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The Psychology of Judicial Decision Making

Edited by

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The Supreme Court, Social Psychology, and Group Formation

Neal Devins and Will Federspiel

The justices of the Supreme Court function not only as individuals, but as members of groups. One group of which they are part is the Court itself, as discussed in Wendy Martinek's chapter in this volume (ch. 5). But they can also come together to form important subgroups. In this chapter, we examine a particular type of subgroup that we refer to as a majority coalition—a group of ideologically simpatico justices who are able to issue unambiguous, far-reaching decisions, as opposed to fact-specific decisions of limited consequence. We employ social psychology literature to better understand when the Court will and will not function as a cohesive coalition. In so doing, we also comment on the models political scientists use to describe Supreme Court decision making.

Our principal claim is intuitively obvious but in tension with much of the political science literature. Political science models of Supreme Court decision making typically focus on the legal and policy goals of individual justices—so that the key question concerns the legal policy preferences of the median justice and the ideological gap between the median justice and other members of the Court. We think the political science models focus too much on the individual and not enough on the group (including the reasons why individuals do or do not join groups). Specifically, when there is an ideologically simpatico majority coalition, intragroup dynamics play a prominent role in determining the reach of Supreme Court decisions. More to the point, the individual preferences of the median justice are less consequential on a cohesive Court—since the median justice will (up to a point) give in to intragroup pressures to uniformity. In contrast, the preferences of the median justice play a more prominent role on an ideologically diverse

Court. At the same time, these preferences may not mirror the policy views of the median justice. In refusing to join forces with an ideologically cohesive coalition, the median justice is likely to place a high value on personal power and reputation. In other words, median justices on ideologically diverse Courts have comparatively weaker legal policy preferences and are willing (up to a point) to sublimate those preferences in order to pursue other goals.

We begin with a brief tour of the chief political science models, highlighting the ways in which those models focus on individuated legal and policy preferences. We then turn to social psychology to examine both the importance of and obstacles to group formation. Finally, by comparing differences in decision-making styles of the (largely simpatico) New Deal Court and the (very diverse) Rehnquist Court, we illustrate how social psychology can contribute to an understanding of Supreme Court decision making.

The Political Science Models

The dominant political science models posit that Supreme Court justices are principally interested in pursuing favored policies. The attitudinal model assumes that judges vote “reflexively in each case; that is, they cast their votes based solely on their individual reactions to the facts and legal issues presented, rather than by considering, in addition, how judges or institutions are likely to react to the decision” (Merrill, 2003, p. 591; Segal & Spaeth, 2002). A second model, the strategic model, posits that judges take the reaction of others into account when advancing their policy preferences. A Supreme Court justice, for example, might calibrate a decision in order to secure the votes of other justices—so that the Court will embrace a decision that most closely matches the justice’s preferred policy outcome (Epstein & Knight, 1998; Maltzman, Spriggs, & Wahlbeck, 2000). Alternatively, a justice might take implementation concerns into account and, with it, potential resistance from either elected officials (Epstein & Knight, 1998; Segal, 1997) or the American people (Mishler & Sheehan, 1996). In recent years, some political scientists have tweaked the attitudinal and strategic models. Institutionalists “shift their focus away from the long-standing question of how institutions are affected by the personal characteristics of judges and toward the question of how judges are affected by the institutional characteristics within which they are embedded” (Gillman, 1999, p. 66). In this way, judges act strategically to pursue both policy and legal goals (federalism, separation of powers, adherence to precedent). At the same time, institutionalists focus on an individual justice’s pursuit of legal policy goals.

The “most influential models of judicial behavior share not only a basic assumption but also a limitation, the lack of a persuasive theory of judges’ motivations” (Baum, 2006, p. 19; see also Baum in this volume, ch. 1). Notwithstanding their differences, the attitudinal, strategic, and institutional models all assume that justices are single-minded maximizers of legal and policy preferences. Differences between the models turn on whether justices act

strategically and whether justices are pursuing legal or policy objectives. For this very reason, the median justice plays a central role in all three models. All models, for example, think that power resides at the median—so that the most powerful justice is “the Justice in the middle of a distribution of Justices, such that (in an ideological distribution, for example) half the Justices are to the right of (more ‘conservative’ than) the median and half are to the left of (more ‘liberal’ than) the median” (Martin et al., 2005, p. 1277). To pick a simple example, if the Court is split 5 to 4, the median justice would be the weakest member of the majority coalition. Under the attitudinal model, the median justice would only sign an opinion she agreed with and, as such, the majority might move closer to her position (so long as they too agreed with the final opinion) or, alternatively, the median Justice might write a consequential concurring opinion that would limit the reach of the majority or plurality opinion. The strategic and institutional models likewise see the median’s view as controlling. Not only might the median write a consequential concurring opinion, but other justices in the majority—fearing possible defection—might move their opinion closer to the median’s preferred legal or policy position.

The power of the median justice is variable, and that variability will call attention both to commonalities and differences between the political science models and a model that makes use of social psychology. For the political science models, medians are most powerful when there is substantial ideological distance between the median and other members of the Court—so that the median sits between one group of justices substantially to the right and another group of justices substantially to the left (Epstein & Jacobson, 2008). During the 2006 term, for example, Justice Anthony Kennedy was a “super-median”; among other measures, he was a member of the winning coalition in each case decided by a 5-to-4 vote. In sharp contrast, medians are least powerful when their preferences overlap with the preferences of justices to their right or left. This convergence of preferences, moreover, makes it more likely that there will be an ideologically simpatico majority coalition of justices. When this happens, the Court is likely to issue consequential opinions, for a “majority coalition sharing great unity of mind has the ability to adopt whatever rule it would like” (Staudt et al., 2008, p. 369).

We agree with these conclusions but nevertheless feel that the political science models are incomplete because their policy-preference-driven focus is too narrow and ignores basic psychological concepts. As we discuss below, the power of the median is diminished on an ideologically simpatico Court because the median justice is a member of a majority coalition and pressures toward uniformity will diminish the preferences of any individual justice. Correspondingly, although median justices are more likely to assume power on an ideologically diverse Court, the unwillingness of a median justice to join one or another group is not simply a matter of ideological or jurisprudential divergence. Median justices do not join groups because they are less interested in the pursuit of some ideological or legal vision and more interested in competing values, most notably power and image.

We are not the first to observe that justices think about more than their legal and/or policy preferences. Lawrence Baum, both in his 2006 study *Judges and their Audiences* and in his chapter in this volume, criticizes the leading political science models for failing to take into account the desires of judges to win approval from audiences they care about. Noting that the “Spock-like judges of the dominant models have no interest in public approval as an end in itself,” Baum argues that political scientists need to take into account the commonsense notion that judges, like other people, “care a great deal about what people think of them” (Baum, 2006, p. 22). We agree and will discuss how impression management figures into the willingness of a justice to be part of a coalition of justices. Unlike Baum, however, the approach taken in this chapter also applies social psychology to describe the interplay between the justices themselves.

Social Psychology and Coalition Formation on the Supreme Court

Before turning to what the psychological literature teaches us about group formation, let us begin by clarifying our central concept. By a coalition, we do not necessarily mean a set of justices who vote together all or nearly all the time. Instead, a coalition of justices is a set of justices who coalesce around an issue or a set of issues that are highly important or salient to the justices involved, and who vote and act together in the relevant issue space. This coalescing need not be a conscious decision made by the justices in the sense that they consciously choose to form a coalition on a particular issue, but is rather a recognition on the part of the justices involved of a shared set of goals or opinions that are salient for each individual justice. Unlike in the dominant political science models, coalitions of justices are not simply individuals who share a similar legal and/or policy preference. Instead, social psychology indicates that where a coalition forms, the very presence of such a subgroup will have profound effects both on the action of other coalition members and on the development of the opinions and reasoning of other coalition members (Stangor, 2004, p. 3; Cartwright & Zander, 1968, pp. 3–21). This, of course, is not to say that legal policy preferences are irrelevant to the formation of subgroups of justices. An individual’s personal beliefs are key to coalition formation. At the same time, membership in a coalition transcends the individualized preferences of coalition members.

Importance of Group Formation

When a majority coalition forms, group dynamics play a crucial role in the Court’s decision making. This is because when people align themselves as part of a group, powerful psychological pressures begin to bear on the members of the group. The most important of these pressures is the pressure to

uniformity that occurs in groups. Pressures to uniformity in group decision making have long been recognized as a hallmark of group behavior and they present themselves in several contexts (Festinger et al., 1968). First, and most intuitively, membership in a group creates pressure to go along with the group in order to achieve the goals for which the group was formed initially. The more important a goal is, the more powerful this pressure is (Cartwright & Zander, 1968). The amount of pressure to conform to a group's decision also increases when the members are more dependent on one another in order to achieve their goals (Festinger, 1968).

There is also evidence that the opinions of group members become more influential for other group members. Some studies indicate that the opinions of group members actually converge once the group has made a decision. Even in situations where consensus among the group is not required, the opinions of group members are influential to other members as they form their opinions (Tinsdale et al., 2000, p. 10). Interestingly, group dynamics may actually push group members to take more extreme positions than they might otherwise be inclined to take (Stangor, 2004, pp. 202–203; Forsyth, 1999, p. 320). Experiments examining this phenomenon may have special relevance to the Court as they examined the decision making of people in a judicial setting. Mock jury experiments indicate that where a group is predisposed to a particular outcome, discussion of the issues presented to the group has a tendency to lead the group to adopt more extreme positions than the average group member held prior to discussing the issues (Stangor, 2003, pp. 202–203).

Social Judgment Theory posits that people generally are most persuaded by positions that are slightly different from the positions they already hold, but that they are not particularly persuaded by positions that are very different (Tinsdale et al., 2000, pp. 9–10; Kerr & Tinsdale, 2004, p. 635). Because members of a coalition on the Court will tend to hold similar, but not identical, views on a given issue, the opinions of the other members of the coalition will tend to be more influential to each other than any opinions of noncoalition members. In other words, when justices associate as a coalition, the median member of the Court (i.e., the most moderate member of the group) will be most susceptible to being pulled in a more liberal or conservative direction by the other members of the coalition instead of by noncoalition members.

Taken together, these psychological processes suggest that Court decision making may be substantially affected when the justices coalesce in a majority coalition. First, pressures to uniformity in the group indicate that members of a group are more willing to subliminate personal preferences, as long as the members remain committed to the core purposes of the group. Thus, where there is a majority coalition of justices, the members will be likely to join an opinion that may be more reflective of the coalition's preference, not necessarily the justice's individual preferences.

Further, where there is a majority coalition on the Court, the members should tend to show greater deference to the opinion writer. The members

should also be more likely to go along with the coalition without issuing a consequential concurrence. This should be especially true when the issue at hand is particularly important or salient to the group's core beliefs. And, the opinions issued by a majority coalition of justices will not reflect the preferences of the median justice on the Court. Instead, it will be the product of the group dynamics of the majority and may be a more extreme position than some members of the group would have preferred on their own.

Finally, depending on the cohesiveness of the coalition, there may be a willingness among the members to vote together on other issues, provided the votes on those issues are not central and opposed to a justice's personal beliefs. The more group members see the group as "significant, important," the more likely it is that the group will "bond together and stick together" (Stangor, 2004, PIN/24). With respect to Supreme Court justices, norms of independence (which typically cut against the formation of a cohesive majority coalition) are likely to limit the willingness of group members to form a group that cuts across all issues. It is far more likely that the group will coalesce around a set of core issues and that the justices will act in a more disparate way on issues that are not central to the group's identity. For example, the New Deal Court—as we will soon discuss—was formed around the core issue of governmental power to regulate economic conditions. Civil rights and liberties issues were not core to the formation of this coalition and, not surprisingly, the majority coalition broke apart on civil liberties questions.

Indeed, the bitterness that subsets of New Deal justices expressed about each other in connection with civil rights and liberties issues backs up the central point of this chapter: Although justices can come together to act as a coalition on one set of core issues, at the same time, the social psychology barriers that stand in the way of group formation also make it likely that these justices will splinter on issues that are not central to the group's mission. We turn to a discussion of those barriers now.

Barriers to Forming a Majority Coalition

From a group dynamics perspective, "attraction to a group for a given individual will depend on his assessment of the desirable and undesirable consequences attendant upon membership in the group" (Cartwright, 1968, p. 95). For reasons we will now detail, social psychology identifies numerous roadblocks that stand in the way of a majority coalition forming on the Supreme Court. The most obvious roadblock (and the one hurdle that political scientists and social psychologist agree on) is ideological diversity among the justices. An individual will not act in ways that are inconsistent with matters central to their cognitive network. In particular, group membership is a basic part of individual self-conception; it is a key component of how we perceive our place in the world, throughout our lives (Forsyth, 1999, pp. 66–80). Because of the fundamental importance of group identification

in our lives, individuals are only willing to associate themselves meaningfully with groups that are in sync with their core beliefs (Arrow et al., 2000, pp. 70–77; Stangor, 2004, p. 25).

A second potential barrier to group formation is tied to an individual justice's motivations, specifically, the need for power (Baum, ch. 1 in this volume). An individual's need to influence others and to control or shape the world around them, the need for power, is a basic psychological need; but it is valued differently by different individuals, and it manifests itself differently in different situations. In some settings, membership in a group may actually provide an outlet for people with high needs for power because groups present opportunities for leadership (Forsyth, 1999, p. 92). Also, an ideologically simpatico coalition may join together in order to decisively advance the individual preferences of coalition members. However, people with a high need for power may find it best to refrain from joining a group and instead play the role of power broker, or "decider," between rival factions. And, of course, for some people the need for power is simply not a sufficient enticement to join any group.

Consider, for example, the so-called swing justices who cast the deciding votes on controversial cases. "Swing" justices exercise power by writing consequential concurring opinions that limit the reach of the majority's ruling or by insisting that their legal policy preferences are reflected in the majority opinion. Like any justice, a "swing" justice will not cast votes at odds with core beliefs. But a "swing" justice might have comparatively weak legal policy preferences and a comparatively strong desire to exercise power. To exercise power meaningfully, however, the Court must be ideologically diverse (Epstein & Jacobi, 2008). An ideologically cohesive Court (with a majority coalition of 5 or more justices) will not need the "swing" justice's vote to advance their legal policy preferences. In this situation, the "swing" justice might seek to exercise power by joining that coalition in the hopes of playing a leadership role in that group (assuming that the coalition is acting in ways consistent with her core beliefs). Alternatively, the "swing" justice might not want to join that coalition—even if that will mean fewer opportunities to exercise power. For example, the "swing" justice (or, for that matter, any justice) might place a high value on external variables—most notably, how she is perceived by audiences that she cares about. These audiences might include journalists, law professors, lawyers' groups, other judges and justices, political parties, interest groups, and even the public (Baum, 2006).

In paying attention to "audiences," justices engage in impression management, that is, the "process of controlling how one is perceived by other people" (Leary, 1996, p. 2). Like group dynamics generally, impression management is a universal phenomenon. Everyone engages in some form of impression management every day. It is an "essential component of social interaction" (Leary, 1996, p. 3). Like an individual's desire to exercise power, the amount of impression management engaged in by individuals varies significantly with the situation and the individual. For Supreme Court

justices, there are countless opportunities to take into account their standing with various audiences—oral argument, opinion writing, the giving of speeches and interviews, attending social gatherings, so on and so forth. In other words, judging on the Court is in many ways an exercise in self-presentation, and the behavior of the justices is shaped in important ways by the opinions of outside groups that the justices care about. More than that, the very process by which we select justices tends “to favor those with an especially strong interest in the esteem of other people” (Baum, 2006, p. 32). Accepting a judgeship entails accepting relatively significant constraints on personal activities and behaviors as well as a significant reduction in monetary compensation. The inducement for accepting these losses is an increase in prestige (and an increase in potential power). As a result, the types of people who end up with judicial positions tend to be those who care a great deal about the esteem of others.

Impression management figures prominently in the willingness of a Supreme Court justice to join forces with others and forge a majority coalition. To start, a justice will not join a coalition if that will harm her reputation among groups that are important to her. Just as a justice will not join a group that would require her to vote in ways not in sync with her personal beliefs, a justice will not hurt her standing with groups she cares about. And while some of these groups may have identifiable ideologies (Federalist Society, American Constitution Society), externally focused justices are well aware that the norm of judging in the United States is that the judge is a neutral, impartial arbiter of disputes. For some (but not all) justices, this norm tends to act as a disincentive to be part of a unified, ideologically identifiable subgroup of justices, because “people try to project images of themselves that are consistent with the norms in a particular social setting and with the roles they occupy” (Leary, 1996, p. 67). In this way, justices have incentives to act like an independent judge and not a member of an ideologically identifiable group. As such, an externally focused judge—especially as compared to public officials whose status is tied to political battles that play out in public view—has little reason to curry favor with one or another ideologically identifiable constituency. Justices with strong ideological precommitments, however, will place a higher value on winning the esteem of some ideologically identifiable group. For these justices, approval by such groups may matter more than engaging in self-presentation that is aimed at reinforcing the norm of neutral, impartial arbiter.

Consider again our so-called swing justice. If all she cared about was power, she would pay no mind to her reputation. Her decision to join one or another side of a dispute would simply be an exercise in power—her efforts to wield as much as influence as possible (either by filing a consequential concurring opinion or by joining one or the other side of a dispute). In particular, she would want to maintain her “swing” justice status—so that her vote would be critical to the resolution of any dispute. Along these lines, she would want to locate herself at the Court’s median (and, to the extent

possible, distance herself from justices to her immediate right and left) (Epstein & Jacobi, 2008, p. 74–81). An externally focused “swing” justice, instead, would focus on how others perceive her. Perhaps she would cultivate a reputation of neutrality; perhaps she would want to be known as the “critical vote”; perhaps she would want groups with disparate ideologies to view her vote as gettable. Whatever her methodology or motivation, the externally focused swing justice will place a high value on cultivating a positive image with groups that do not demand ideological conformity.

Indeed, the desire to appear independent may prompt some justices to engage in a type of behavior known as reactance. Reactance speaks to the desire of individuals to resist challenges to their autonomy (Brehm & Brehm, 1981). In particular, when people feel their independence is threatened, they will take steps to demonstrate that they are in control of their own behavior. For example, the Supreme Court’s 1992 reaffirmation of abortion rights in *Planned Parenthood v. Casey* may well be tied to the desires of Justices O’Connor, Kennedy, and Souter to demonstrate that they were not the political lackeys of the presidents (Reagan and Bush I) who appointed them to the Court. Proclaiming that the Court’s legitimacy is tied to its ability to withstand political attacks, these justices made clear that they would not facilitate efforts by the Reagan and Bush administrations to push for the overruling of *Roe v. Wade*. Taken together, these psychological concepts illustrate some of the difficulties of forming a majority coalition on the Court. A justice, of course, will not choose to join a coalition if doing so means they have to cast a vote on a core issue that does not match her central beliefs. In addition to legal and/or policy preferences, the desire for power, impression management, and reactance may all contribute to a justice’s refusal to join a coalition. In other words, even if a justice’s legal policy preferences are largely in sync with an existing subgroup on the Court, a justice might not join it. Put another way: Without strong ideological precommitments to a particular group, Supreme Court justices are likely to value power and image in ways that make them resistant to forging a majority coalition.

On the other hand, justices with strong ideological precommitments may be especially likely to join coalitions. Members of ideologically simpatico coalitions will agree with each other on issues of high salience to coalition members; consequently, they will more likely seek to assume power by forcefully advancing a shared agenda. In other words, members of such a group have less interest in exercising individualized power by casting the decisive swing vote; for them, the pursuit of a shared agenda is the most important manifestation of power. Likewise, justices with strong ideological precommitments may be less interested in fostering the norm of an impartial, independent jurist. Rather, when it comes to impression management, the outside groups they care about are those who share their values and objectives. Compare, for example, Justices Anthony Kennedy and Clarence Thomas. Kennedy—consistent with “swing” justice behavior—places a high

value on the opinions of the news media and other elites; Thomas identifies closely with ideologically conservative groups (Baum, 2006, pp. 132, 142–144). If there are 5 or more ideologically simpatico justices, a majority coalition may form. The key variable, as noted above, is whether these justices have sufficiently strong ideological precommitments to overcome the basic obstacles to group formation. For example, in determining whether a justice will join a group, it may require more than the justice agreeing with other members on the preferred outcome and legal reasoning in any given issue space. A justice not strongly precommitted to the group's agenda may place a higher value on the exercise of individual power or cultivating a reputation for judicial independence. Perhaps for this reason, Justice Anthony Kennedy broke ranks with the Rehnquist Court's "conservative bloc" by switching his initial conference votes in high visibility school prayer and abortion cases. (Greenburg, 2007, pp. 145–160).

The appointments-confirmation process also stands as a substantial obstacle to the formation of an ideologically simpatico majority coalition, especially with regard to controversial, highly salient issues. Because justices have life tenure, it is very unlikely that appointments to the Court will be clustered closely together. Such clustering of appointments facilitates group formation (Arrow et al., 2000, p. 69). In the case of the Court, this is both because people who join an existing organization tend to identify with others who join at the same time and because such clustering means that the same president and Senate will be making the appointments, increasing the likelihood of clustered appointees being relatively closely aligned ideologically. For example, as we will discuss near the end of this chapter, President Roosevelt's clustering of Supreme Court appointments from 1938 to 1943 figured prominently in the New Deal Court's dramatic expansion of government power over the economy. At the same time, this perfect storm of closely clustered appointments and other factors that would help overcome the barriers to group formation rarely occurs.

Applying the Psychological Perspective

Social psychology explains both the ramifications of group formation on the Supreme Court and the innumerable roadblocks that typically stand in the way of group formation. When there is no dominant majority coalition on the Court, social psychology suggests that concerns of power and image (including reactance) stand in the way of justices voting their true legal and/or policy preferences. And when there is an ideologically cohesive majority, social psychology suggests that intragroup dynamics will play an important role in defining the Court's decision as well as the willingness of justices to stick with the coalition on issues that are not core to the group's identity. This section will provide a preliminary test of the social psychology model. We will compare the willingness of the Rehnquist and New Deal

Courts both to overrule precedent and to issue consequential rule-like (as opposed to minimalist fact-specific) decisions. For both Courts, we will focus on two issue sets—congressional power and individual rights.

Before turning to our discussion of these two Courts, two clarifying comments: First, even though this paper highlights significant differences between the social psychology and dominant political science models, these models overlap in significant respects. Most important, just as political science models talk about the pursuit of legal policy preferences, social psychology likewise talks about the importance of personal beliefs to an individual's willingness to join a group. For this very reason, it is often the case that the social psychology model and the political science models will both point to personal beliefs as a principal motivation for a justice's decisions. More to the point, the social psychology and political science models both anticipate that the Court is more likely to generate consequential precedents when there is an ideologically simpatico coalition of five or more justices. Likewise, when there is no such coalition, each of these models recognizes that the median justices' views are often controlling. At the same time, social psychology provides a much more nuanced explanation for Supreme Court decision making. That explanation has strong empirical foundations and, as such, we think that political scientists must do more than demonstrate the predictive powers of their models. They must also explain why Supreme Court Justices do not function like other individuals who operate in a group dynamic. Second, in discussing the Rehnquist and New Deal Courts, our objective is quite limited. Specifically, we want to see if these two Courts superficially track the social psychology model discussed in the preceding section. A more detailed, empirical assessment still needs to be done—and we hope to do that in another paper. For reasons we will now discuss, Rehnquist and New Deal Court decision making seem to follow the social psychology model discussed in this chapter.

The New Deal Court

The New Deal Court (1937–1949) was, in critical respects, two Courts. On issues involving Congress's power to regulate the economy, an ideologically simpatico majority coalition operated as a cohesive group. Those issues were central to the group's identity. On individual rights issues, however, the Court was anything but coherent. These issues, while of great national significance, were not central to the group's identity.

To start, the New Deal Court was forged by President Franklin Delano Roosevelt. Roosevelt used his appointments power to nominate eight justices during a five-year period, 1938–1943. More than that, Roosevelt used his appointments power to celebrate the New Deal's embrace of big government, especially the power of government to regulate the economy. Roosevelt felt compelled to do so because the pre-1937 Supreme Court had taken the country back to its "horse and buggy" days by overturning several New

Deal initiatives; indeed, Roosevelt promised—when introducing his ill-fated Court-packing plan—to appoint justices who “will not undertake to override the judgment of Congress on legislative policy” (quoted in Devins & Fisher, 2004, p. 61).

Roosevelt did just that; his appointees were committed New Dealers who, from the moment they joined the Court, advanced an expansive view of the federal government’s power to regulate the national economy. From 1937 to 1944, the New Deal Court had created a “new constitutional order,” overruling thirty cases—“two thirds as many as had been overruled in the Court’s previous history” (Leuchtenburg, 1995, pp. 208–215). Over the course of its twelve-year tenure (1937–1949), the Court “thoroughly repudiated the entire doctrinal system of constitutional limitations of federal power over the national economy” (Ackerman, 1999, p. 47). It handed down 42 rulings that overturned at least 59 of its prior decisions. The majority of these decisions had broad support—only five were decided by a 5-to-4 vote (as compared to 10 unanimous overruling decisions).

Group dynamics, as well as the legal policy preferences of the justices, likely figured into New Deal Court decision making. As discussed earlier, justices who are part of an ideologically simpatico majority coalition seek power by voting with the coalition. Likewise, rather than cultivate an image of impartiality by refusing to join a coalition, justices who are part of a majority coalition pay attention to audiences that agree with the core agenda of that coalition. Perhaps most significant, justices on an ideologically simpatico majority do not necessarily vote their personal preferences—instead, they allow the group dynamic to shape their final vote.

Consider, for example, the New Deal Court’s 1942 decision in *Wickard v. Filburn*. *Wickard* concerned the power of the secretary of agriculture, acting pursuant to the Agriculture Adjustment Act, to extend a quota on wheat production to a farmer who grew wheat for home consumption. In upholding the secretary’s power, the Court issued a sweeping opinion—ruling that Congress may regulate economic conduct “trivial by itself” so long as the aggregation of similar activity by other actors affects interstate commerce (*Wickard v. Filburn*, 1942, pp. 127–128). For our purposes, *Wickard* is especially instructive because some justices on the Court put aside personal misgivings about the decision’s reach in order to forge a pathbreaking ruling that reflected the core beliefs of the New Deal.

Before *Wickard*, the Court encouraged Congress to make findings that commerce indeed was affected. In this way, the justices placed the ball in Congress’s court, for once Congress found facts, it would be very difficult for the Court to meaningfully check Congress. Nonetheless, in the years preceding *Wickard*, Congress contributed to the Court’s approval of New Deal initiatives through its “sustained and thoughtful” showing that there was, in fact, an integrated national economy (Frickey, 1996, pp. 711–712). When Congress enacted the Agriculture Adjustment Act, however, lawmakers made no factual findings. For this very reason, Justice Robert Jackson, who had been

tasked to write the decision, initially drafted an opinion that would have remanded the case so that a trial court could make additional factual findings (Cushman, 2000, p. 1138). Jackson nevertheless backed away from his original opinion and wrote a decision that effectively granted Congress carte blanche power to regulate anything arguably economic. In private correspondence, Jackson signaled his discomfort with his handiwork. Recognizing that we no longer have “legal judgment upon economic effects which we can oppose to the policy judgment made by the Congress in legislation,” Jackson observed: “I really know of no place . . . where we can bound the doctrine” (quoted in Cushman, 2000, pp. 1143, 1145).

Wickard exemplifies what a coherent Court can do. Committed to a shared agenda, group members can work together to advance an expansive vision of the law. *Wickard* also stands in sharp contrast to New Deal Court decisions on individual rights. Unlike economic issues (which were core to the group’s formation), civil and individual rights were irrelevant to the formation of the New Deal Court. Roosevelt wanted justices who would validate the regulatory state; he was not especially interested in constitutionalizing civil liberties and civil rights. At the time of Court-packing, the Court’s docket had almost no cases implicating civil and individual rights. But with the Court’s approval of sweeping legislative power over economic issues, the Court inevitably turned its attention to other matters. Reflecting both changing social conditions and their personal interest in asserting power, “judges created for themselves a new role in the political system, one that involved identifying those ‘preferred freedoms’ or ‘suspect classifications’ that might provide a basis for trumping the otherwise unrestrained power of the modern legislature” (Gillman, 1993, pp. 202–203). Here, the New Deal Justices divided—reflecting the fact that groups organize around clusters of core issues, that justices will not vote against their legal policy beliefs on issues of consequence, and that the norm of impartiality pushes justices away from groups that do not share their core beliefs. In other words, just as social psychology helps explain why the New Deal Court acted as a coherent group on economic questions, social psychology is also useful in understanding why the justices were unwilling to forge a majority coalition on issues involving civil and individual rights.

The Rehnquist Court

The Rehnquist Court (1986–2005) likewise exemplifies the forces that push against group formation on the Supreme Court. Throughout its history, the Rehnquist Court was fractured on issues involving civil and individual rights. But even its much ballyhooed efforts to reinvigorate federalism-based limits on congressional power proved to be a bust—principally because a majority coalition was never able to coalesce around these issues. The inability of the Rehnquist Court to fundamentally transform doctrine, as we will now explain, is to be expected. Without five justices strongly committed to the

pursuit of some shared agenda, concerns of power, impression management, and reactivity stand in the way of group formation.

On civil and individual rights issues, the Rehnquist Court seemed destined to embrace Reagan's vision of judicial conservatism. When running for president in 1980 and 1984, Ronald Reagan both pledged to appoint judges "who share our commitment to judicial restraint" and reached out to social conservatives by condemning Supreme Court decisions on school prayer, busing, and especially abortion (Devins & Fisher, 2004, quoting Republican party platform). But two of Reagan's four nominees, Sandra Day O'Connor and Anthony Kennedy, refused to embrace the social conservative agenda—so much so that "Republican domination of the Court" did not result "in the overruling of a single revolutionary Warren [or Burger] Court decision" (Nagel, 2006).

On social issues, Justices Kennedy and O'Connor were anything but precommitted to the social conservative agenda. Reagan picked O'Connor to fulfill his pledge to nominate the first woman to the Supreme Court. Accounts of his decision to nominate her make clear that ideology was not central to Reagan's decision (Toobin, 2007, pp. 17–18). Kennedy's selection is even more telling. Reagan initially nominated Robert Bork for that seat—but civil rights and abortion rights groups strenuously objected to that nomination and the Senate rejected Bork. Reagan's second choice, Douglas Ginsburg, withdrew from consideration after newspapers revealed embarrassing personal details. Kennedy was selected to stave off further embarrassments; ideology entered the calculus but it was not figural in Kennedy's nomination (Greenburg, 2007, pp. 35–65).

Kennedy and O'Connor repudiated the social conservative agenda by, among other things, voting to reaffirm earlier rulings on school prayer and abortion rights. Reactance may well have been a contributing factor to these decisions. O'Connor and Kennedy also acted in ways that expanded their personal power and fostered their reputation for judicial independence. Kennedy, in particular, seemed concerned with his public persona. His decisions to reaffirm Court rulings on school prayer and abortion rights may not have reflected his true preferences—but, instead, his desire to exercise power in ways that would distance himself from the Reagan administration's social conservative agenda. According to one of his law clerks, Kennedy "would constantly refer to how it's going to be perceived, how the papers are going to do it, and how it's going to look" (Tushnet, 2005, p. 176, quoting an anonymous Kennedy clerk). On the very day that the Court reaffirmed *Roe*, Kennedy told a reporter, "[s]ometimes you don't know if you're Caesar about to cross the Rubicon or Captain Queeg cutting your own tow line." (quoted in Greenburg, 2007, p. 159). Kennedy, moreover, seemed determined to "occupy the pivot" on the Court. According to one account, Kennedy sought to maneuver himself to the center—and "even boasted of employing this strategy" (Lithwick, 2004, p. 25; Lazarus, 1998, p. 515). Kennedy's concerns for power are further revealed in a 2005 interview; he spoke about Supreme Court justices' "shap[ing] the destiny of the country,"

noting that “in any given year, we make more important decisions than the legislative branch does” (quoted in Rosen, 2007b, p. 17).

For her part, Justice O'Connor made extensive use of fact-specific concurring opinions to keep her options open in future cases and, more importantly, to tell litigants that “the outcome of a case goes through her”—so much so that litigants spoke about “writing for an audience of one” when crafting Supreme Court briefs (Brust, 2005, p. 37; Estrich & Sullivan, 1989, p. 119). “As Justice Sandra Day O'Connor votes, so goes the Court,” wrote one commentator, and it is undeniable that O'Connor was aware of both the power she wielded and her legacy as the Court's first women justice (Lazarus, 2000). O'Connor's “flexible, context specific approach” was most pronounced in cases implicating civil and individual rights (Maveety, 1996, p. 31). In a prominent voting rights case, O'Connor filed a concurrence to a decision she authored (*Bush v. Vera*, 1996, pp. 990–995). When concurring to a decision rejecting a constitutional right to physician assisted suicide, O'Connor's reasoning fundamentally limited the majority opinion—so much so that Justice Stephen Breyer joined the concurrence “except insofar as it joins the majority” (*Washington v. Glucksberg*, 1997, p. 789). Whatever her motivations, O'Connor did not want to be pinned down. She wanted to make her mark through individuated fact-specific decisions of limited reach, decisions that would make her the focal point of subsequent cases.

Without a solid coalition of five ideologically simpatico justices, the Rehnquist Court's civil and individual rights legacy was inconsequential. The Court did not “make a single move that would radically change or unsettle existing constitutional doctrine” (Friedman, 2002, p. 146). The Rehnquist Court's federalism revival, for the most part, tells a similar story. Unlike civil and individual rights, the Rehnquist Court did pursue doctrinal innovations on federalism (Merrill, 2003, p. 584–86). More than that, commentators initially labeled a group consisting of Justices O'Connor, Kennedy, Scalia, Thomas, and Chief Justice Rehnquist as the “federalism five.” But the federalism revival, ultimately, was more bust than boom; the Court overturned only one significant precedent and, ultimately, backed away from its campaign to limit congressional power under the Commerce Clause and section 5 of the Fourteenth Amendment. In cases decided in 2003, 2004, and 2005, four of the five so-called federalism five distinguished earlier Rehnquist Court rulings in order to back up congressional power. The only justice to consistently vote in favor of limits on Congress was Clarence Thomas.

The failure of the federalism revival is tied to the simple fact that federalism-qua-federalism was never a core issue to the so-called federalism five. Presidents Reagan and Bush never used federalism as a measuring stick when screening candidates; the Senate paid no mind to federalism during its confirmation hearings. The focus, instead, was on first-order policy issues—race, privacy, religion. Unlike the New Deal era (where Court limits on congressional power frustrated Roosevelt's pursuit of a fundamental

restructuring of the regulatory state), elected officials neither pushed for nor resisted Rehnquist Court efforts to place some federalism-based limits on congressional power (Devins, 2004). Against this backdrop, it is not surprising that a core group could not form around this low salience issue and, in so doing, invalidate laws that they otherwise supported.

For our purposes, the Rehnquist Court highlights the various roadblocks that stand in the way of group formation on the Supreme Court. Groups form around core issues and, in part, that requires the appointment and confirmation of justices who are precommitted to the pursuit of some agenda. Otherwise, median or “swing” justices will resist banding together with other justices—for these “swing” justices are likely to place a high value on power and/or their image. Indeed, the Reagan administration’s embrace of the social conservative agenda may well have boomeranged, in that, “swing” justices—consistent with reactance—felt that their independence was threatened by the administration’s assault on the Court.

Conclusion

Social psychology provides important insights into group formation on the Supreme Court. In particular, unlike political science models, which emphasize the pursuit of legal and policy preferences, social psychology highlights the importance of group processes and how issues of power and reputation also contribute to group formation on the Supreme Court. In so doing, social psychology suggests that political scientists overemphasize the median justice benchmark. When a majority coalition forms, intragroup dynamics define the scope of the Court’s ruling. Those dynamics reflect group preferences, not the preferences of the median justice. And when there is no majority coalition, the median justice may well be influenced by concerns of power and reputation—concerns that may lead the median justice to vote in ways that do not necessarily reflect her true legal policy preferences. Through limited case studies on the New Deal and Rehnquist Courts, there is reason to think that justices—like other humans—operate within the boundaries of group dynamics. That, of course, is not to denigrate the profoundly important role of legal policy preferences. Justices, according to the social psychology model, will never cast votes that do not jibe with their core beliefs. At the same time, the dominant political science models offer a too simplistic picture of Supreme Court decision making.

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