarily represent a true interest in desegregation. Furthermore, several nonprofits and activist groups continued to fight for increased civil rights, such as the ACLU and NAACP (Zackin 2008; Tushnet 1999; Meier and Bracey 1993). When nonprofits saw their limited success in the other branches, they eventually turned their work to the judiciary to institute changes (Zackin 2008). The judiciary became the necessary actor for desegregation.

When *Brown v. Board* (1954) was a pending case on the Supreme Court's docket, an unexpected event occurred. Chief Justice Vinson passed away suddenly from a heart attack in 1953, and President Eisenhower was left with the difficult task of finding a new person to lead the Court (Larson 2011). Vinson did foreshadow the Supreme Court's decision in *Brown* through his majority opinion in *Shelley v. Kraemer* (1948), but it is debatable if he would have rendered the same powerful outcome in *Brown* as his successor (Lefberg 1975; Larson 2011). Eisenhower's choice of Earl Warren for Chief Justice was not intended to be what it became. Eisenhower thought that the California Republican who defended Korematsu's decision would make for a predictable Court for the impending *Brown* case (Ogletree 2004). Yet Warren was a much more progressive choice than he appeared, and he desired a clear, inadmissible decision to integrate the

schools in *Brown* (Crowe 2012; Ogletree 2004). Eisenhower came to regret his choice to place Warren at the top of the highest Court of the land, as Warren's decision in *Brown v. Board* (1954) would instigate an unprecedented turn of events (Cho 1998). This is another circumstance where, like the New Deal Era, the switch of a justice altered the judicial landscape of the nation.

The aftermath of the Court's adamant verdict for integration was mass protest. State governments refused to comply with federal guidelines set through the Court and the other branches, and riots broke out throughout schools that first integrated students. *Brown v. Board II* (1955) appeared on the Court's docket when problems arose with the implementation of *Brown's* verdict (Ogletree 2004). Among protests from other localities, Arkansas passed a state constitutional amendment refusing to implement *Brown* (Bhagwat 2008). Arkansas's protests led to the Little Rock case known as *Cooper v. Aaron* (1958), exemplifying the difficulties the Court faced with enforcing judicial decisions. There was even a national push to impeach Earl Warren in the aftermath of *Brown*. Tackett writes, "billboards . . . dotted the South in the 1960s with the common message: Impeach Earl Warren" (Tackett 2006). The Court faced a dangerous landscape for descriptive legitimacy through racist protests across the nation.

The inequality of this country did not disappear as the Civil War ended, nor did it vanish after *Brown v. Board* (1954). The decision in *Brown* clarified that separate but equal was by no means actually equal, but the decision required further enforcement for it to take effect (*Brown v. Board* 1954; Clawson and Waltenburg 2009). As Clawson and Waltenburg write, *Brown's* pages were merely "the seeds for the elimination of

state-created and [state]-sanctioned second-class citizenship for black Americans” (Clawson and Waltenburg 2009, 2). It took a long time for others within society and the government to acknowledge the authority of the case. Furthermore, much of the work *Brown* sought to achieve was dialed back after subsequent rulings, especially through the concept of “all deliberate speed” (Chen 2006). Numerous inequalities are still apparent within our society due to the modifications made on this case over time. The seeds of segregation continue to limit student opportunities to this day.

### *Challenges to Supreme Court Legitimacy*

The most significant challenge facing the Supreme Court was that of deciding the desegregation cases in a way that would force others to listen. Dennis J. Hutchinson writes, “[g]reat cases strain not only the law but also the position and effectiveness of the Supreme Court” (Hutchinson 1980). The power behind *Brown* and its successors drew many questions over the Supreme Court’s authority. As discussed above, the Court suffered from a series of affronts from lower courts, other branches, and society at large, especially in the Southern states. While there was a wide variety of attacks for the Supreme Court to overcome, most of them connected back to the authority of the Court when rendering divisive decisions. Even by inadvertently questioning the decision of *Brown*, governmental officials made an implicit threat to the Court’s legitimacy. In a time of oppositional politics, the judiciary must exercise additional caution in its conduct.

The primary goal of the Warren Court was to make desegregation happen. In order to accomplish their central purpose, the justices had to create a message of unity. Warren understood the importance of creating an outcome that would stick in *Brown v. Board* (1954). A unanimous case would send the message that the Court's interpretation of the law was legally unquestionable, and that the opinion had not drifted from the implicit messages of the 1950s Trilogy (Hutchinson 1980). If not one justice wavered from the opinion of the rest, then opposition could not challenge the majority opinion through the voice of a justice's dissent. It was clear to see that people in the South would fight back against the Supreme Court's ruling in *Brown* (Chen 2006). The best way to avoid additional criticism would be to give them fewer tools to apply from the justices themselves. If the nine highest judges all adamantly agreed that segregation in schools was wrong, then there would be fewer ways to apply judicial opinions to segregation.

Next came the challenge of controlling the public's response. Anger towards the Court flourished among white people in the South. They could not understand the Supreme Court's sudden shift in policy, and outrage toward the judiciary grew. State governments refused to enforce what they saw as a decision which circumvented the law. Additionally, they placed blame on the Supreme Court for daring to render such a decision. A Brennan Center guide by Bert Brandenburg lists several quotes from members of government in the South. These "attacks" include a quote from a Georgian State Attorney General, who said, "[t]he State of Georgia is no longer concerned as to whatever methods of enforcement the Supreme Court employs," as its government would refuse to follow them anyways (Brandenburg 2004). If the Supreme Court's words



constituted the correct interpretation of the law, then what message would circumventing its decisions send? Southern states disputed the authority of the Court itself through disputing the justices' capacity to render decisions like *Brown*. In this regard, the specific attack formed by *Brown* was impossible to articulate without drawing a connection to the Court's larger reservoir of support. Every instance of pushback from society prompted additional urgency from the justices.

As a part of influencing the public, the Supreme Court needed to rely on the other branches of the federal government. This meant the Court had to convince them of the power of the judiciary through diffuse support, which continued to dwindle. As I briefly addressed in Chapter 4, another iteration of the Supreme Court has mentioned before how the judiciary depends on the executive for help with protection and enforcement (*In re Neagle* 1890). Granted, that was a different justice writing on behalf of a different Court, but the idea still stands true. With the topic of desegregation, and the reluctance of many people to allow school integration, the justices required further assistance from Congress and the executive to make their verdict a reality. Southern governmental officials insisted that only an "army" would be able to bend them to the will of the Supreme Court (Brandenburg 2004). Thus, the Court needed assistance from Congress and the president to authorize enforcement and bring changes. Only with further justification from the other branches and public could the Court's decision proceed.

Another aspect of the Court's descriptive legitimacy developed through *Brown*. Depending on who is discussed within the idea of "the public," public opinion started to change in the mid-1950s. Public outrage towards the administration's failing measures to

apply integration to schools drew further criticism for President Eisenhower, which in turn, made him reconsider his stance on integration (Layton 2007). As Azza Layton writes in 2007,

“[t]he Eisenhower administration moved reluctantly in its first term. But in the second term, the 1955 murder of fourteen-year-old Emmett Till, widely publicized discriminatory sentences by southern state courts, the 1955–1956 Montgomery bus boycott, and, most dramatically, southern defiance of federal school desegregation orders all generated negative international publicity” (Layton 2007).

It was not the Supreme Court who eventually moved the executive branch to action. It was perceived criticism towards the actions of the executive which prompted greater enforcement. The United States had an international image to uphold after World War II (Crowe 2012). This, in turn, created a new challenge for the Supreme Court. If the authority of the judiciary alone was not enough to move the executive to change, then how could the judiciary alter its responses to be enough to force compliance? Rosenberg often discusses the helplessness of the Supreme Court during desegregation throughout his chapters on *Brown* in *The Hollow Hope* (Rosenberg 2008). The unique challenge before the Court was how to litigate a series of cases which relied on people respecting the Court’s legitimacy in the first place. The Court needed to find a way to gain traction, and fast.

As the final set of challenges drew closer for the Court, the justices had to handle both the image of success and the image of defeat tied to the desegregation cases. In *Brown v. Board II* (1955), the Supreme Court noted that desegregation should happen “with all deliberate speed” (Ogletree 2004). The justices’ proclamation held the opposite effect — it permitted the South to approach desegregation in a slower manner at the cost

of students' education (Chen 2006). The misstep of this phrase cost the justices further in their next attempts to handle desegregation policies. The Court's own words created a specific attack for the institution's reservoir of diffuse support.

The effect of the Court's vague phrase "all deliberate speed" meant that the Court had to work even harder to make state governments follow through with integration. In *Cooper v. Aaron* (1958) the justices composing the Supreme Court needed to make an especially powerful statement. Their authority was not respected by those who, according to normative judicial standards, had an obligation to adhere to the word of the Court (*Cooper v. Aaron* 1958; Bartley 1969). The challenge posed in *Cooper v. Aaron* (1958) was exactly what I discussed in my intro as one of the most severe threats to Supreme Court legitimacy. Decisions only matter if others let them. The only way the Supreme Court can regain legitimacy after this type of attack is by expecting the other branches to acknowledge the Court as legitimate in the first place. This is why the Court has never completely lost legitimacy despite all of the challenges it has faced. People keep at least a minimal level of trust in the Court's normative justifications.

### *The Court's Responses*

The first response from the Court was an effort to preserve unity. Once Warren became the new leader of the Court, he made a persistent effort to get every justice on board with the *Brown* decision, and he did this by appealing to the justices from the South in particular (Cho 1998, Footnote 1, 73). Any dissent had the potential to delegitimize the

Court's controversial stance on constitutional civil rights. The unanimity of the Court only implied the justices' opinion was the law in *Brown's* decision. Now, whether others adhered to the justices' message of unanimity was another matter. When unanimity in *Brown* was not enough to discourage dissent, the Supreme Court justices took their stance a step further in *Cooper v. Aaron* (1958). *Cooper* asserted that the Court did not merely impart the sentiment behind the law; the words the justices wrote became the law (*Cooper v. Aaron* 1958). The justices' additional steps in *Cooper* protected judicial legitimacy when it was clear unanimity was not enough. Unanimity served as a necessary condition for the desegregation cases rather than a sufficient one.

The Court then delivered an eleven-page opinion meant to extinguish racially-charged discrimination within the education system (Clawson and Waltenburg 2009). The response Warren imparted shocked his audience. Although the verdict on desegregation was fairly expected, the audience could not comprehend the persistent stance every single justice took in *Brown* (Hutchinson 1980; Clawson and Waltenburg 2009; Lefberg 1975). The meaning behind Warren's response reflects an intention to leave a landmark decision. Warren's words in *Brown* served as his attempt to reconcile the racist stances he had taken in the past (Cho 1998). In order to succeed, Warren recognized that the decision of *Brown* required elements which would set it apart. Warren's internal goals set the tone for the landmark Supreme Court case, and his response fueled that of the other justices.

Just as the fight continued for desegregation after *Brown*, so did the Warren Court's replies to specific attacks. Political leaders and members of the public alike

attacked the Court's desegregation decisions relentlessly, arguing that it would take "an army" to force them to comply with Supreme Court jurisprudence, which they also knew the Court could not command (Brandenburg 2004). The crisis for the justices was clearly one based in legitimacy – was the authority of the Court's words enough to compel those around them? The process of discrediting the Court's desegregation stance often came through discrediting the Court itself. The Supreme Court's resolution to declare such a controversial opinion posed a risk to the Warren Court. Yet the Chief Justice bore the burden of that risk for the sake of reconciling a substantial inequality in society (Cho 1998).

By the time *Cooper v. Aaron* (1958) took place, it was clear that the Supreme Court's initial responses were not sufficient. The Court needed more. It was time for an unprecedented means to occur, one which could finally authorize changes. What eventually happened, and pushed the other branches to act, was the emphasized unity of *Cooper v. Aaron* (1958). In this case, each of the justices signed their name on the technically unanimous opinion, as though this would reiterate the underlying message of unity throughout the desegregation cases (Bhagwat 2008). Frankfurter, then, penned a concurrence calling out Southern judicial officials who had ignored the voice of the highest legal decision-making body (*Cooper v. Aaron* 1958). The divided yet united message of the Supreme Court demonstrated the justices' reply to the increasing threat to their authority and legitimacy. Their frustration and legitimacy-based fears came forth in their actions. The Court had to get bolder over time to impart its legitimacy before it began to see greater success.

### *Impact of the Responses*

*Brown v. Board* (1954) is by no means a perfect case for instigating change. Our society is still suffering as a result of resistance to the landmark civil rights case. Regardless, the impact the case left over time created an increase in diffuse support for the Supreme Court. As Clawson and Waltenburg explain, while referencing Gibson and Caldeira's 1992 paper, *Brown* and the subsequent 1950s and 60s cases brought forth "a reservoir of good will toward the Court among African Americans, a reservoir that appears deep enough to endure the high court's much more tepid support for black political and legal interests since the 1970s" (Clawson and Waltenburg 2009; Gibson and Caldeira 1992). The Court used its reservoir of support to influence public opinion. In turn, Warren's judicial advocacy fed into more support for the institution at large.

The idea of *Brown v. Board* (1954) itself, a case that made history for education and civil rights (Brandenburg 2004), feeds into cultural myths surrounding the judicial branch. The judicial branch became a symbol for progress at the cost of society's false belief that progress has been fully realized. As Nikhil Pal Singh writes in the book *Black is a Country*, "civic myths about the triumph over racial injustice have become central" to the United States's narrative of "exceptionalism" and "nationalism" (Singh 2004, 17). *Brown v. Board* (1954) and other desegregation cases are one of the "myths" Singh describes. Cultural imagery of a judiciary that does something, one which achieves progress, allows the Supreme Court to maintain legitimacy over time. Specific attacks on

judicial legitimacy are not enough to outweigh diffuse support if the Court comes across as powerful through landmark cases like *Brown*.

What contributed to the Supreme Court's ability to seem powerful was the unity Warren worked so hard to achieve. Each unanimous decision in desegregation case law, from *Brown v. Board's* (1954) unanimous declaration to *Cooper v. Aaron's* (1958) unanimous concurring majority, sent a resolute message about the Supreme Court's refusal to back down on integration cases. Unanimity alone, though, was not enough by itself to assert the authority of the Court. It was the rule rather than the exception in these desegregation cases. It became expected (Hutchinson 1980). The Supreme Court had to take their responses a step further. The individual justices came together as an institution made of separate voices. The bold decision of *Cooper v. Aaron* (1958) demonstrated that the Court has other responses it may apply as a last resort when its typical stances lack success.

Another impact of the Supreme Court's stance appeared through descriptive legitimacy, which occurred in changing social constructions of the public. Before this decision, only people who were white counted as members of the public, due to the discriminatory nature of society and legal institutions (Wong 2015). After this decision, the social definition of "the public" opened to accept more people regardless of race. In constructions of descriptive legitimacy, or legitimacy based on public opinion, it is important to note who is included within society's image of "the public" during a given time. Not everyone has always been included within this classification due to social

discrimination (Wong 2015). *Brown v. Board* (1954) was a critical step in expanding rights for people as a part of the public.

For descriptive legitimacy in the midst of *Brown*, one must remember the position the justices took opposite to the public. Supreme Court justices act in the sphere of elites and higher academia. Michael Klarman states, “[t]hough justices live in a particular historical and cultural moment, they are not perfect mirrors of public opinion. Judges occupy an elite subculture” (Klarman 2004). The elitism of justices must be recognized further in discussions of descriptive legitimacy and *Brown v. Board* (1954). The public was only beginning to shift against segregation by the mid-1900s, but the elites had often been distancing themselves from segregation since the Post-War period (Bartley 1969). The Supreme Court, as a body composed of legal, academic elites, frequently acted with the interests of the elite in mind, rather than the explicit interests of the public (Baum and Devins 2010; Klarman 2004; Bartley 1969). Thus, considering the shift in descriptive legitimacy was preceded by a shift in academia, the Court was likely less preoccupied with the public’s resistance on this matter, and more concerned about the scholarly and international reputation of segregation when *Brown* was decided.

In conclusion, the specific attacks facing the Supreme Court reflected centuries of bitterness and discriminatory ideology. Despite the mythos surrounding the *Brown v. Board* (1954) line of cases, racial biases did not disappear after the conclusion of *Brown*. It took decades to bring forth comprehensive changes, and additional decades to muddle progress further. The mythos behind *Brown* refilled the Court’s reservoir of support as time passed and the public adjusted their opinion of desegregation. Despite the eventual



increase of support for the Court over time, it took persistent responses from the Supreme Court justices to change public opinion. This era serves as a case where legitimacy drained at first, then came back through the assistance of time and public memory.

## Chapter 6: Polarization in the Modern Court

People often believe that the polarization we see now has reached high, if not unprecedented, levels in government (Newport 2019; Drutman 2016). However, our current levels of partisanship are not dissimilar to the partisanship surrounding other contentious periods. The one major difference is the Court's method for tackling partisan bias. Between the late 1980s and 2010s, the Rehnquist and Roberts Courts have faced similar challenges and developed a few strategies for combating them. This period is what I call the Modern Court Era. The challenges are largely descriptive ones, and the Supreme Court is hyper-aware of its legitimacy as a result. While there are many similarities between the Modern Court Era and other contentious periods, one significant difference is Trump's presidency. Trump poses a unique risk to the Supreme Court because of the political climate surrounding him. The specific challenges we see in the Modern Court Era develop different responses for familiar problems.

Multiple issues between the 1960s and the beginning of the Modern Court brought forth particular challenges to the Supreme Court (*Roe v. Wade* 1973; *Milliken v. Bradley* 1974; *US v. Nixon* 1974; *INS v. Chadha* 1983). The Supreme Court faced questions of implicit rights and unexplained powers throughout the decades separating *Cooper v. Aaron* (1958) and *Planned Parenthood v. Casey* (1992). These cases included *Casey's* predecessor *Roe v. Wade* (1973), and *Cooper's* descendant *Milliken v. Bradley* (1974). However, as I will argue later in this section, the legitimacy-based challenges from the period before the Modern Court Era did not significantly threaten judicial

legitimacy until our current political climate. Those earlier challenges were not perceived as particularly strong attacks when they occurred. Rather, they increased in magnitude as time carried on.

### *Historical Factors*

By the 1990s, over two hundred years of precedent existed for constitutional case law. New issues continued to appear, but many doctrinal lines had strong historical decisions which came before them. Case decisions wavered between oppositional mindsets over time, and justices had more leeway when referencing past cases. The Court can respond to precedent with positive reinforcement or negative limitations, but judicial decisions frequently rely on elaborating on precedent in some manner (Hansford and Spriggs II 2006). Over two centuries of legal precedent left different iterations of the Supreme Court with many positions they could apply to recent majority and dissenting opinions. This allowed for greater freedom over which case law to apply to certain circumstances, and in which forms.

Although much of the law could still rely heavily on precedent, one new area of the law arose from recent technologies. The creation of the public internet, or “World Wide Web,” in 1989 completely changed the way the judiciary had to view free speech issues (*CERN* Editors 2020; Rappaport 1997). Later in the 1990s, the internet’s influence expanded past colleges and universities to infiltrate the public sphere (Farrell 2012). As with the introduction of radio, television, and film, the introduction of computers into

everyday life cultivated both “one-sided and contrasting discourses” (Kellner 1999).

Scholars, politicians, corporations, and the public noticed how the internet permeated into political discourse. People could access political information from anywhere — news and speech became uncontainable by the government.

With easier access to governmental information, public opinion seeped into conversations over political theory and legitimacy. Internet access amplified the threat posed by descriptive legitimacy. Gibson and Nelson note that Chief Justice Roberts is “keenly aware” of the role of the Court, especially as it pertains to “public” perception (Gibson and Nelson 2014). This occurs in part because people could access information with greater ease in recent times (Gibson and Caldeira 2009, 1). Tolbert and McNeal write that technological advancements through the internet delivered the content of political news at the speed of telecommunication devices like phones (Tolbert and McNeal 2003). The internet revolutionized the way people could view politics.

For the Supreme Court, the accessibility that the internet offers poses a greater risk. Social media took regular news sources and transformed them into a collaborative, speed-driven force where news sites can interact with and shape their consumer bases (Lee 2015). This meant that the Supreme Court encountered further threats from the type of news reporting on it. As Sill, Metzgar, and Rouse write on the modern threat the Court faces from the media,

“the importance of media coverage is magnified for the United States Supreme Court because, lacking the public affairs mechanisms of the other two branches, the Court is dependent on media dissemination of information about its decisions” (Sill, Metzgar, and Rouse 2013).

As the internet contributed to media accessibility, people could self-select the news they wanted to read with greater ease (Lee 2015). Therefore, they could more easily construct a personalized view of the government based on what they wanted to hear, subject to individual biases.

Polarization also increased between 1990 and 2020, and it especially escalated during the 2016 election. Information technology fueled political propaganda for the left and right alike. Roger Ailes used television to polarize the American electorate through his 1996 creation, Fox News (Sherman 2014; Ortiz 2017). He criticized the elitism of leftist media while demonizing outsiders with “us-or-against-us” rhetoric (Sherman 2014). Social media enhanced opportunities to sharpen ideological divides between the right and the left by letting people create their own echo chambers (Garimella et al. 2018). For the Supreme Court, partisanship became particularly noticeable after Elena Kagan replaced John Paul Stevens on the bench in 2010, thus realigning the Supreme Court by party (Hasen 2013; Baum and Devins 2017). This realignment, otherwise known as “partisan sorting,” occurred not just within the Supreme Court, but within other sectors of society (Baum and Devins 2017; Young 2017). Polarization, coupled with party sorting and echo chambers, made it challenging for the Supreme Court to maintain its impartial stance that built legitimacy over time.

Just as polarization increased over the last few decades, so did dislike of certain Supreme Court cases. As mentioned at the beginning of this chapter, *Roe v. Wade* (1973) was not as much of an oppositional case at its time, but it became a political talking point through its subsequent cases in the Rehnquist and Roberts Courts. Preacher Jerry Falwell

wondered why so few voices were against *Roe* in the early 1970s, as “[b]oth before and for several years after *Roe*, evangelicals were overwhelmingly indifferent to the subject” (Balmer 2014). Only later did rage build towards the case. Scholars point to different moments for when people galvanized right-wing Evangelicals through *Roe*. Professor Randall Balmer claims the moment was before the Modern Court in 1979, as an attempt to thwart Carter’s reelection (Balmer 2014). Professor Neal Devins argues the moment arose in the late 1880s, when Ronald Reagan nominated the “*Roe* critic” Robert Bork for the Supreme Court (Devins 2009). Either way, *Roe* itself was much less polarizing when the Court decided it than it is now. Right-wing media and politicians transformed this case into a political matter, then left-wing media followed suit.

By the time 2016 primary candidates started declaring their intent to run, the nation took a sharp ideological shift to the right. All across the globe, countries experienced an uptick in right-wing populism brought on by ethno-nationalist policies and a growing dislike of the elite (Pierson 2017). As with many European nations, the United States was not immune to this brand of populism. Immigration and disorder are two common scapegoats in right-wing populist rhetoric, regardless of whether or not rhetoric matches reality (Millman 2018). Donald Trump, who ran on the campaign slogan “Make America Great Again,” channeled this nationalist dynamic to win the 2016 election (Nguyen 2019). Trump made references to immigration and crime which fueled his base, but were inaccurate (Millman 2018). He used right-wing populist rage to gain support in the 2016 election.

Donald Trump's victory shocked the world. For the left, it was a symbol that society had not moved past discrimination embedded deep within the history of the United States. America has long suffered from its persistent ties to discrimination, and the slogan "Make America Great Again" stirs bad memories of the nation's history (Nguyen 2019). For the right, it proved that rural-based populism could overcome the elitism of liberal politics. Donald Trump promised to weed out the "swamp" of politics, and his base believed he would succeed (Rowland 2019). Populist imagery behind Donald Trump fueled heightened polarization already in place, and served as a warning to the judiciary.

In the first few years of his presidency, Donald Trump exercised a type of rule similar to other presidents in contentious times, such as Jackson and Roosevelt. These presidents are called a variety of terms for their bold executive stances, from "oppositional" to "authoritarian" (Whittington 2007; Babones 2018). The promises Trump made and the actions he attempted go beyond the scope of executive powers. Trump has promised to build a wall on the Mexican border, ban people from entering the country based on their religion, lock up Hillary Clinton, and give opioid drug dealers the death penalty (*BBC News* Editors 2018; Keneally and Liddy 2017; Diamond 2018). Each of these promises falls outside the scope of presidential powers. Trump questions the other branches when they disagree with him, and personally attacks members of the judiciary and legislature (Brettschneider 2016). The threats he makes on the other branches draw parallels to the harsh criticism of Jackson or Roosevelt.

The Court is still widely regarded as an impartial or apolitical branch, but even the judiciary could not withstand descriptive challenges made towards the other branches between the 1980s and 2010s. The media is quick to attack members of the executive and legislative branches, who often dominate political news (Oswald 2009; Baird and Gangl 2006). For the most part, the press pays less attention to the Supreme Court. CSPAN provides constant monitoring of Congress, and presidential elections receive vast media coverage (Oswald 2009). Perhaps one explanation behind less frequent coverage of the Supreme Court is that members of the Court are nominated by the executive, rather than the public (Gibson and Caldeira 2009). However, as Baird and Gangl explain, it is a “misperception” to believe “that Court procedures are relatively immune to the politics of bargaining and compromise” that appear in media portrayals of the other branches (Baird and Gangl 2006). Judicial challenges have the potential to worsen through media attention.

### *Challenges to Supreme Court Legitimacy*

Since the 1980s, the Supreme Court has faced a myriad of different challenges. Some of the most pertinent threats are ones which repeat several times during this epoch. A pattern appears in the types of challenges facing the Modern Court under the leadership of Rehnquist and Roberts. These legitimacy threats center around the Court’s impartiality in a polarized and recorded polity (Gibson 2007). Through analyzing the most common threats facing the Court in the Modern Court Era, a clearer picture arises about legitimacy



over time, especially as society changes. Descriptive legitimacy challenges are a larger issue than normative ones for the Modern Court.

The challenges in the 1990s started with a few specific doctrinal issues. Commerce clause, abortion rights, and free speech issues acquired greater attention from Supreme Court. Cases such as *Planned Parenthood v. Casey* (1992), *RAV v. St. Paul* (1992), *US v. Lopez* (1995), and *Reno v. ACLU* (1997) went into new challenges on familiar issues. The Supreme Court began to notice and change a series of doctrinal lines in the mid-1990s. For example, *Lopez* saw changes to previous Commerce Clause doctrine, but it still left past precedent open for future use (*US v. Lopez* 1995). What made the Modern Court pay further attention to these doctrinal issues? As Neal Devins explains through an analysis of *Roe* and *Casey*, partisan actions in the other branches contributed to the issues facing the Supreme Court at the beginning of the Modern Court (Devins 2009). The other branches used the judiciary to boost support for themselves at the cost of specific support for the third branch.

Another set of challenges appeared towards the justices themselves. Robert Bork's hearing served as a precursor to future partisan nomination challenges (Kelly and Cummings 2018). Considering Bork's harsh stance on *Roe v. Wade* (1973), people had a difficult time believing his ability to be impartial (Devins 2009; Kelly and Cummings 2018). Some argue that Bork's defeat was an indication of the public's impact over Supreme Court nominations (Gibson and Caldeira 2009). After the Bork hearings, this issue repeated for other nominations. Anita Hill testified that Clarence Thomas sexually harassed her when he was her supervisor (Kelly and Cummings 2018). People doubted

Hill's testimony, and Thomas was confirmed (Kelly and Cummings 2018; Gibson and Caldeira 2009). Ruth Bader Ginsburg's ability to remain impartial was also questioned, although she was also confirmed (Simon 2018). Then there is Brett Kavanaugh, who, like Clarence Thomas, was accused of sexual assault and barely confirmed in his confirmation hearing (Tatum 2018). Partisanship makes challenges to Supreme Court justices more frequent in current times.

Within the challenges towards the Supreme Court and the justices loomed the increasing threat of technological advances. As a branch of government so heavily based in temporal laws, The Court undertakes a devastating threat from unprecedented technology. Innovation challenges the very foundation of the Court by merely existing outside the scope of social expectations. With recent innovations improving information access, the public gains a greater say in political matters. As Gibson and Caldeira explain, referring to Supreme Court nominations,

“[t]he role of ordinary people has increased in part owing to the far greater availability of information about nominees and the confirmation process. In recent times, cable television has provided extensive coverage of the Senate hearings, and the public's pulse is often taken by media polls during the confirmation period. Evidence from many sources indicates that Americans are remarkably attentive to and even informed about the actors and issues involved when a president puts forth a nominee to the nation's highest court” (Gibson and Caldeira 2009).

Gibson and Caldeira note above the multifaceted nature of descriptive legitimacy challenges through media. Although the challenges appear to affect the president and Senate more explicitly, they also question the validity of the Court as a consequence. As technology expands to deliver information to the public, so does the public's capacity to influence politics in multiple branches. While the initial threat from modern information

technology was clear, the role it would play in free speech rights, the secondary threat, was less obvious. With advancements in information technology came a greater public capacity to affect politics. People could comment on the Court globally, share their opinions on news sources, blog about Supreme Court decisions, and express commentary more readily (Lee 2009). Innovations in this regard created a context for the attacks facing the Supreme Court, and eventually became a challenge for the Court to overcome.

As the 2000s began, the Court faced additional challenges toward state rights and federal authority. Federal authority continued to expand, except in a few cases where political opinion argued otherwise (*US v. Lopez* 1995; *Gonzales v. Raich* 2005). State rights still remain, but the federal government holds more centralized authority than it did in the past. A new challenge to state and federal authority comes from the coronavirus, and questions of power that arise from it. Under precedent for state police powers, quarantine remains an issue for state governments, although the federal government can claim further powers in national emergencies (Millhiser 2020). The projected economic downturn from COVID-19 could draw judicial parallels to the New Deal Transition Period and the Great Depression, when the judiciary faced several challenges over executive authority and rebuilding society (Orlik et al. 2020; Crowe 2012). Regardless of the eventual coronavirus outcome, it is clear that federal and state issues remain a concern for the Modern Court Era.

With increased polarization between the other branches, the Modern Court was left to mitigate tension-ridden disputes between Democrats and Republicans. To imagine the judiciary as an impartial branch, people often think of legal cases as external, or

separate from the politics that otherwise appear in government (Baird and Gangl 2006). Through cases such as partisan gerrymandering, gay rights, abortion, and the results of the election itself, the Court must grapple with inevitably political outcomes which need attention from the judiciary (*Rucho v. Common Cause* 2019; *Obergefell v. Hodges* 2015; *Whole Woman's Health v. Hellerstedt* 2016; *Bush v. Gore* 2000). The Court can apply the “political question” doctrine to cases it considers too controversial to decide, but the guidelines for this doctrine lack clear explanation (Cole 2014). The Court is the decision-making body for other branches on partisan issues, whether it wants to be or not.

Last, but certainly not least, the Modern Court faces a threat from an authoritarian executive. The Supreme Court has encountered a few other controlling presidents in the past. Andrew Jackson and Franklin Roosevelt represent different sides to a similar executive position. Both are powerful executive figures. Nonetheless, the exact threat posed through Donald Trump goes further than previous executives have before. Trump's command of right-wing populism, fueled by his attacks on social media, pose a severe threat to the judiciary. He has targeted members of the judiciary before, and argued against decisions which impede his authority (Brettschneider 2016; *Trump v. Hawaii* 2018). With the President's ability to control partisan opinions of government, the Supreme Court continues to face significant threats when the justices dispute his authority.

## *The Court's Responses*

There are four significant responses the Rehnquist and Roberts Courts have employed against specific legitimacy attacks. While some methods appeared in both iterations of the Supreme Court, others are specific to one Chief Justice's leadership style. As a part of increasing public awareness of the Court's role in politics, a few specific justices within the Court took on a distinct role in decisions. Each of those roles constitutes one of the four types of responses. The justices and their strategies shaped the actions defining the Modern Court Era. Their four methods provide a comprehensive outlook into the Chief Justices, the Associate Justices, and the increasing awareness of judicial descriptive legitimacy between both groups.

The first response is one which appeared often in the Rehnquist Court. The Rehnquist Court prioritized certain cases over others on the docket, shaping political discourse in the process (Tushnet 2005, 10). The Court, through its use of larger, diffuse support, can draw greater attention to some legal matters rather than others. This is a process that Clawson, Kegler, and Waltenburg term the Supreme Court's "legitimacy-conferring authority" (Clawson, Kegler, and Waltenburg 2001). The Court's legitimacy-conferring authority allows the Court to control the public's views on politics, thereby manipulating the public's perspective of Supreme Court legitimacy. For example, in the end of the Rehnquist Court, the justices pushed gay rights issues higher up on public agenda, while pushing down affirmative action decisions after *Gratz* and *Grutter* (Tushnet 2005, 10). The Roberts Court, then, could reshape the public agenda in a different way afterwards. By adjusting the public's perspective on political matters, the

Court is able to divert attention away from itself and minimize threats posed through descriptive legitimacy challenges.

Agenda-setting is by no means a new method for dealing with legal cases (Clawson, Kegler, and Waltenburg 2001; Tushnet 2005), but the temporal context of the Rehnquist Court altered this type of approach. With technology's increased presence in people's daily lives, the Court had further opportunities to disseminate judicial viewpoints to the public (Farganis 2012, 209). Agenda-setting expanded with social innovations. Whether the Court directly responds to challenges while thinking of the impact of technology, though, is another matter. It is not clear if the Court intentionally applies technology's effects to its words. Some sources imply the opposite, that the Court avoids using technology as much as it can, and still perceives public opinion through its typical institutional lens (Thomson-DeVeaux 2018). It is more likely that the Court implicitly benefits from technological innovations than that it intentionally utilizes them. The Court uses the justices' responses to shape descriptive legitimacy, thereby minimizing the threat public opinion poses.

The most important response from the Court is the second one, which furthers the importance of the first response. The Modern Court is a restrained branch of government. The key justices of this era hold themselves back when responding to legitimacy-threatening challenges. Their reactions are particularly noteworthy when compared to other eras, with justices that were both activist and united. (*Schechter Poultry Co. v. US* 1935; *Brown v. Board* 1954; Cho 1998). The Court acts with increased caution now due to heightened polarization and media's speed with disseminating news.

As Casillas, Enns, and Wohlfarth argue, “repeatedly issuing judgments that deviate from the public’s preferences risks attracting negative attention from the news media, the public, and other branches of government” (Casillas, Enns, and Wohlfarth 2011). This is why the Court cannot afford to make decisions that could incite the public. The spin given by reporters in a world with heightened accessibility to news makes public opinion a real and devastating threat.

Chief Justice Roberts most often applies the restraint characterizing the Modern Court Era. Warren and the Four Horsemen used judicial activism to reclaim legitimacy (Wright 1968), whereas Roberts exercises judicial restraint in his opinions. As Robert Barnes elaborates, “Roberts made clear what he *does* consider his job to be . . . a fierce defender of the judiciary’s independence and a firm believer in judicial restraint” (Barnes 2016). He is careful to toe the line on certain political matters which pose a severe threat to the Supreme Court as an institution. It is difficult to say whether Marshall and Taney were more activist judges or restrained judges — they both developed a leadership style of deferring to the opposite side to claim victory in the end — but Roberts is much clearer about his position on the Supreme Court’s legitimacy and his concerns to minimize public attacks to the Supreme Court. He is a cautious chief.

Perhaps Roberts’s perspective on the Chief Justice position explains the restraint he applies to certain cases. Roberts abhors partisanship, and admires the legacy Marshall left as an impartial yet decisive chief (Biskupic 2019). His position is, as Casillas, Enns, and Wohlfarth argue, a part of the institutional responsibility he bears in his role as a justice. The authors state that “individual justices have an institutional incentive to think

about the context in which they make decisions, and this context includes public opinion” (Casillas, Enns, and Wohlfarth 2011). For John Roberts, the institutional role he takes is not only that of a justice; he is the Chief Justice, the first among equals (Biskupic 2019; Schmidt and Yalof 2004). Richard Hasen elaborates on why Roberts’s institutional role guides his thoughts on legitimacy, due to recent partisan disputes over gerrymandering and the census citizenship question (Hasen 2019; Shapiro 2019). Hasen stated in 2019, “there’s going to be real pressure for the institutionalist John Roberts to be dominant,” the version of the Chief Justice “who is desperate to show that there remains a distinction between law and politics” (Hasen 2019). When partisan disputes arise, Roberts feels a responsibility to be more cautious of how the Court appears in the public eye.

While restraint most often appears in Chief Roberts’s actions, it also appears in the actions of a few other key justices. Before Roberts became the median political vote, Associate Justice Anthony Kennedy acted as the “key” or swing vote on the bench (Biskupic 2019). There is significant dispute within legal scholarship over whether Kennedy truly was a “swing” vote in his time on the Supreme Court (Schmidt and Yalof 2004; Parshall 2007; Enns and Wohlfarth 2013). Yet, during his tenure on the bench, he is most often credited as the deciding vote between the liberals and conservatives. Sandra Day O’Connor was thought of as a deciding vote before Kennedy, and she also contributed significantly to the direction of the Modern Court (Parshall 2007). Having at least one justice who exercises restraint and varies opinion makes the Supreme Court seem more impartial as an institution.



The third significant response of the Modern Court is the Roberts Court's 5-4 response to polarized cases. Granted, there is still a preponderance of unanimous cases in many matters (Turberville and Marcum 2018). However, the Roberts Court has an increasing tendency to decide close, polarized cases with a 5-4 vote, largely split down party lines (Biskupic 2019). Now, this choice is often unintentional for most of the justices, but the justice casting the deciding vote grapples with the impact on legitimacy in his or her decision. Some of the biggest examples of this occurring include *NFIB v. Sebelius* (2012), *Citizens United v. FEC* (2010), *Obergefell v. Hodges* (2015), *Herrera v. Wyoming* (2018), and *Rucho v. Common Cause* (2019). It is also common for one of the conservative justices to “switch” and deliver a victory for the liberals in these cases (Thomson-DeVeaux 2019). Each of these cases covered a critical issue that divided the public, from health care, to partisan gerrymandering, to gay marriage. There is a common trend in the Modern Court to render close decisions on such matters. The next couple of paragraphs explain why this occurs.

As the previous chapter details, unanimity sends a strong message to those who would dissent with the opinion of the Supreme Court. Arguably, the opinion of a unanimous Court carries with it the full force of the law, more so than divided decisions (Hutchinson 1980; Greenhouse 2020). If the Court instead hands down a 5-4 decision, various parties would have greater justification in ignoring the ruling. Close decisions provide a greater possibility to see reversal in the future. After all, the justices of the highest Court themselves were split on the matter, and even the winning side could not sway the other four justices (Schwartz 2018). Because of existing polarization in the

modern polity, the Court is wise to leave politically charged cases as close decisions, thus sending the message that the law could be switched back in the future. These decisions appease factions as a result.

The Roberts Court's frequent application of 5-4 decisions demonstrates some of the justices' already explicit awareness of judicial legitimacy. Roberts has already hinted to his attention to legitimacy both in his concerns over the "status and integrity" of the judiciary, and in the tone he read Elizabeth Warren's question of legitimacy during Trump's impeachment procedures (Fuentes-Rohwer 2018; Creitz 2020). Other justices serving on the Supreme Court, both liberals and conservatives alike, have discussed the concerns they have about public perception of the Supreme Court, such as Kagan, as appears in the Introduction (Page 2018). These justices show in their actions that they are at least partially aware of the role legitimacy plays in the judiciary.

Contentious matters are already likely to increase coverage of a Supreme Court case, thereby drawing public attention to the Court. Yet these close decisions also draw greater publicity, making the public believe the Court is more impartial than it actually is. Sill, Metzgar, and Rouse write, "as the number of dissenting justices increases, it serves as a greater signal of both newsworthiness and legal significance" and "a four judge dissent increases the probability of *NYT* coverage by 3.3%" (Sill, Metzgar, and Rouse 2013). The public, then, is more likely to see the Court as a branch that renders close decisions, thus as a branch that gives more validity to both sides of an issue. The justices, who already state their awareness of legitimacy in other contexts, might let legitimacy influence their decisions over close matters. If this does occur, it likely only happens for a

few key justices, such as Roberts, O'Connor, Kennedy, and Gorsuch. However, it is impossible to prove this inference without the justices explicitly stating that their awareness of legitimacy influences the decisions they render. This is a limitation of research conducted in this area.

The final type of response from the Modern Court is their reference to multiple sides in the same line of doctrine. The fourth method, paired with the Court's application of 5-4 decisions for contentious cases, gives people the message that outcomes they disagree with are likely to change in the future. The possibility of dissent and reversal appeases factions in a polarized climate (Moran 2019). People see motivation in dissenting justices who represent their opinions. Part of the reason why the Court might waver in lines of doctrine has to do with availability. The Court has seen a variety of decisions in the centuries that it has covered doctrinal cases (Hansford and Spriggs II 2006). For many cases, this means the Court has precedent to turn to if it wishes to reverse its current position. The Court's recent trend of leaving cases open for future possibilities gives factions hope in a time of polarization and dissonance.

### *Impact of the Responses*

The quiet, legitimacy-driven aspect to the Court's responses signifies the justices' deference to descriptive legitimacy. The Court sees the public as a looming threat to its authority, and perhaps even its existence (Gibson and Nelson 2014). This is the reason why some of the key justices hesitate to follow through with confrontations towards the

other branches. The Court wishes to be viewed positively in the public eye, thus it exercises more restraint and gives voice to dissenting factions. Although this may well occur unintentionally, there are clear ramifications for the Court's legitimacy as a result of the justices' actions.

The Modern Court's 5-4 decisions imply that impartiality is connected to legitimacy. Or, at the very least, the justices view the guise of impartiality as essential for their legitimacy (Loewenstern 2003). This stands in stark contrast to some of the previous eras, where the Supreme Court took resolute stances on one side of the aisle or the other to acquire further legitimacy. As mentioned above, I think that this is due to the ever-present role media plays in people's everyday lives, and the internet's effect on polarization. In the Early National Period and the Civil War Era, unanimity was still valued, but the Court released layered decisions. The New Deal Era and Desegregation Period saw strength in unanimity, where the justices fought as one for distinct outcomes. The Modern Court Era is different because the Court's key strategy is to fuel dissent. 5-4 decisions let polarized factions see each case as a potential victory (Schwartz 2018). Thus, in an era surrounded by descriptive legitimacy threats, the Supreme Court is able to rely on its diffuse support to get past specific challenges.

Conservative justices play an interesting role in the Modern Court's 5-4 responses. The 5-4 switch most often occurs with a conservative justice switching to the liberal side. Various scholars see that conservative justices are more likely than liberal justices to "miss" the intentions of the president appointing them (Bartels 2016). While liberal justices are more likely to align with the intentions of liberal presidents,

conservative justices are more likely to swing in opinion. Amelia Thomson-DeVeaux even writes that the current Supreme Court has not one, but three justices who qualify as “swing” justices based on their voting records (Thomson-DeVeaux 2019). Swing justices come from the conservative side as a result of continued majorities on the Supreme Court (Biskupic 2019). Swing conservative justices allow for the Supreme Court to preserve its legitimacy through implied impartiality.

By leaving doctrinal lines open, Supreme Court justices may refer to various cases as they see fit. Recent decisions do not dismiss the chance of reversal. They open the door to future cases instead (*Planned Parenthood v. Casey* 1992; *Wickard v. Filburn* 1942; *US v. Lopez* 1995; *Gundy v. US* 2019). When a line of doctrine reverses without being fully overturned, it provides the Court a chance to expand on precedent, and choose that which most applies to a given circumstance. Precedent continues to build and adjust to society’s needs over time (Hansford and Spriggs II 2006). One might argue that the Supreme Court looks weaker upon changing its mind or altering doctrinal lines. However, it looks stronger by appeasing factions in a time of heightened partisanship. If anything, the possibility of reversal helps maintain diffuse support for the Supreme Court.

Donald Trump’s command over right-wing media, and his attacks on the judiciary, reflect a particularly severe challenge for the Court. As an oppositional leader, he poses a threat to the Court and people’s perception of it. His actions are similar to those of other oppositional presidents (Babones 2018), yet he also represents a unique risk for the Supreme Court. His direct challenges towards the rule of law, mixed with his ability to command media attention, endanger the judiciary as an institution. He does not

back down from direct challenges to individual justices, and represents a considerable populist faction of the American public (Brettschneider 2016; Millman 2018). His unpredictability continues to cause concern for the justices, which does not go unnoticed by others in government (Creitz 2020). The Modern Court is already cautious, yet the justices have more reason to guard their actions amidst the current executive.

Public opinion, assisted through social media and other recent advancements, has become the most significant threat to judicial legitimacy over time. It links into all the other challenges listed above, and will likely remain a heightened threat for many years to come. Normative legitimacy challenges encompassed issues for the past, now descriptive legitimacy challenges do so for the present. The justices continue to use caution because they are afraid of how the public will perceive their actions. Technology advancements, polarization, and public opinion make for a fearsome trifecta for descriptive judicial legitimacy.

# Conclusion

A historical perspective on recent legitimacy challenges demonstrates how the Supreme Court’s responses have developed over time. Similar challenges exist in different temporal contexts. From handling authoritarian executives to mitigating conflict between branches of government, the Court survived many of the same challenges in its existence. It seems strange that a body so dependent on legitimacy and intangible constructs can persist past real, perceptible threats. Yet it does, often because the Court responds carefully to each challenge based on temporal factors. The following section will dive further into the conclusions from the previous chapters, connecting them further and explaining links between eras.

**Table 2:** Contextual Factors by Period

\* No X does not mean this factor was not present, but it did not significantly impact legitimacy

\*\* A gray X connotes that a legitimacy-based argument could be made, but comparatively less so

	Early National Period	Civil War Era	New Deal Transition Period	Desegregation Period	Modern Court
Authoritarian Executive		X	X		X
Justice Attacks	X	X	X	X	X
Factions	X	X	X	X	X
Polarization	X	X			X
Technological Advancements			X		X
Oppositional Court	X	X	X	X	X
Less Precedent	X	X			
Race and Civil Rights Issues		X		X	X
Federal vs. State Powers	X	X		X	X

First, I must readdress the specifics of each time period, and why they pertain to the larger discussion at hand. To assist with this analysis, above is Table 2, which covers which individual issues appeared in which legitimacy-based time periods. Each factor that impacted the Court's legitimacy challenges is marked with an "X" for that time period. The key factors for the Early National Period were the inception of the Supreme Court and Constitution, the factions of the Federalists and Democratic-Republicans, the polarization between both groups, and Chief Justice Marshall's role against President Jefferson. For the Civil War Era, the most important historical factors were the division between the North and the South, the civil and human rights issues, and the Supreme Court's role in the midst of it all. During the New Deal Transition Period, the key factors were the Great Depression, FDR's presidency, information innovation, and public opinion changes. For the Desegregation Period, the key contextual aspects were racial issues, the Court's oppositional role, and public outcry to progress. The Modern Court Era has handled disputes over individual justices, Trump's presidency, information technology advancements, and polarization. These were the primary influences on legitimacy-based attacks for each respective period.

Next, a couple of links tie together some of the periods. To start, there are a few connections between chronological periods. In the Early National Period and Civil War Era, the Court gained more by taking clandestine, bolder stances. Preserving unity and developing the judiciary were the most significant goals of the Court. Thus, the Supreme Court justices would render decisions in favor of one faction, with the outcome eventually benefitting both the other faction and the judiciary. This would allow the Court



to continue making decisions without facing significant uproar from either faction. In the New Deal Transition Period and the *Brown* Era, the Court stood in opposition to the public and the other branches of government. Both times it served the Court better to progress society forward. That meant caving to the public in the former era, and standing against it in the latter, no matter the immediate cost to support. The Modern Court applies some aspects of the previous Courts to its position, but ultimately, the restraint exercised by the Chief Justices now make it more of an outlier comparatively.

There are also a few non-chronological links which are important to mention. The first would be the racial link between the Civil War Era and the Desegregation Period. In both periods the Supreme Court used racial issues to boost judicial legitimacy. For the Civil War Era, the Supreme Court dismissed civil rights issues to prevent Southern secession, and this came at the cost of massive rights violations. In the Desegregation Period, the Supreme Court also used racial issues to boost its diffuse support over time. Efforts endorsing more equal treatment and reversing previous decisions made the Court seem more valid over time. Warren had the intention of making the Court better on racial issues, but the true impact of *Brown's* doctrine came as decades passed. By reversing previous precedent on racial issues, the Supreme Court constructed legitimacy for itself across time periods.

Unlike the clear connection between the Civil War Era and the Desegregation Period, a surprising trend appears in Table 2 between two periods which seem less connected. The Modern Court Era almost mirrors the Civil War Era for historical factors impacting legitimacy. However, it is worth noting that the magnitude of each factor is

quite disparate between the two time periods. The most important factors for one are less important for the other, or apply to a separate set of circumstances. For example, partisanship was more violent in the Civil War Era. Furthermore, some of the greatest discrepancies between the two times happen as a result of the factors which do not overlap. Technological advancements are essential to comprehending the Modern Court Era's responses to legitimacy crises. The Modern Court may differ from the various Courts acting in the Civil War Era in these few respects, but these specific factors contribute significantly to each Supreme Court's responses.

As the past few paragraphs imply, contextual factors guide the Court's responses to a given circumstance. This is why my thesis took such a historical focus, and why the Court has continued to exist past threats to its legitimacy. To look only at recent responses would miss much of the framework responsible for constructing them. It would be difficult to explain the pertinence of Trump's presidency to legitimacy without addressing similar challenges from Andrew Jackson and Franklin Roosevelt. Furthermore, when looking at the studies of responses in the previous chapters, it seems that combinations of multiple historical factors dictate the justices' responses. That is, singular contextual factors appear to have less of a commanding role on responses than combined ones. It was the combination of the Great Depression, FDR's presidency, telecommunication devices, and the Court-packing plan which drove the judiciary's responses in the New Deal Era. Likewise, the Modern Court is responding to a divided public, information innovation, Trump's presidency, and so-called "cancel" culture (Cillizza 2019). Various factors influence the Court's responses by themselves, but it is

the culmination of two or more factors which most impact judicial actions, especially those of greater magnitude.

Finally, by linking time periods together as a cohort, a trend appears in the type of legitimacy challenges faced by the Court. The threats have grown increasingly descriptive over time, culminating into the challenges faced by the Roberts Court today. Two hypotheses explaining this trend appear in the chapters above. First, the Supreme Court, as a body dependent on precedent, gains more normative legitimacy as time passes. It becomes harder to challenge judicial authority as this authority builds over time. The Early National Period and Civil War Era faced more normative attacks because the nation was still developing and under constant threat. The later periods, by contrast, featured more challenges to judicial strength than to judicial existence. Second, information access and social media have altered society so that public opinion bears more weight on politics. As stated in Chapters 4 and 6, advancements in opinion polls and media formats made it less difficult to tell what the public thought of political matters. This, in turn, gave descriptive legitimacy more weight over normative legitimacy over time. Between time and innovation, descriptive legitimacy eventually posed a greater risk to the Court than normative legitimacy.

The responses themselves vary based on polarization and faction-based issues. The period where the justices were the least restrained would be the Desegregation Period, where the bench stood in stark opposition to the other branches, the state governments, and much of society. Polarization was less of a legitimacy-based concern in the 1950s compared to some of the other time periods, although it certainly existed then

as well. The Court is most restrained in the current period, under Roberts's leadership in the Modern Court Era. Because faction is so high over political matters, and the factions remain closely split, the Supreme Court risks angering vast populations if the justices take a more activist approach. Otherwise, the Early National Period and Civil War Era Courts were a mixture of activist and restrained, while the New Deal Transition Period Court was more activist than restrained, although it eventually caved to societal perspectives. This is how the types of responses have varied over time. The justices adapted to meet normative and descriptive needs in society. It is better to apply more restraint in times with greater polarization, whereas it is better to apply activism in times when divides are not as sharp.

If the Court continues to follow current trends, what might the Court's legitimacy-based actions look like in the future? It is difficult to predict the exact direction the Court will head, especially without knowing what problems society will face in the next few decades. Legitimacy issues keep changing over time, as do the Supreme Court's tools for responding to them. Perhaps descriptive legitimacy will continue to pose a greater threat than normative legitimacy, but one cannot be certain without knowing social contexts. Societal changes can be as abrupt and unexpected as the COVID-19 outbreak. This virus could leave devastating effects on the economy and it raises further questions about emergency powers in our democracy (Chinni 2020; Cathey 2020; Millhiser 2020). The coronavirus and its predicted effects parallel many features of the Great Depression's effects on society. I would not be surprised if the disease and response to it brought about a new era for Supreme Court legitimacy.

Without knowing what circumstances will surround the nation, one cannot definitively state what responses will look like in the future. However, it is still possible to predict that descriptive legitimacy concerns are likely to remain strong, so long as public opinion carries comparable weight in future years. Perhaps the Supreme Court could see a rise in federal power cases after COVID-19. Or, alternatively, the Court could stay with its more restrained efforts that it applies now, even in the face of a global crisis. I do think that public opinion will continue to outweigh normative concerns, regardless of what happens with the virus. Otherwise, the rest remains difficult to predict for future eras.

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