

The Impact of Racial Representation on Judicial Legitimacy: White Reactions to Latinos on the Bench

Abstract:

Despite evidence that racial diversification has increased support for the judiciary, political scientists know little about the heterogeneous effects of diversification across different population segments. Previous research illustrates that including Black judges increases judicial legitimacy among the Black population, but it decreases the legitimacy of the courts among the White population. We expand on this knowledge by examining the impact of adding Latinos to the bench. Our survey experiment compares White respondents' perception of the courts based on differing levels of Latino representation in the ruling panel. Does descriptive representation in the racialized issue area of immigration signal fairness and legitimacy to White respondents? Or does the inclusion of Latino jurists in immigration cases trigger racial animosity and decreasing support for the courts? We find that when the court rules against the White respondent's preference, they tend to penalize all-White judicial panels that rule against the perceived interest of Latinos. Additionally, we find that when presented with a Latino majority panel, White respondents who disagree with the ruling are more likely to punish the anti-Latino decisions as their levels of group consciousness increase. Ultimately, our findings illustrate how judicial diversity may affect the countermajoritarian capacity of the court.

Public support for American institutions, including the judiciary, have been trending downward for decades and this slide notably increased under the Trump Administration (Hetherington 2005; Kromphardt & Salamone 2020). For example, when a judge ruled against him in a class-action lawsuit, Trump denigrated the judge and trial as biased citing the judge's Mexican heritage (Wolf 2018). To his mostly White supporters, such statements potentially reduce levels of confidence in the judiciary as objective and apolitical, which might have consequences on support for the judiciary (Kromphardt & Salamone 2020). These eroding levels of confidence, combined with the inclusion of racial diversity on the bench may shape perceptions of judicial legitimacy among White respondents in unique ways compared to racial minorities. President Biden has been able to successfully appoint more federal judges during his first six months in office than any other president since Richard Nixon, and increasing the court's diversity has been an important priority, according to an analysis by Axios (Swan et al 2021). Still, questions surrounding White reaction to a more diverse judiciary remain understudied.

Judicial scholars have long noted differences in perceptions of procedural legitimacy based on the extent to which racial and ethnic minorities are on the bench, (e.g. descriptive representation), and the extent to which citizens agree with the outcome of the decision and feel represented, (e.g., substantive representation). However, there is a dearth of research on Latino descriptive representation on the bench and its impact on perceptions of legitimacy among Whites. We examine the impact of adding Latinos to the bench on White perceptions of the fairness of decision-making procedures, procedural legitimacy. Specifically, we focus on how respondents view the court when they disagree with the outcome at varying levels of Latino representation on the judicial panels. Thus, we are able to test the ability of the increasingly diversified appellate courts to act as a countermajoritarian force without further eroding support among the White population.

Does the presence of Latinos on the bench affect Whites' perceptions of procedural legitimacy, especially when ruling on racialized issues? Do Whites respond differently as they lose the majoritarian position within the judicial panel? The answers to these questions, especially the degree to which the diversification of the bench shapes the legitimacy of the court for White respondents, are crucial to assess the ability of the court to serve as a countermajoritarian institution. While previous research has examined the link between judicial diversity with a focus on how the identity of judges affects their decision-making (Budziak, 2016; Songer & Johnson, 2007; Tate & Sittiwong, 1989; Kulik, Perry, & Pepper, 2003; Morin, 2014; Moyer & Haire, 2015; Segal & Spaeth, 2002; Collins & Moyer 2008; Farhang & Wawro 2004; Tiede, Carp, & Manning 2010; Moyer et al 2021) few studies have attempted to understand how the inclusion of racial representation may affect the courts' ability to rule on racialized issues against the preferences of the White majority. Whether a diversified judiciary will still hold legitimacy among Whites when it acts in a countermajoritarian manner is crucial

considering shifting demographic, political, and economic trends. We use a survey experiment to identify how the inclusion of Latino judges affects the perceived legitimacy of judicial panels among White respondents. We created two fictional decisions, one pro-immigration and the other anti-immigration adopted by an appellate court. We use the three judge panel structure of the US court of appeals to facilitate our treatment of different racial makeups of the panel. We selected the appeals courts due to their relevance to the immigration process and less bureaucratic role in immigration proceedings (Jain 2018). As a result, we examine differences in perceived legitimacy from White respondents in three theoretically relevant scenarios generalizable to other panel structures: when Latinos are excluded, when they are included but not a majority of the panel, and when they are the majority on the panel. Ultimately, this approach allows us to delineate the role of race in perceptions of judicial legitimacy among the public.

Judicial Legitimacy

Legitimacy means that Americans are more likely to accept the courts' decisions for the whole of the political community (Gibson, Caldeira, & Spence 2003). Without legitimacy, the judiciary's ability to serve as a check on powerful elected officials or as a countermajoritarian force in American democracy is weakened. The perception that the courts are removed from politics and are neutral in regard to opinions on public policy is also known as positivity bias (Caldeira & Gibson 1992; Gibson, Caldeira, & Spence 2005). Without a perception of legitimacy, rulings of the court are more likely to be ignored, actively opposed or repeatedly challenged (Gibson, Caldeira, & Baird 1998; Gibson, Lodge, & Woodson 2014). The account of positivity bias in the literature may present an overly optimistic or naive conception of the courts' legitimacy (Badas 2019). There is ample evidence that perceptions of legitimacy are formed based on the outcome of cases rather than the process (Armaly 2020; Bartels & Johnston 2013; Johnston, Hillygus, & Bartels 2014).

Whether the decision aligns with an individual's political preferences has been shown to dramatically shape their perceptions of the court's legitimacy; therefore, individuals will view the court as legitimate when it rules in accordance with their preferred outcome and will view the court as less legitimate when it rules contrary to their preferred outcome (Bartels & Johnston 2013; Johnston, Hillygus, & Bartels 2014; Christenson & Glick 2015, 2019). While most research has to do with opinions about Supreme Court decisions, we believe the same general mechanism is at work concerning lower court decisions. Such decisions might not be as well known, but this should not matter in terms of the basic theories about legitimacy. In experimental studies, researchers have consistently confirmed this tendency to judge the legitimacy of the court based on agreement with the case outcome (Bartels & Johnston 2013; Christenson & Glick 2015, 2019).

Racial Diversification Efforts and Implications for Judicial Legitimacy

While policy preferences determine a large extent of individual support for a case outcome, other group-based considerations also play a role as they influence the perceptions of fairness and impartiality (Scherer & Curry 2010). The identity of the perceived beneficiaries affects the institutional legitimacy of courts when courts protect minorities but not when courts are unsympathetic to a group's claims (Schneider & Ingram 1993; Zilis 2018). While the courts are systematically perceived as less legitimate among minority groups, the inclusion of more jurists of color might present a catch-22 as it may negatively affect perceptions among Whites (Scherer 2011). In the current context, perhaps the Biden Administration's concerted effort to diversify the judiciary might prove to be an important test of how these theories play out. Figure 1 shows the confirmation of Latino judges to the federal appellate courts, which demonstrates Latino descriptive underrepresentation. The solid line represents the overall percentage of Latinos; meanwhile, the dashed line represents the percentage of Latinas on the appellate courts. For each group, there is the plot of the cumulative percentage and a line depicting the incremental trend.

Figure 1. Percentage of Latino judges in the U.S. Courts of Appeals

The effort to diversify the judiciary over the last half century has been made with the expectation that creating a judiciary which better reflects the social make-up of American society will increase the perceived legitimacy of courts, especially among under-represented groups (Scherer 2011). Reactions to this increased diversity, however, may vary. The symbolic effect of diversity on legitimacy may not be homogenous as assumed in the literature. Empirical evidence indicates that while the inclusion of Black judges increases legitimacy among the Black population, it also decreases the courts' legitimacy among the White population (Scherer & Curry 2010). Such a finding supports the idea that Whites might consider decisions adopted by a diverse set of judges as biased (Scherer 2011). Therefore, we should know how the inclusion of Latino judges impacts perceptions among White respondents. This is especially true in cases where Latino jurists rule in support of their perceived group interests in regard to immigration. Further, it is also important to understand whether there may be a more dramatic impact when Latinos make up the majority of the judicial panel. While inclusion into the panel may signal fairness and prompt greater levels of White support, a majority Latino panel may trigger a backlash among White respondents.

The perception of legitimacy among judicial panels may corroborate results from previous studies of institutions. Clayton, O'Brien, and Piscopo (2019) identify two ways in which inclusion of marginalized groups, such as women, affects how citizens value political institutions. Citizens may evaluate political institutions based on how inclusion signals fairness regardless of their policy preferences (procedural legitimacy), or inclusion could shape their perceptions of the right decision (substantive legitimacy). We focus on procedural legitimacy,

because we expect heterogeneity among White respondents' attribution of fairness of the court conditioned on whether their support of the policy outcome and their levels of in-group consciousness. In addition, research has established quite clearly that citizens will be more supportive of judges when they get their preferred outcome (Hillygus, & Bartels 2014; Christenson & Glick 2015, 2019). This is why our focus is on procedural legitimacy conditioned by the ethnic makeup of appellate court panels. The utility of procedural legitimacy is to offset some of the decline in support for the judiciary when it rules against popular opinion. Understanding this phenomena renders practical insight about how the courts can maintain legitimacy as a countermajoritarian actor.

According to the common account of procedural legitimacy, gains in legitimacy should be tied to the outcomes of the decisions adopted by judges of color (Miller & Maier 2008). However, this view of representation is at odds with the basic expectations of impartiality accompanying the rule of law inasmuch as judges should normatively decide cases without taking into consideration their own biases (Johnson & Fuentes-Rohwer 2004). Unlike legislatures or other political institutions, the role of 'representation' in the judiciary is more complex as judges are still expected to enforce the law rather than represent the particular preferences among the population. Diversification efforts may undermine the positivity bias that legitimizes the courts when they are ruling against citizens' policy preferences; meanwhile, among racial minorities, procedural legitimacy is eroded by a lack of representation (and voice) in the judiciary. Ultimately, gains in the perceived legitimacy among one group may correlate with losses for another. So far, this dynamic relationship has been understudied.

Representation Goals in the Judiciary

Scholarship on the impact of judicial legitimacy has built on the classic distinction between substantive, descriptive, and symbolic representation (Pitkin 1967). Substantive representation is defined as the coherence between the ideological preferences of judges, as representatives of a particular sector of the constituency, and the ideological perspective of their decisions (Kastellec 2013). Descriptive representation refers to the extent to which the bench resembles a given constituent and her social or demographic identities (Grossman, Gazal-Ayal, Pimentel & Weinstein 2016). Theories of both descriptive representation and substantive representation expect that greater diversification of the bench increases the legitimacy for the institution (Lupu 2013; Tobias 2011).

Research continues to illustrate racialized decision-making in cases based on a shared identity with a jurist or racialized case issues (Boldt et al 2021; Mak et al 2021; Boyd 2016; Fix & Johnson 2017; Chew & Kelley, 2012; Goelzhauser 2011; Hofer & Casellas 2020).¹ However,

¹ Especially in court cases with racialized subject matter or public policy at stake, non-White judges are typically more receptive to the voices of minority defendants and interests (Harris & Sen, 2019; Kastellec, 2013; Scherer

racial diversity on the bench is more than mere descriptive representation. Being represented by those who “look” like you positively impacts the perception of judicial procedures as fair for minority observers (Badas & Stauffer 2018). While respondents indicate they care more about the outcome of cases, there are still some differences in how men respond to outcomes by female judges; moreover, there are even differences in how women and people of color write decisions (Fix & Johnson 2017; Stauffer 2021; Moyer et al 2021). Previous studies have found that the inclusion of women in judicial panels alters the behavior of men on the judicial panels as well (Mendelberg et al 2014; Karpowitz et al 2012; Hinkle 2021). When it comes to racial diversity, even less is known about how the inclusion of a person of color on the bench may impact judicial outcomes and the behavior of White jurists on the panel (Hinkle 2021). Despite these important differences in decision-making, our focus is on the reaction of the public to judicial outcomes from racially-diverse panels.

Indeed, while all-White panels continue to dominate the composition of the federal bench, the inclusion of marginalized groups may have significant consequences for how White citizens perceive the courts’ intervention in the policy-making process. Symbolic representation of Whites in judicial panels when deciding racialized issues refers to their attitudinal effects of descriptive representation, including two considerations: first, whether they feel fairly and effectively represented, and second whether they feel that the affected racial minority were also represented fairly. The importance of focusing on the reaction of Whites to the racial diversification of the bench is that it allows us to reassess the ability of the institution to remain counter-majoritarian, but supported among the populace made of a White majority.

At this point, many questions remain about White reactions to diversification in government institutions. Rapid demographic changes threaten White Americans’ majority status and have also come to be perceived as a threat to economic, political, and social power (Jardina 2019). Jardina (2019) argues that “not all Whites have a negative response to demographic changes, nor all Whites identify strongly with their racial group.” Moreover, the adoption of White consciousness, as Jardina (2019) argues, is not entirely motivated by racial animus, but by racial threat and the desire to protect their group’s interests. White consciousness is the extent to which individuals advocate for “Whites” as a group in economic, social, and political arenas. This concept is important for understanding the role of Latino representation on White perceptions of the legitimacy of the courts as it may moderate their perception of procedural justice. Our experiment tests the nuanced responses of White respondents to diversity engaging the other side of the descriptive legitimacy and diversity question--when they disagree with the

2004). All told, these trends mean that in a very real sense, the race of the jurist can create disparate outcomes in cases with similar circumstances.

outcome of the decision, do White respondents also perceive the courts to be more legitimate when they are racially diverse?

White Identity Politics Meet Racial Diversification Efforts

Our account of the divergent impacts of diversification efforts on the perception of judicial legitimacy among Whites begins by acknowledging a consistent trend across races. We expect that all respondents will view the courts as more legitimate when the outcome of the case aligns with their interests. The trend of basing perceptions of legitimacy on the case outcomes rather than the procedures has been illustrated across a wide array of research (Armaly 2020; Badas 2019; Bartels & Johnston 2013; Johnston, Hillygus, & Bartels 2014; Christenson & Glick 2015, 2019). We expect that substantive representation for political outcomes will have an impact on perceptions of legitimacy. Specifically, all respondents will be more supportive of the court when the decision is aligned with their policy preferences than when they do not agree, regardless of the racial makeup of the panel; however, substantive legitimacy is just one part of the overall picture.

To test how racial diversification affects the ability of the court to maintain legitimacy despite ruling in a countermajoritarian fashion, we narrow our analysis to the reaction of those who disagree with the judicial decision (i.e. those who were not substantively represented). We expect that among Whites, perceptions of procedural legitimacy vary based on levels of descriptive representation. Diversity levels may erode the legitimacy of a decision against the presumed interest of a particular group and may represent a threat to White respondents based on their level of group consciousness. We begin by considering empirical evidence, which illustrates that the impact of inclusion of minoritized identities on the bench may have divergent effects on the perception of its legitimacy across groups (Fix & Johnson 2017; Scherer 2011). Drawing on insights from traditional accounts of judicial legitimacy and reactions to racial diversification efforts, we ask whether the inclusion of racial diversity conveys judicial legitimacy through symbolic representation.

We expect that racial composition of the judicial panel moderates White respondents' attribution of legitimacy in response to decisions at odds with their preferences. When White respondents disagree with the court in cases perceived to be against minorities, the inclusion of their voices may be rewarded with increased acceptance of the outcome as it signals fairness of the procedure. Conversely, we expect that courts receive an additional punishment for lacking diversity when respondents disagree with the outcome of a decision perceived as against the minority group not represented on the bench. This additional penalty to judicial panels translates to a greater appreciation of racially diverse panels not only when they rule against the perceived interest of a racial minority group but also when the presence of Latinos signals that the outcome is not the result of bias in favor of Latinos on the bench. In sum, when a decision negatively

impacting a non-white racial groups comes before the courts, White respondents will view the process as more legitimate when the decision-making process includes members from that racial group. On the contrary, there is less reason to expect that the inclusion of racial minorities on the bench will affect the perception of the court among White respondents when the decision favors the minority. Therefore, we expect that:

H1: When White respondents disagree with the racialized case outcomes, panels with greater representation of the impacted identity group (Latinos) will be viewed as more legitimate if the decision is against their perceived group interests (pro-detention).

Meanwhile, previous research has found that disagreement with decisions perceived as benefiting a minority group along with negative perceptions of the minority group triggers lower perceptions of procedural legitimacy (Zilis 2018). We expect that White respondents impose an additional penalty on the court when the racial group is represented on the panel as they may understand the outcome as an instance of racial favoritism on the bench as well as a ruling against their policy preferences. We believe this erosion in the perception of procedural legitimacy will be most substantial when White respondents are presented with majority Latino panel treatments.

H2: When White respondents disagree with the racialized case outcomes, panels with greater representation of the impacted identity group (Latinos) will be viewed as less legitimate if the decision is in favor of their perceived group interests (anti-detention).

White consciousness is a politicized form of group attachment fostered by assumed threats to the group. It refers not only to the identification of the group but also to the way they respond as a group to external forces, like the encroachment of another racial group and their predisposition to work together with other group members to eliminate challenges to White hegemony (Jardina 2019, 60). Variation in the strength of the negative impression of the judiciary among Whites will depend on the perceived threat of the diversification efforts—whether Latinos are the majority in the panel. We expect that White respondents with higher levels of White consciousness punish majority-Latino judicial panels when the decision is at odds with their policy preference. This leads to our final hypothesis:

H3: As White consciousness increases, respondents disagreeing with case outcomes will view the courts as less legitimate when the panel is composed of a Latino majority.

Table 1: Hypotheses and Expectations

Experimental Design: Measuring White reaction to the presence of Latinos on the bench

To test our hypotheses, we use a survey experiment, which allows us to control for two conditions, the makeup of the judicial panel and the case outcome. Our experiment is designed to measure how differing levels of Latino representation impact White respondents' perception of the legitimacy of the courts, especially in cases where they disagree with the outcome. We also include a post-treatment battery of questions related to White consciousness, which we expect to be associated with distinct predispositions regarding the political interests of minorities. White consciousness moderates the impact of the inclusion of Latinos in the panel on the perceptions of the court, when there are disputes over racial minority interests. This is especially relevant considering the role of race in shaping preferences in the issue area of immigration. By including different racial cues from the institution on a racialized issue, we create an environment where respondents were made aware of the race of the judicial panel. Indeed, immigration has become a substantially racialized issue with most White respondents conjuring up images of Latinos and the southern border (Farris and Silber Mohamed 2017). It has also become a more polarized issue with Republicans increasingly becoming restrictionist and Democrats becoming more open to immigration (Tichenor 2003; Abrajano and Hajnal 2015).

The experiment tests the relationship between racial representation and perceptions among the respondents who disagree with the decision. Our survey provides a glimpse at how legitimacy will be assessed in a racially diverse future. Moreover, the focus of the experiment on immigration policy facilitates the analysis of the effects of Latino representation on the judiciary in a racialized issue that can clearly identify Latinos as the beneficiaries of the judicial outcomes and may threaten White respondents as a group.

Subjects were randomly assigned to read a vignette that portrays a mocked-up newspaper article reporting a court decision adopted by a federal court of appeals. We use the three judge panel structure, because it facilitates our treatment of different racial panel makeups and makes more realistic the probability of being in a judicial panel in which a racial minority is in the majoritarian position. We identify differences in perceived legitimacy from White respondents when Latinos are excluded, included but not in the majority, and when they are the majority in the panel. Ultimately, this approach allows us to delineate the role of race in perceptions of judicial legitimacy among the public.

The vignettes incorporated two types of treatments: the outcome of the judicial decision and the demographic composition of the panel adopting it. Each news-formatted vignette presents a ruling considering that immigrants could or could not be detained for more than six months unless immigration authorities could prove the immigrant is a danger or flight risk. The pro-detention decision is an outcome that makes immigration more difficult (referred to here as the anti-immigration outcome), a policy position often associated with animosity against Latinos as a racial group (Perez 2010). The anti-detention decision (referred to here as the pro-immigration outcome), on the contrary, describes a ruling protecting the rights of immigrants

and, to that extent, is often associated with favoring the Latino community. Although Latinos are not a monolithic group and have differing opinions on immigration, for most Whites, the assumption is that any policy which makes immigration easier is ‘pro-Latino.’

Table 2. Vignettes

The second treatment, the racial composition of the judicial panel, was presented through the pictures of three male judges of varying races: All White, minority Latino (two White and one Latino), and majority Latino (two Latinos and one White).² Given the manipulation of the outcome of the decision, we exploit the mismatch between the racial composition of the panels and the group purportedly benefiting from the decision. Respondents were presented with vignettes informing anti-immigration decisions adopted by a majority Latino panel as well as pro-immigration decisions adopted by an all-White panel. This will allow us to differentiate between attribution of legitimacy based on the type of representation.

We collected data in August 2020 on 1,018 White respondents using Amazon’s Mechanical Turk (MTurk) and assigned each to one of the six treatment groups and the control group. In the treatment groups, respondents read one of the six press releases about the court case and the outcome, as well as visual cues concerning the racial makeup of the 3-judge panel.³ Subjects were asked to answer a series of questions measuring procedural legitimacy of the panel. They also provided demographic information, income, education, gender, typical for an experiment of this type as well as, White consciousness, authoritarianism, and ideology (Zilis 2018).

Table 3. Dependent Variable Question Battery Matrix

We measure our dependent variable, procedural legitimacy, by aggregating the responses for the four questions listed in Table 3 modeled based on Clayton, O’Brien and Piscopo (2019). Because responses to these questions are highly correlated,⁴ and factor analysis confirms their suitability for the construction of an index recovering the latent value; we generate a composite score of procedural legitimacy, ranging from 1 (low legitimacy) to 5 (high legitimacy) ($M =$

² The mocked-up articles include a headline and photos of the three judges (see Appendix in the supporting information). We also include a control condition that provides no information about the racial makeup of the panel as information about judicial decisions often ignore the racial composition of the panel and focus on other factors such as partisanship. Because our main interest is the comparison across treatments, the analysis of the control group is presented in the Appendix. The comparison between the control group, those respondents that were not primed about the racial composition of the panel and the treatment group of all-White judges are not statistically significant.

³ Before conducting our experiment, we conducted three pre-tests of our survey materials. We confirmed that respondents correctly identify the race of the judges presented in the vignettes (i.e. Latino and White). We also assessed the potential association of the racial composition with the perceived ideology of the panel (ie. panels including Latino judges as being liberal), which may complicate the analysis of our results as respondents may assess the panel based on perceived ideology rather than its racial composition. We found this not to be the case and have reported the results in the Appendix.

⁴ Cronbach’s = .88 and correlations ranging from .67 to .76.

3.29, $SD = 1.07$).⁵ The three main independent variables are the racial composition of the judicial panel, operationalized a three-category variable, the outcome of the decision, coded as a dichotomous variable taking the value of zero if the if the decision is pro-detention and one if the panel supported the anti-detention position. Also, we also incorporate four questions to measure White consciousness. Following Jardina’s (2019) operationalization, we created an aggregated index from the four questions listed in Table 3.

We estimate three OLS regression models (see results in Table 4 below). In Model 1, we include only the categorical variable indicating the treatment group, as well as the dummy variable indicating the exposure to the pro-detention vignette and the respondent’s agreement with the decision. This model illustrates that the key coefficient estimates are not conditioned on the addition of control variables and serves as a baseline model (Lenz & Sahn 2020). Model 2 includes controls for pretreatment variables: age, gender, income, education, party strength, and social desirability bias previously identified in the literature as influencing the attribution of confidence in the courts. The results mirror those mentioned previously and present evidence that our models are robust under multiple specifications. Also, note that our control variable for social desirability bias is statistically significant while gender, education, and income were not. Finally, Model 3, our main model for analysis, was specified to include a three-way interaction of the panel racial composition, the indicator of agreement with the decision, and the outcome of the case. To examine the expected moderating effect of White consciousness (*H3*), we restrict the sample to respondents that disagree with the outcome. Model 4 shows the effects of including White consciousness and Model 5 includes a three-way interaction including the racial composition of the panel, the outcome of the decision, and White consciousness.

Table 4: Effect of Latino Representation on Procedural Legitimacy

Experimental Results and Discussion

The results show that White respondents attribute greater legitimacy to the court when they agree with the decision, supporting the idea of substantive representation as the major element determining the court’s legitimacy. It also indicates that White respondents have higher levels of confidence in the court when they include jurists of color compared to the decisions adopted by all-White panels.

Figure 2. Effect of Latino Representation on Procedural Legitimacy

Figure 2 portrays the results of Model 3 from Table 4. As expected, we confirm previous expectations in regard to the impact of substantive representation in the attribution of legitimacy to the courts. Agreement with the outcome of the decision is the factor with the greatest impact

⁵ See descriptive statistics of all variables in Table A5 in the Appendix.

in determining the attribution of procedural legitimacy. White respondents who agreed with the decision display 1.5 standard deviation more confidence in the court than those who disagreed. For example, a White respondent agreeing with the pro-detention decision adopted by an all-White panel almost doubles their approval of the court, from 2.03 to 3.96 (SD= 0.06 0.10). Focusing on those respondents who agree with the decision, we also find that there are no significant differences among respondents who were exposed to either case outcome, across all three treatments. The effect of substantive representation remains the same regardless of the inclusion of Latinos in the panel and whether the decision favors immigration. Overall, this is an important finding for the study of judicial legitimacy that implies that substantive representation is the most important determinant in whether respondents considered the court to be legitimate.

Our findings provide strong evidence against the account of positivity bias as a source for judicial legitimacy. Instead, we find that legitimacy is primarily based on whether the case outcome aligns with policy preferences, in line with current explanations of judicial legitimacy (Badas 2019; Bartels & Johnston 2013; Johnston, Hillygus, & Bartels 2014; Christenson & Glick 2015, 2019)

Symbolic Representation

When the decision is at odds with the respondent's policy preferences, White respondents are more supportive (or express more approval) of the court on the issue when they are anti-detention (pro-immigration) to a greater degree than when they are pro-detention (anti-immigration), for the subset of respondents exposed to the all-White panels. Moreover, across treatments, we see an increase in the perception of the judicial panel in which Latino judges are the majority ruling against the perceived interest (pro-detention) of the Latino community compared to the same decision adopted by all-White panels, confirming H1. Indeed, the court's legitimacy faces a higher penalty for a decision that is seen as favoring an out-group when that group (Latinos) is not represented at all in the judicial panel.

In contrast, comparing across treatments exposed to the anti-detention decision, we find that the racial composition of the court has *no impact* on the attribution of procedural legitimacy by White respondents. This is perhaps our most important finding for the future of the courts. Since most who agree with a case outcome will be supportive of the courts, the important question is how to improve perceptions of legitimacy among those who disagree with the outcome. Ultimately, improving the perception of legitimacy in the face of an undesired decision is essential for maintaining the necessary approbation for the courts, which allows them to be a check on the potential tyranny of the majority. In this case, the increased representation of Latinos on the panel is improving the perception of legitimacy among those who disagree with a decision that is perceived as against the minority interest. White respondents penalize counter-preference decisions more when there is an absence of the group that is being harmed by

awareness, and as White consciousness increases, there is a greater penalty imposed on courts when Latinos are the majority on the panel and they are ruling against their perceived interests. Surprisingly, White respondents who disagreed with the ruling perceived to favor ‘Latino interests’ did not further penalize the panel as their level of White consciousness increased (as shown by the horizontal grey line). Perhaps this is because White respondents who espoused an anti-detention view may have views that are distrustful of government and therefore might view the panel as respecting and protecting the individual liberties of their fellow group members. Future research should continue to analyze this finding and provide a more thorough causal explanation.

Conclusion

Traditionally, the judiciary has been seen as an objective check on the whims of the executive and legislative branches of government. As we describe above, trust in the elected branches has dropped precipitously as partisan polarization has increased. Until recently, the courts were insulated from polarization, but the heightened partisanship of the last several years has led many Americans to see judges more and more as partisan actors rather than neutral, objective voices. Since Bickel’s (1986) discussion of the countermajoritarian difficulty, the courts have increasingly had to grapple with the fact that they are unelected and might, at times, rule in favor of minority rights rather than the preferences of the majority. As many citizens view the courts as acting in political ways, legitimacy is a key concern in that more and more Americans view the courts as illegitimate because the jurists were appointed, in some cases, decades prior.

Coupled with the increasing demographic changes and decisions affecting important issues such as immigration, this experiment has tested several hypotheses regarding how the White majority in the United States assesses court decisions that might affect the country’s growing Latino population. We tested the idea that symbolic representation has an important impact on rulings that might disproportionately affect the Latino community. Our experiment examined responses to immigration issues because this issue is most likely to prime White respondents to think about Latino identity. Jurists deal with all sorts of case types; however, legitimacy may be especially susceptible in this case type because of *perceptions* of partiality among the jurists and the heated rhetoric surrounding the issue. Ultimately, studying the response of Whites who disagree with this outcome positions us to better interpret how group dynamics play into perceptions of legitimacy and representation. Overall, when Whites’ preferences are at odds with the ruling, they express higher support for the court’s legitimacy when a panel of Latino judges rules against the perceived interests of the Latino community than when the same decision is adopted without Latinos on the bench. In this way, Whites are expressing the idea that

are not model dependent. We also include models without controlling variables to demonstrate the lack of the potential bias discussed in Montgomery, Nyhan & Torres (2018).

legitimacy is connected to the representation and inclusion of people from diverse backgrounds. An increasingly diverse judiciary is therefore important not just because everyone deserves to be represented but because it also leads to higher degrees of procedural legitimacy among the White majority.

Next, we tested the impact of White consciousness on the legitimacy of decisions regarding immigration. For Whites with high levels of group consciousness, when faced with a decision perceived as against Latino interests and at odds with their preferences, the racial makeup of the panel matters. That is, the majority Latino panels are seen as less legitimate as White consciousness increases. How the nation's White population reacts to the growing influence of minorities in the judiciary is an important and evolving research question. In this project, we uncovered evidence that judicial legitimacy is not a static concept unaffected by racial attitudes.

Future research should continue to investigate how diversity on the bench may impact perceptions of legitimacy while studying groups other than White respondents. As our experiment illustrates, there are different reactions to the representation of Latinos on the bench. While our findings suggest that increased diversification of the courts may improve perceptions of legitimacy among White respondents who disagree, in order to understand the full impact of racial diversification, it is important to identify the role diversity plays in perceptions of legitimacy among Latinos and other racial minority groups.

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Pre-testing: results and analysis

Selection of the photos for the panel composition

We created a pool of photos with 14 White judges and 16 Latino judges, chosen as potential visual primes for the vignettes in the experiment (See Figure A1: Original Pool of White judges and Figure A2: Original Pool of Latino judges). The photos were of real judges from the U.S. Circuit Courts of Appeals and judges from smaller, local municipalities in the United States. These photos were taken from the judges' online profiles and Google image searches. The names of the judges (Ruben Castillo, Eduardo Mendoza, George Adams, Mark Cohen, and Denis Knapp) were combinations of the first and last names of these and other judges found online.

We used the pool to conduct a pretest with students from a large research university in the Southwest, to choose the two Latino and three White judges needed for the vignettes out of the 30 photos possible.

Figure A1: Original Pool of White judges



Figure A2: Original Pool of Latino judges



Students were randomly presented with 5 of the photos of 30 judges and asked to give their own impressions and perceptions of 6 personal traits of each photo, including ideology, competence, attractiveness, likeability, trust, and age. They were also asked to guess the race/ethnicity of each judge and if they recognized the judge. Ratings for each trait were averaged for each photo and those averages were subtracted from the pooled mean of each trait of all judges. The photos were then ranked based on these distance scores, with scores closer to zero indicating that the photo was closer to the pooled mean of the 6 traits. Table A1 and A2 presents the percentage of respondents who correctly identified their race/ethnicity were calculated for the photos of the top scoring three White and two Latino judges, as well as the percentage of respondents who recognized the judges in the photos to address concerns about pre-treatment effects. The percentage of respondents who correctly classified the race or ethnicity of the judges ranged from 57.14% to 100%, and the percentage that recognized the judges that were chosen was under 10%.

Table A1: White Judges Chosen

Judge id.	Average distance from means	% Respondents correctly identifying judge race	Number respondents correctly identifying judge's race	Total respondents in group	% Recognized judge
1	3.333333	98.11	52	53	5.66%
28	3.333333	82.22	37	43	6.67%
12	3.333333	100	42	42	9.52%

Table A2: Latino Judges Chosen

Judge id.	Average distance from means	% Respondents correctly identifying judge race	Number respondents correctly identifying judge's race	Total respondents in group	% Recognized judge
16	2.17	57.89	22	38	0%
17	2.5	57.14	28	49	6.12%

Based on the results of the pre-tests, Photos 16 and 17 were chosen to represent the Latino judges because they received the lowest distance score, among the highest percentage of respondents who correctly identified their ethnicity, and the lowest percentage of respondents who reported recognizing the judge's photo. Judges 1, 3, and 28 were chosen as the White judges in the main experiment based on the same criteria.

Figure A3: Judges Chosen for Vignettes



Judge 16



Judge 17



Judge 1



Judge 12



Judge 28

Immigration as a racialized issue

In the case of Latino judges, we might expect variation in rulings on cases dealing with immigration or other issues disproportionately affecting Latinos. While immigrants come from all over the world, in many ways, citizens often conflate immigrants as Latinos and vice-versa (Branton et al 2011; Brader et al. 2008). Indeed, implicit attitudes about Latino immigrants shape opinions about immigration policy more broadly (Perez 2010). Moreover, xenophobic rhetoric in the political arena raises the salience of ethnic linked fate, leading Whites to become more conscious of their racial identity and Latinos to be more conscious of their Latino identity (Perez 2010). We argue that these same mechanisms are activated when respondents assess their attitudes about representation and legitimacy regarding judicial decisions on matters related to immigration.

Potential confounders: Perceived ideology of the panel, ideology and partisanship of the respondents






We took steps to account for the possibility of respondents assigning legitimacy to the judicial panel based on their perceptions of the ideological preferences of the panel and not the racial cues in our survey. We analyzed the agreement of the respondent with the decision and their perception of the ideological stand of the panel among White respondents at research university in the south (N = 183). There was no statistically significant correlation between the perceived ideology of the judge and agreement with the decision. As would be expected, though, ideology and party identification of the respondent was correlated with agreement and disagreement with both decisions. We report the results from this test below in Table A3.

Table A3: Correlations of agreement with the decision and other potential co-founders

Correlation	Anti-detention	Pro-detention	Analysis
Agreement with the decision and judge's liberal perceived ideology	$r = .25, p = .29$	$r = 0.03, p = .91$	Perceived ideology of the panel is not included in the experiment
Agreement with the decision and respondent ideology liberal	$r = .54, p < .01$	$r = -.32, p < .01$	Ideology of the respondent is included as control variable in the experiment
Agreement with the decision and respondent party ID democrat	$r = .45, p < .01$	$r = -.39, p < .01$	Given the high correlation between ideology and partisan identification the latter is not included. We included Party Strength.

Treatment Vignettes

Figure A4: Pro-detention Vignette


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Three-Judge Panel Rules Immigrants Can Be Detained Indefinitely

By [Reuters](#) on May 26, 2020 at 6:25 a.m.



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From left to right: Judge Rubén Castillo, Judge George Adams, and Judge Eduardo Mendoza

On Monday, a three-judge panel of a federal appeals court (pictured above) ruled that immigrants illegally entering the United States could be detained indefinitely without a status hearing. The decision of the U.S. Court of Appeals for the Tenth Circuit to allow the practice of indefinite detention affirmed a lower court's ruling after a week of review and deliberation.

Critics of the decision argue that this ruling effectively removes mandatory legal requirements governing the detention of individuals illegally entering the United States, including the right to due process. They also contend that indefinite detention will lead to the overcrowding of federal detention facilities.

Supporters of the decision maintain that the ruling gives immigration officials a necessary degree of flexibility as they face an unprecedented backlog of cases. They also argue the ruling will streamline the immigration process by reducing legal filings and eliminating the need for further legal personnel to adjudicate future cases.

Figure A5: Anti-detention Vignette


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Three-Judge Panel Rules Immigrants Cannot Be Detained Indefinitely

By [Reuters](#) on May 26, 2020 at 6:25 a.m.



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From left to right: Judge Rubén Castillo, Judge George Adams, and Judge Eduardo Mendoza

On Monday, a three-judge panel of a federal appeals court (pictured above) ruled that immigrants illegally entering the United States could not be detained for more than three months without a legal hearing. The decision of the U.S. Court of Appeals for the Tenth Circuit to prohibit the practice of indefinite detention affirmed a lower court's ruling after a week of review and deliberation.

Critics of the decision argue that the ruling denies immigration officials the necessary flexibility to protect the border as they face an unprecedented backlog of cases. They also contend the ruling will impede the immigration process by increasing the number of legal personnel required to adjudicate the cases and other legal filings.

Supporters of the decision maintain that the ruling will effectively reinstate the right to due process for those detained. They believe the ruling will decrease the number of individuals in federal detention facilities.

Descriptive statistics

Table A5: Description of Variables used in the analysis

Variable	Obs	Mean	Std. Dev.	Min	Max
<i>Dependent Variable</i>					
Procedural Legitimacy	971	3.307673	1.098392	1	5
<i>Independent Variables</i>					
Panel Composition					
Latino Minority	971	0.3171988	0.4656254	0	1
Latino Majority	971	0.3491246	0.4769391	0	1
Agree	971	0.5746653	0.4946484	0	1
Pro-detention	971	0.5005149	0.5002574	0	1
<i>Control Variables</i>					
Age	971	42.0309	13.83664	0	89
Gender	971	0.5159629	0.5000027	0	1
Income	971	7.291452	4.412788	1	21
Education	971	6.515963	1.307592	2	9
Ideology	971	3.53656	1.851567	1	7
Party Strength	971	2.706488	1.421249	1	5
Social desirability	971	2.224511	0.8436482	1	5

Table A6: Operationalizations of Control Variables used in the analysis

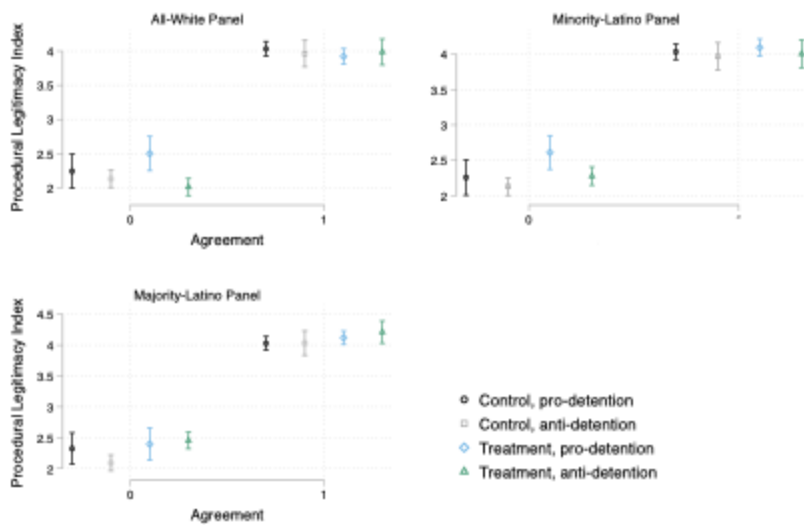
Variable	Survey Questions	Method of Aggregation and References
Education	What is the highest level of education that you have completed?	Continuous variable
Gender	What is your gender?	Dummy variable
Age	Please enter the FOUR-DIGIT YEAR you were born below (example: 1988).	Continuous variable
Ideology	Here is a 7-point scale on which the political views that people might hold are arranged from extremely liberal to extremely conservative. Where would you place yourself on this scale?	Continuous variable
Party Strength	<p>1) Generally speaking, do you usually think of yourself as a Democrat, a Republican, an Independent, or something else?</p> <p>2) Would you say you identify strongly or not so strongly with the Democratic [Republican] Party?</p> <p>3) [If independent] Do you think of yourself as closer to the Republican Party or Democratic Party?</p>	Variables combined and recoded from Strong Democrat to Strong Republican
Social desirability	<p>1) When you're with other people, how often do you put on a show to impress or entertain them?</p> <p>2) When you're in a group of people, how often are you the center of attention?</p> <p>3) How good or bad of an actor would you be?</p>	Additive Index Berinsky and Levine (2012)

Additional models: Analyzing the control group

We present our results related to the effect of each of the treatments on racial composition of the panels in comparison to the control group. For each of the three treatments, we compare the attribution of legitimacy to the court when the respondents are exposed to the pictures of the judges in the panel and when they are exposed to the news without cues for the racial composition. Figure A6 shows that the treatment has no effect on the all-White panel.

We confirmed the assumption that respondents believe that given the lack of diversity on the bench, the decision was adopted by an all-White panel. Also note that for both the minority-Latino panel and the majority-Latino panel there is statistical difference between the control and treatment for those exposed to the anti-detention vignette.

Figure A6: Racial composition of the panels in comparison to the control group



MTurk Protocols and Reliability

To address concerns about the MTurk sample’s composition, we considered treatment assignment, political/ideological differences, satisficing, attention, and the “professional Turker” problem.

We did not intend to gather a representative sample of Americans in our experiment, as we were primarily concerned about changes in White respondent attitudes on average, controlling for demographic and political traits. The lack of need for a representative sample and the appropriateness of MTurk for psychological studies involving political questions has been documented, demonstrating that liberals and conservatives on MTurk hold very similar views, values, and attitudes as conservatives and liberals in nationally-representative surveys.⁷[1] Comparing median values of demographic variables with Census data, however, we do find that our sample was comprised mostly of males, slightly younger, less wealthy, more educated, slightly more Democratic (less Republican but more Independent), much more liberal, very much less conservative, and about equally as moderate (ideological non-leaners).

Table A7: MTurk Respondents Compares to US Population

	MTurk Median (Whites)	US Median (Whites)
Age	37	43.7
Male	56%	49.2%
Income	\$50-60,000	\$62,483
Education (Associate Degree +)	76.41%	39%
Party Strength (D/R)	(47%/42%) ⁸	(43%/51%)
Ideology (L/M/C)	(51%/17%/32%)	(29%/16%/48%)

These differences might be problematic if individual demographic variables predicted treatment group assignment (anti-/pro-detention and minority/majority/all-white/control panel composition). Though randomly assigned by design, it is possible for this to happen due to random chance. However, we find that the demographic variables age, income, education,

⁷ Clifford S, Jewell RM, Waggoner PD. Are samples drawn from Mechanical Turk valid for research on political ideology? *Research & Politics*. October 2015. doi:[10.1177/2053168015622072](https://doi.org/10.1177/2053168015622072)

⁸ 10.5% leaned toward neither party versus about 4-5% in the US White population.

gender, party strength, and ideology did not predict treatment assignment, indicating successful random group assignment.

Next, we investigated the role of social desirability, as White respondents might be more likely to agree with an anti-detention decision or with a panel that contains more minorities in order to not appear “anti-minority”. We find that treatment assignment was statistically insignificant in predicting self-monitoring, our proxy variable for a respondent’s propensity to state socially desirable opinions, in nearly all groups. In other words, we do not expect that those who are more prone to give socially acceptable answers were any differently assigned to the treatments than anyone else. The exception was the control group that was assigned an anti-Latino opinion vignette. Being assigned this vignette was associated with a -0.21-point decrease in the self-monitoring scale among liberals and liberal leaners ($p < .05$), though the difference was small (4.39% of the scale ranging from 1-5). This effect was not statistically significant for those who leaned or identified as conservative ($p = .91$). There was no statistically significant difference between Democrats/leaners and Republicans/leaners in any treatment assignment, despite the slight ideological differences. The average self-monitoring score was 2.25 on a 5-point scale, corresponding to a relatively low average level of self-monitoring among the White respondents.

We then investigated whether White agreement with the ruling was correlated with the panel’s racial/ethnic composition and the nature of the ruling. We find no significant correlation between agreement with the pro-/anti-immigrant ruling among White respondents ($r = .03, p = .47$; and $r = -.04, p = .32$, respectively). We also find no correlation with the level of agreement with the ruling and the racial/ethnic composition of the panel. Agreement with the majority Latino versus the majority White panel was statistically insignificant ($r = .03, p = .37$). These statistics indicate that the nature of the ruling and the composition of the panel did not coincide with systematically different levels of agreement about the outcome, another indicator that satisficing did not drastically alter our results.

Another concern with MTurk samples is the so-called “professional Turker”, or those who complete large numbers of surveys for compensation. The worry is that these Turkers will be less likely to pay attention because they are satisficing or because they are not fully engaged in the task as intended. To combat this, we included specific instructions that were timed (5-10 seconds before being able to move on). We also took into account the amount of time taken to complete the survey. Median and mean survey completion times (7.27 and 9.89 minutes, respectively) were consistent with those in the pretest of the survey and suggest meaningful engagement with the survey. To impress upon the respondents the importance of taking the survey seriously and to ensure that they had read the directions, we inserted the following language at the beginning of the survey:

Text: Warning: We check responses carefully in order to make sure that people have read the instructions for the reading tasks and responded carefully. We will only accept participants who clearly demonstrate that they have read and understood the survey. There will be some very simple questions in the survey that test whether you are paying attention. If you get these wrong, we might have to reject your responses. Please choose "Yes, I understand" and the forward arrow to continue. If you do not want to proceed, you may close the browser.⁹

The following before the treatment or control vignette:

Text: Please read and examine the article's contents carefully and thoughtfully. You will then be asked to provide your own opinions immediately following the article. Unlike the last article you just read, you will not be able to return to this article once you have moved on to providing your opinions.

And the following in the instructions before the sections of the survey that measure legitimacy, racial/ethnic consciousness, and demographics:

Text: Please read and consider the questions carefully.

We took additional steps to ensure the integrity of the data collection process, including a language comprehension check at the beginning of the survey and three attention checks toward the beginning, middle, and end of the survey. Party strength was the only variable that was associated with passing more attention checks at the 5% level, though the difference between strong Democrats (99.68%) and strong Republicans (94.39%) was relatively small (5.29 percentage-point difference). Males were also more likely than females to pass attention checks, though again, this difference was small (99.37% and 97.86%, respectively).

Given our findings on demographics, treatment assignments, and agreement, as well as taking into account self-monitoring, emphasizing instructions, and the inclusion of attention checks, we are fairly confident that common issues raised with MTurk samples, such as professional Turkers, attention, random assignment, demographics, and satisficing, were adequately addressed or mitigated.

⁹ CLIFFORD, SCOTT, and JENNIFER JERIT. "DO ATTEMPTS TO IMPROVE RESPONDENT ATTENTION INCREASE SOCIAL DESIRABILITY BIAS?" *The Public Opinion Quarterly* 79, no. 3 (2015): 790-802. Accessed August 3, 2021. <http://www.jstor.org/stable/24546791>.