Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court

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The question of how courts in newly emerging democracies are able to act in a “counter-majoritarian” fashion is of burning theoretical and practical importance. Consequently, we investigate the relationship between the legitimacy of the South African Constitutional Court and its success at generating acquiescence to its decisions even when they are unpopular. Based on a national survey, we begin by describing the institutional loyalty the Court enjoys among its constituents. We next consider the consequences of legitimacy by determining whether people are willing to acquiesce to an adverse Court decision on a civil liberties dispute. Our central hypothesis—that legitimate institutions are capable of generating acceptance of decisions, even when citizens find the policy highly disagreeable—receives only conditional support. What little legitimacy the Constitutional Court has acquired does not readily translate into acquiescence to its decisions. The apparent inability of the Court to perform the role of a “veto player” in South African politics has important consequences for that country’s efforts to consolidate its democratic transition.

Those responsible for the “Third Wave” of democratization place an extraordinary degree of confidence in judicial institutions as guardians of democracy. Courts are often cast as “veto-players” (see, e.g., Alivizatos 1995)—institutions designed to protect democracy from the excesses of executive power, majority
tyranny, corruption, and a myriad of social and political ills. Many seem to regard strong and independent courts as an essential palliative for the potential afflictions of the democratic body politic.¹

At least some courts in the new democracies of the world have been surprisingly effective in policing the contours of the new regimes. According to Schwartz (1998, 2000), the constitutional courts of Hungary and Poland have been quite influential, and relative success has characterized the first few years of the courts in Bulgaria, Slovakia, Slovenia, the Czech Republic, and the Baltic states (but with relative failure in Russia and failure of the high courts in Kazakhstan, Belarus, Albania, and Romania). Some courts in the emerging democracies have apparently started “out of the gate” with effective decisions of enormous political consequence.

How do these courts get away with making such consequential and controversial judgments? In particular, how do these courts get their decisions respected, accepted, implemented, and complied with, even when most people disagree with their decisions? The paradox is that though courts have fewer formal powers than most other political institutions—possessing the power of neither the purse nor the sword—some courts seem to have an uncommon ability to get people to abide by disagreeable rulings. This is precisely the power of a veto player—an institution that can go against what is popular (especially in a democracy) and do so effectively, making its decisions stick.

Political scientists have developed some understanding of why some courts are effective at getting their decisions accepted and others are not. For instance, the issues being litigated are surely important: part of the success of the Polish Constitutional Court has to do with the fact that it has exercised much of its judicial power against legislation adopted by the old Communist regime (Schwartz 2000). But most believe that theories of institutional legitimacy provide the most comprehensive account of the efficacy of legal institutions. According to legitimacy theory, under some circumstances courts achieve a moral authority that places them above politics and allows them the freedom to make unpopular decisions. This moral authority—or legitimacy—means that people accept judicial decisions, even those they bitterly oppose, because they view courts as appropriate institutions for making such decisions. In this sense, commitment to procedure and process trumps concern over outcomes; dedication to the long-term health and efficacy of an institution overrides dissatisfaction with its immediate outputs; and, consequently, courts can effectively perform their assigned function within the political system.

Within the context of established democracies, legitimacy theory is widely accepted by scholars.² Unfortunately, however, few attempts to test this theory

¹ Schwartz (1997) provides many interesting accounts of the struggle of courts to attain the independence necessary to police the political system in his appropriately titled paper “Defending the Defenders of Democracy.”

² An obvious illustration of this theory is the success of the U.S. Supreme Court in getting its decision in Bush v. Gore accepted. See Gibson, Caldeira, and Spence n.d.
outside such polities have been reported, and it is unclear that extant findings, mostly on the U.S., are generalizable to other political and legal systems. Not all cultures perceive courts as above politics—certainly this was not true of the old Communist regimes in Central and Eastern Europe (see, e.g., Markovits 1995)—and in many legal systems the rule of law is not a deeply and widely shared cultural value (see Gibson 2002; Gibson and Caldeira 1996). Subcultural differences within heterogeneous systems (e.g., Muslims in Western Europe) may render compliance especially problematic. Is it reasonable to assume that powerful political actors in regimes undergoing democratic reform will accept court decisions vetoing their programs? Politics in transitional regimes is often fierce, sometimes violent, since battles over the fundamental contours of political institutions are often being fought. The theory claiming that courts have special abilities to generate acquiescence, and thus that they can act as referees for political wars, may be applicable only to stable, democratic regimes, where the theory has been examined and tested empirically.

Consequently, the purpose of this article is to investigate the legitimacy of one of the newest of these high courts, the South African Constitutional Court. Based on a survey of the South African mass public, we ask whether the Court can function as a guardian of South Africa’s nascent democracy. More specifically, we test hypotheses about the consequences of institutional legitimacy for acceptance of unpopular court decisions. We do so within the context of a civil liberties dispute over the rights of political minorities. We expect that South Africans who attribute legitimacy to their Constitutional Court are willing to accept a court ruling that they oppose. We discover that the Court has relatively low legitimacy, at least as compared to other high courts; its legitimacy varies across racial groups; and, most important, that the Constitutional Court is able to convert its legitimacy into acquiescence only in some circumstances and only with some groups. We also find that the Court has only a limited ability to foster political tolerance by protecting unpopular political minorities from the wrath of the majority. We conclude that the theory of legitimacy so widely accepted among scholars studying stable, western democracies must be recast and rethought if it is to apply to great parts (if not most) of the world.

Theories of Institutional Legitimacy

Considerable agreement exists among political scientists on most of the major elements of legitimacy theory. For instance, nearly all agree that legitimacy is a normative concept, having something to do with the right (moral and legal) to make decisions. “Authority” is sometimes used as a synonym for legitimacy. Institutions perceived to be legitimate are those with an authoritative mandate to render judgments for a political community. This understanding of institutional legitimacy is widely accepted among those studying judicial institutions in the United States, especially the U.S. Supreme Court (e.g., Caldeira and Gibson 1992; Murphy and Tanenhaus 1968, 1990).
To serve effectively as veto players in a democracy, courts must have some degree of legitimacy. Indeed, the very notion of vetoing the actions of another institution implies that the court is going against popular opinion, at least as opinion is represented in majoritarian institutions (see Dahl 1957, particularly his attention to the “countermajoritarian powers of courts”). Thus, legitimacy takes on importance primarily in the presence of an objection precondition. When people approve of a decision, the legitimacy of the decision maker is of little consequence since people are getting what they want. When the decision is unpopular, its efficacy hinges upon the perceived legitimacy of the decision-making process and institution. Some may ask, for instance, whether the institution has the authority, the “right,” to make the decision, thereby challenging the outcome. Institutions short on legitimacy are thought not to be capable of vetoing the actions of more representative (and hence more legitimate) institutions of government.3

At this point in the theory, an important disagreement over definitions arises. Some scholars equate legitimacy with compliance; others treat legitimacy as one of many possible causes of compliance. We take the latter tack, conceptualizing the decision to obey or not obey a law or accept or challenge a decision as conceptually independent of whether an institution is judged to have the authority to make the decision. Hyde (1983), for instance, has argued that compliance flows more from habit than from legitimacy. Compliance may also reflect coercion, or compliance may result from fairly simple calculations of costs and benefits. To treat compliance as evidence of legitimacy makes tautological the relationship between perceived legitimacy and compliance and precludes consideration of any determinants of compliance that are not grounded in legitimacy.

To this point, we have been purposefully vague about the nature of the “dependent variable” in the legitimacy-compliance hypothesis since the empirical literature on the relationship has typically investigated one of three phenomena. First, studies analyzing elite or institutional compliance typically examine the actions or policies of institutions to determine whether they are in conformance with court decisions (for a review, see Canon 1991). Second, some scholars consider substantive change in attitudes, under the hypothesis that when the Court rules, people see the wisdom of its position and adjust their own views accordingly. Evidence of this effect is not particularly strong (see, e.g., Franklin and Kosaki 1989; Hoekstra 2000; Murphy and Tanenhaus 1990; see also Rosenberg 1991), although experimental research has been kinder to the hypothesis than survey-based research (e.g., Hoekstra 1995; Mondak 1991).

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3 Dahl and others refer to this power as a “legitimacy conferring capacity,” by which they mean that a court ruling can induce people to accept the decision of another institution because the court has ratified that decision. Since courts rarely challenge the ruling coalition in the United States, the role of the judiciary has been mainly to place its imprimatur on decisions, thereby encouraging citizens to accept outcomes with which they disagree. Scholars refer to this as the “political capital” of courts and note that institutions must husband this capital and spend it wisely if they are to be effective (e.g., Choper 1980; Mondak 1992).
A final line of research focuses not on attitude change, but rather on simply “accepting” a court’s decisions (e.g., Gibson 1989; Gibson, Caldeira and Spence 2002). The importance of this variable has been suggested by many, including Easton (1975, 451): “This positive nature of the belief in legitimacy usually carries with it the implication that we have an obligation to accept the acts of those considered legitimate to be binding on us.” Gibson and Caldeira (1995, 465) define accepting a decision as whether “citizens will countenance a judicial decision on an important issue of public policy as definitive, and whether they will therefore desist opposition on the issue and refrain from attacking the institution for its actions.” They also claim that, “By stamping their constitutional imprimatur on legislation, some argue that courts ‘settle’ political conflicts, or at least make it more difficult for opposition to continue to mobilize.” It is precisely this third tradition that informs our research on the South African Constitutional Court. Of course, all three bodies of work agree that when legitimacy is conferred, controversies tend to dissipate and subside.

Some of the strongest evidence that the U.S. Supreme Court possesses a legitimacy-conferring capacity comes from experimental research. For instance, Mondak (1992) found that attributing policies to the Supreme Court tends to persuade students to adopt or accept the Court’s position (whether this effect can be generalized to the full population of Americans is unknown; nor do we know the rate at which the attitudes “created” during the experiment deteriorate or persist). More generalizable survey-based research also contributes some support to this hypothesis. Most relevant for our purposes, Gibson (1989) found that the U.S. Supreme Court has some ability to generate acquiescence to unpopular decisions, although its effectiveness was not as great as many might have supposed. Gibson and Caldeira (1995) extended this research to a transnational context, focusing on the legitimacy of the European Court of Justice (ECJ). Though the ECJ has a limited store of legitimacy, it is effective at converting its legitimacy into compliance with its decisions, even its unpopular decisions. Thus, some empirical evidence does indeed support the conventional wisdom that “the greater the perceived legitimacy of the Court, the greater the probability that its policies will be accepted and faithfully implemented” (Johnson and Canon 1984, 194).

Despite voluminous research on the legitimacy-acquiescence linkage, it is unclear to what degree findings from long-established democratic polities can be generalized to the world’s emerging democracies. Courts such as the U.S. Supreme Court and the German Federal Constitutional Court have enormous stores of legitimacy, developed over a long time. How do courts in fledgling democracies acquire this ability to make their decisions “stick”? Do, and how do, people in political systems with little history or tradition of democratic governance come to accept granting counter-majoritarian powers to relatively unaccountable political institutions? Although the legitimacy-acquiescence linkage is

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4 Gibson, Caldeira, and Baird (1998) have shown that the length of time a court is in operation is in fact an important contributor to the legitimacy of the institution.
widely accepted by scholars, the generalizability of the theory must be more thoroughly investigated.

Once we broaden our concern beyond established democracies, it is reasonable to hypothesize that a variety of factors influence the degree to which courts are able to make their decisions stick. For instance, as the size of the stakes in the litigation increases, we expect the likelihood of compliance to decrease. When fundamental political values are at risk, acquiescence would be expected to be less widespread. To the extent that a polity is characterized by heterogeneous subcultures, including perhaps variability in fundamental commitments to the rule of law, judicial effectiveness would likely be more limited. More generally, the legitimacy of democracy itself—not just majority rule, but institutionalized respect for minority rights as well—may influence acquiescence to court decisions. Many Western courts are able to capitalize on deep-seated support for the rule of law, individual liberty and liberalism, limited government, and political tolerance through respect for minority rights (see Gibson and Caldeira 1996). But some new democracies tend toward the “illiberal democracy” model, and systems in which minority rights are not much respected are increasingly commonplace, even among nominally democratic regimes (see, e.g., Zakaria 1997; but see Karatnycky 1999). Studies limited to established Western democracies, therefore, in effect hold constant many of the variables determining the legitimacy-conferring abilities of courts.

The end of apartheid in South Africa provides a valuable opportunity to test legitimacy theory within a transitional regime. We begin our analysis with a description of the activities of the Constitutional Court and how South Africa might contribute to understanding better the hypothesized processes.

The Constitutional Court in South African Politics

South Africa’s Constitutional Court has struggled from its inception in 1995 to create a separate and distinct identity as a legal institution, in contrast to South African political institutions. According to Spitz and Chaskalson (2000), the creation of the Constitutional Court was enveloped in intense and highly political conflict, in part because all actors were able to foresee the power and importance of the Court in South African politics. Conflict over the Court’s structure was publicized widely, which probably undermined the initial legitimacy of the institution to at least some degree.

Perhaps recognizing the precariousness of its situation, the Court has been highly consensual in its decision making, with dissents in fewer than 5% of its cases (Klaaren 1996, 1997; Klaaren, Dagut, Mochaba, Phalane, and Singh 1999; Taylor and Klaaren 1998). Presumably, members of the Court believe judicial unity goes some distance toward countering its image as an institution conceived in partisan politics.

At the same time, the Court has not been reluctant to enter the political fray, often handing down politically controversial decisions. Though it may not be sur-
prising that the Court struck down many statutes from the apartheid regime, it also came down in many cases against the strongly held views of the new majority and various political and legal elites, and it has even challenged President Mandela and the African National Congress (ANC). For instance, in the face of widespread public concern about rampant crime and violence, the Court broadened protections of those accused or convicted of a crime, as in its decision to strike down the death penalty (*State v. Makwanyane and Another*, 1995), and in its ruling reversing the presumption that a confession made to a magistrate is voluntary and therefore admissible in court (*State v. Zuma and Others*, 1995). The Court angered many anti-apartheid activists when it rejected an application to have the Truth and Reconciliation Commission’s amnesty powers declared unconstitutional (*Azanian Peoples Organization (AZAPO) and Others v. President of the Republic of South Africa and Others*, 1996). The Court directly challenged the “governing coalition” by invalidating President Mandela’s effort to modify the Local Government Transition Act so as to favor the ANC in the Western Cape (*Executive Council of the Western Cape Legislature and Others v. President of the Republic of South Africa and Others*, 1995), and when it refused to certify portions of the final Constitution, in effect “declaring the Constitution unconstitutional” (*Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa*, 1996). Some scholars (e.g., Klug 1996, 54) warned that the rulings on capital punishment and other controversial issues are so unpopular that they threaten the legitimacy of the Constitutional Court and, indeed, of the constitutional order itself (see also Corder 1995).

If the Court took bold steps in some areas, it has, in the views of many, moved too cautiously in defining and expanding the social and economic rights in the Constitution. Thus, for example, in *Soobramoney v. Minister of Health of KwaZulu-Natal* (1997), the Court found the provincial government’s refusal to fund extraordinary medical measures consistent with the constitutional right to health care and emergency treatment. More generally, some scholars and activists on the left have taken the Constitutional Court to task for failing to force the national government to deliver on the promises of the social and economic clauses of the Bill of Rights (e.g., Rickard 2000). By the end of 1997, ordinary South Africans could point to few decisions of the Constitutional Court that markedly improved the quality of their lives.

Racial conflict over the judiciary has also been pervasive, with some of the residue rubbing off on the Constitutional Court. Many see the courts as the last bastion of white domination, especially since blacks make up only a small percentage of the bench in the ordinary courts and since only three blacks sit on the Court (Corder 1995). Despite the Constitution’s clear concern for racial diversity, diversification of the Constitutional Court lags behind the other branches of the South African government.

In sum, the Constitutional Court was conceived in controversy, continues to be involved in the most contentious social issues, and has not been timid in offending various constituencies. Ironically, it suffers at once from an understandable...
identification with the ANC, which undoubtedly undermines its legitimacy among whites, and from an image in some quarters as much too timid in its approach to constitutional development, too willing to protect the white minority, allied with the regular judiciary, and too slow to reflect the racial diversity of the society at large. Moreover, the Court is a young institution and inevitably is tainted by its linkage to the apartheid past. Thus, we expect the Court to enjoy a limited store of institutional legitimacy, to have little capacity to bring about acquiescence to its controversial decisions, and to be unable to play a major role as a veto player in South African politics.

The Special Meaning of Legitimacy in a Deeply Divided Society

Unfortunately for the Court, legitimacy takes on particular importance in a deeply divided society like South Africa (see Horowitz 1991). In such polities, differences in history, culture, values, and interests can produce dramatically different views of the duties of political institutions, as well as assessments of whether they are functioning properly. Such polities face enormous difficulties when it comes to consolidating democracy. If the legitimacy of democratic institutions—including the Constitutional Court—varies across the major ascriptive groups, then it is difficult to confine political conflict to ordinary issues of public policy and to keep it from spilling over to struggle over the very nature of the political regime itself (see, e.g., Gibson n.d.). Thus, in the analysis that follows, we are especially attentive to the attitudes toward the Court held by South Africa’s various racial communities.

Research Design

Our analysis is based on a panel survey of South Africans conducted in 1996 and 1997. The first wave was fielded in the fall (April through June) of 1996. Interviews were completed with roughly 94% of the 3,258 South Africans in the sample. The respondents were interviewed in their language of choice. Versions of the instrument were prepared and validated (i.e., translated, back-translated, and reconciled) in Zulu, Xhosa, Tswana, North Sotho, South Sotho, and Afrikaans (in addition, of course, to English). The sample is representative of all major ethnic/racial/linguistic groups in South Africa (i.e., via over-sampling; for details on the research design and sampling, see Gibson and Gouws 2002).

The reinterview—in which the items measuring the legitimacy of the Constitutional Court were asked—was conducted in 1997. The response rate was 53%.

5 In South Africa, scholars and practitioners alike have worried that multiculturalism might undermine the fledgling democracy (e.g., Giliomee 1995). For instance, if elections are nothing more than a racial census (see Horowitz 1991)—if political allegiances are strongly and perhaps irrevocably tied to race—then the political pluralism so essential to democratic governance has difficulty emerging (see also Mattes, Taylor, and Africa 1999, 236).
This compares favorably with panels conducted in other parts of the world (see Gibson 1996; Gibson and Caldeira 1996).

In our analysis, we distinguish among the various subcultures in South Africa, adopting the traditional racial categories used by survey researchers and others. In our analysis, we distinguish among the various subcultures in South Africa, adopting the traditional racial categories used by survey researchers and others.

When we report figures for the entire South African population, we weight the data so as to render the number of respondents in each group proportionate to the size of the group in the population. Although 1,518 reinterviews were completed, the weighted N is 1,285 (since many minority groups, like whites and Coloureds, were oversampled).

The Institutional Legitimacy of the Constitutional Court

Following a considerable body of research on conceptualizing and measuring mass perceptions of high courts (see Caldeira and Gibson 1995; Gibson and Caldeira 1995, 1998; and Gibson, Caldeira, and Baird 1998), we employed three items as indicators of the legitimacy of the Constitutional Court. Table 1 reports the responses of the South Africans to these queries. The first statements propose making fundamental structural changes to the institution (see Boynton and Loewenberg 1973); the last proposition is a generalized measure of trust that the institution will perform acceptably in the future. To the extent that South Africans support fundamental structural changes in the Court and distrust it, they are extending little legitimacy to the institution. We have excluded from this table those respondents who, when asked whether they had ever heard of the Court, replied that they had no awareness at all.

South Africans hold ambivalent attitudes toward their Constitutional Court. A majority believes that the Court can generally be trusted, but it is a slim majority, and a plurality asserts that if the Court started making unpopular decisions it should be abolished. Most respondents were simply confused by the item on

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6 These categories are derived from the insidious system used by the South African government under apartheid to classify people by race. Our use of the same or similar categories should not be taken to imply approval of anything about apartheid. Irrespective of the merits or demerits of such racial categorizations, as an empirical matter South Africans of every race continue to use similar terms in their daily lives (e.g., distinguishing between black and Coloured people; see Gibson and Gouws 2000). Generally, we follow the South African convention of referring to black South Africans as “Africans.”

7 Drawing on the work of Easton (1965), institutional legitimacy is typically referred to as “diffuse support.” Diffuse support is synonymous with our concept “loyalty”: One who is loyal to another does not turn on the other merely because the other acts badly now and again. Loyalty is sticking together even when it seems to make little sense to do so. Thus, diffuse support is decidedly non-instrumental in the sense that attitudes are not based on the calculation of satisfactions and dissatisfactions with the policy outputs of the institution. That is the concept we are attempting to measure here.

8 This follows the practice of earlier research. See Caldeira and Gibson 1992, 1995; Gibson and Caldeira 1995, 1998; and Gibson, Caldeira, and Baird 1998. The percentage of the sample excluded is 15 (and we report a cross-national comparison of comparable data in Table 2 below).

9 Note that only a minority (40.8%) of those expressing trust in the Court are willing to say that the institution ought not to be abolished if it consistently goes against the preferences of the people.
jurisdictional change. Very few South Africans actively distrust the Court, but the reservoir of goodwill for this institution is not particularly deep or solid. In the minds of many South Africans, the Court seems to be on a sort of probation, based on a cautious and somewhat suspicious trust. This is not surprising in light of the newness of the Court at the time of the interview (1997).

TABLE 1
Institutional Legitimacy, South African Constitutional Court, Attentive Public

<table>
<thead>
<tr>
<th>Level of Support for the Constitutional Court</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Not Supportive</td>
</tr>
<tr>
<td><strong>Court Jurisdiction—Reduce Decisional Authority</strong></td>
<td></td>
</tr>
<tr>
<td>South Africans</td>
<td>29.5</td>
</tr>
<tr>
<td>African</td>
<td>28.5</td>
</tr>
<tr>
<td>White</td>
<td>37.0</td>
</tr>
<tr>
<td>Coloured</td>
<td>29.3</td>
</tr>
<tr>
<td>Asian Origin</td>
<td>31.8</td>
</tr>
<tr>
<td><strong>Institutional Commitment—Do Away with the Court</strong></td>
<td></td>
</tr>
<tr>
<td>South Africans</td>
<td>39.5</td>
</tr>
<tr>
<td>African</td>
<td>38.1</td>
</tr>
<tr>
<td>White</td>
<td>42.9</td>
</tr>
<tr>
<td>Coloured</td>
<td>51.6</td>
</tr>
<tr>
<td>Asian Origin</td>
<td>34.4</td>
</tr>
<tr>
<td><strong>Trust—Court can be trusted</strong></td>
<td></td>
</tr>
<tr>
<td>South Africans</td>
<td>9.9</td>
</tr>
<tr>
<td>African</td>
<td>6.7</td>
</tr>
<tr>
<td>White</td>
<td>27.6</td>
</tr>
<tr>
<td>Coloured</td>
<td>17.2</td>
</tr>
<tr>
<td>Asian Origin</td>
<td>11.3</td>
</tr>
</tbody>
</table>

Note: In the first three columns, each row totals 100%, except for rounding errors. The data were collected with a Likert scale, ranging from strongly agree to strongly disagree. For the percentage distributions in the table, strong and moderate responses are collapsed into “Supportive” and “Not Supportive.” All items are scored so that a high number indicates a supportive response. The nature of the supportive response is shown below in parentheses for each item. Due to weighting, the racial group Ns do not total to the N for all South Africans.

Court Jurisdiction—Reduce decisional authority: The right of the South African Constitutional Court to decide certain types of controversial issues should be reduced. (Disagree)

Institutional Support—Do away with the Court: If the South African Constitutional Court started making a lot of decisions that most people disagree with, it might be better to do away with the Court altogether. (Disagree)

Trust—Court can be trusted: The South African Constitutional Court can usually be trusted to make decisions that are right for the country as a whole. (Agree)

a Racial differences: \( \eta = .05 \), not significant.
b Racial differences: \( \eta = .06 \), not significant.
c Racial differences: \( \eta = .24, p < .0000 \).
Racial differences in attitudes toward the Court are inconsistent across the items in Table 1, in part due to the large percentage of respondents who have not yet formed views toward the institution. Still, a difference of means test on a summed index of support for the Court reveals highly significant differences ($\eta = .14$, $p < .000$), with Africans expressing the highest level of loyalty toward the Court. A regression equation using dummy variables to predict attitudes (with Africans as the excluded group) reveals significantly less support among whites ($b = -.24$, s.e. = .06), and Coloureds ($b = -.24$, s.e. = .07), with less significant though lower support among South Africans of Asian origin ($b = -.13$, s.e. = .06).

In terms of the number of supportive responses on these three items, 33.9% of the Africans expressed no support for the Court, compared to 45.4% of the whites, 48.5% of the Coloureds, and 51.0% of the South Africans of Asian origin. Generally, Africans are the most supportive constituency for the Court, with whites, Coloureds, and Asian South Africans extending somewhat less legitimacy to the institution.

How much legitimacy does South Africa’s Constitutional Court enjoy? Though it seems from Table 1 that the Court’s legitimacy is limited, a more rigorous comparative basis for assessing these findings is available. Gibson, Caldeira, and Baird (1998) have reported comparable data from surveys in eighteen European countries (including Russia, which is, of course, partly in Asia). Table 2 reproduces the index of support from their Table 5, with comparable South African data added to the table.11

The first column in Table 2 reports the percentage of respondents who were completely unaware of the national high court in their country (these data are taken from Gibson, Caldeira, and Baird 1998, 348 (Table 2)). These respondents are excluded from the index of support since it makes little sense to ask people questions about an institution about which they have never heard. In South Africa, 15.1% of the sample is excluded from what we call the Court’s “Attentive Public.” This figure compares favorably with most of the other countries for which data are available.

From a comparative perspective, the South African Constitutional Court has failed to develop a very deep reservoir of goodwill among the South African mass public. The South African average is among the lowest in the table, with a mean nearly identical to that of Spain (1995). To put this further into perspective, consider the statement about doing away with the Court (since it so directly reflects our theoretical concern with institutional loyalty). The 27.9% of South Africans who would stand by their Court even when it makes unpopular decisions com-

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10 The mean inter-item correlation for these variable is .24, which is reasonably high for survey data. When factor analyzed, these three items produce a strongly unidimensional solution (the eigenvalues of the first two factors are 1.49 and .88, respectively). The weakest loading is from the trust item.

11 We have also added data from a recent survey in Canada that employed the same measures. For details see Fletcher and Howe 2000. We are grateful to Paul Howe for calculating the specific data we report for Canada in Table 2 (Provided by an e-mail communication, September 7, 2000).
pares with a support figure of 76.0% for the U.S. Supreme Court. Of the countries studied by Gibson, Caldeira, and Baird (1998), only in Bulgaria is support for a high court at a lower level (although East Germans and the Spanish are only slightly more supportive of their courts). Thus, in its early years, the South Africa Constitutional Court seems to have built less legitimacy than many of the major high courts in Europe, including the courts created since the fall of the Berlin Wall.

The Consequences of Institutional Legitimacy

Does institutional legitimacy have consequences for the ability of courts to serve as veto players in politics? The central hypothesis of research on institutional support is that legitimacy contributes to acquiescence. As Gibson and Caldeira assert (1995, 465): “Our interest here is with whether citizens will coun-

### TABLE 2

<table>
<thead>
<tr>
<th>Inattentive Public—% Unaware of Court</th>
<th>Index of Support</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mean</td>
</tr>
<tr>
<td>Spain (1993)</td>
<td>10.3</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>13.4</td>
</tr>
<tr>
<td>Germany (East)</td>
<td>1.0</td>
</tr>
<tr>
<td>Belgium</td>
<td>9.2</td>
</tr>
<tr>
<td>South Africa</td>
<td>15.1</td>
</tr>
<tr>
<td>Spain (1995)</td>
<td>10.7</td>
</tr>
<tr>
<td>Ireland</td>
<td>1.6</td>
</tr>
<tr>
<td>France (1995)</td>
<td>9.2</td>
</tr>
<tr>
<td>France (1993)</td>
<td>7.6</td>
</tr>
<tr>
<td>Russia</td>
<td>50.8</td>
</tr>
<tr>
<td>Canada</td>
<td>1.0</td>
</tr>
<tr>
<td>Hungary</td>
<td>9.0</td>
</tr>
<tr>
<td>Italy</td>
<td>9.0</td>
</tr>
<tr>
<td>Great Britain</td>
<td>1.7</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>25.0</td>
</tr>
<tr>
<td>Portugal</td>
<td>17.7</td>
</tr>
<tr>
<td>United States</td>
<td>.6</td>
</tr>
<tr>
<td>Poland</td>
<td>11.7</td>
</tr>
<tr>
<td>Greece</td>
<td>6.1</td>
</tr>
<tr>
<td>Germany (West)</td>
<td>1.5</td>
</tr>
<tr>
<td>Denmark</td>
<td>1.3</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>6.0</td>
</tr>
</tbody>
</table>

Note: The 100-point summated index is created from responses to the items reported in Table 1. The countries are ranked according to the degree of support for the national high court (lowest to highest).
tenance a judicial decision on an important issue of public policy as definitive, and whether they will therefore desist opposition on the issue and refrain from attacking the institution for its actions.”

Whether people accept actual court decisions of which they disapprove has rarely been analyzed, in large part due to the difficulty of studying heavily contextual behaviors such as the decision to accept a court ruling or not (but see Tyler 1990). Nonetheless, experimental research provides a method by which acquiescence can be studied. Following earlier research (Gibson 1989; Gibson and Caldeira 1995), we included in this survey a “Legitimacy Experiment” designed to assess whether loyalty toward the South African Constitutional Court contributes to the willingness of citizens to accept its unpopular decisions.12

The Structure of the Legitimacy Experiment

The experiment focused on tolerating a political enemy and began by asking the respondents to “imagine that [a disliked political enemy] was planning to make a public speech in your community.”13 Since such speeches are a common part of political life in South Africa, we doubt that many respondents had difficulty conjuring up an image of such an event. Indeed, a tactic often used by political parties in South Africa is to make recruiting speeches in “enemy” territory, including so-called no-go areas.14 The initial responses of the South Africans to a proposed speech by a disliked political enemy are, in general, fairly intolerant. Indeed, nearly 51% of the respondents strongly support banning the speech, with another 18% supporting the ban but not strongly. Since 9% of the respondents were uncertain of their own position, only 21% of the South Africans gave a tolerant reply when asked about an opponent’s desire to express its views. To reiterate, in the experiment,15 70% of the sample, the intolerant, were presented with

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12 For a report on another different experiment based on these data, see Gibson and Gouws 1999.
13 We refer to the responses toward a “disliked political enemy,” deliberately employing this vague phrase since the targets of intolerance used in the experiment are complicated. Appendix A discusses the structure of the groups used as targets. Note, however, that all respondents were confronted with a speech by a group they disliked very much, and thus the experiment validly measures political tolerance.
14 Portions of South Africa have from time to time been declared “no-go” zones by various political parties. A “no-go” area is designated to prevent members of another party access to that community, effectively eliminating the right to compete for the support of the voters in that area. For instance, in May, 1995, the Inkatha Freedom party (IFP) declared 84 “no-go” areas, claiming retaliation for the ANC’s “no-go” areas (Gouws 1996, 28). Though our experiment does not explicitly refer to “no-go” communities, the scenario depicted was no doubt realistic to nearly all South Africans at the time of the survey.
15 Disagreement exists in the research literature over whether a research design without random assignment of subjects to treatment conditions can properly be termed an “experiment.” Whatever term is applied to this vignette, random assignment is undesirable in this case because theory dictates the necessity of presenting a stimulus—the Court decision—with which the respondent disagrees (see Gibson, Caldeira, and Spence 2002).
institutional decisions allowing the speech to take place; the tolerant 21% were confronted with a court decision banning the speech. Once the South Africans had indicated their tolerance or intolerance, they were told that what they did not want to happen in the dispute was about to happen and were asked whether they would do anything about it. The next question posited that the local political authorities had made a decision on the controversy that was contrary to the respondent’s own preferences. For instance, those who would allow the speech to take place were told that the local authorities had decided to ban the speech. They were then asked whether they would accept or contest the decision of the local authorities. Finally, the subjects were told that the Constitutional Court had made a decision contrary to the respondent’s own view. Thus, for each of the survey respondents, we measured the preference prior to any institutional intervention, the initial behavioral propensity, the willingness to accept a contrary decision of the local authorities, and the willingness to accept a contrary decision of the Court.

Table 3 reports responses to the three measures of reactions to the possibility of an unwanted civil liberties outcome. The table splits the respondents according to whether their initial position was to tolerate or ban the speech. The first column reports the percentage of respondents who claim they would accept an unwanted outcome. The second and third columns show comparable data after the intervention of the local authorities and after the Constitutional Court ruled on the matter.

Most tolerant South Africans would not join in a movement to try to get the speech allowed, although racial differences in this propensity are large. Whereas only 38.4% of the Africans would not act to protect the rights of their political enemy, fully 78.9% of the whites would accept the decision. Coloureds and South Africans of Asian origin are similarly inclined to do nothing to support the speech taking place, although not to the degree of whites. The differences across race are moderately strong and highly statistically significant. The passivity of the whites stands out clearly in Table 3.

By contrast, intolerant South Africans are much more prone to action—only 29.5% would not join in efforts to ban the speech. Again, racial differences are substantial, with only one-quarter of the Africans claiming they would do nothing, but nearly two-thirds of the whites similarly inclined toward inactivity.

16 Since the number of respondents with no initial view is a non-trivial portion of the sample, we cannot entirely ignore them. However, it makes little sense to ask respondents without an opinion whether they would challenge an institution’s decision on the issue. We assume that citizens always accept decisions about which they do not care, so whether an institution is perceived as legitimate or not has no relevance (no “objection precondition” is present). Thus, institutions always begin with a bedrock of acquiescent citizens—those who approve of the outcome and those who do not care. Whether indifferent citizens are politically valuable for an institution is doubtful, however.

17 Caution must be exercised when analyzing groups other than the Africans since the number of people in some categories is often small.
Thus, Table 3 reveals that tolerant South Africans are less likely than their intolerant fellow citizens to act upon their initial preferences. This is true of each of the racial groups, although the difference is considerably smaller for South Africans of Asian origin. This finding is consistent with more general research (e.g., Gibson 1998) showing those with tolerant attitudes as having characteristics that make them less likely to be influential in politics, when compared to those with intolerant attitudes. This finding does not bode well for the protection of civil liberties in South Africa.

The most theoretically relevant portion of Table 3 has to do with reactions to the interventions of the authorities. Among tolerant South Africans, the decision of the local authorities increases acceptance of an intolerant outcome by about 12 percentage points; the Constitutional Court’s intervention results in roughly 18% more acceptance of a decision to ban the speech. Among those initially intolerant, the effect is weaker, with the Court able to convince about 11% more of the South African mass public to tolerate the speech. Across all South Africans, irrespective of their tolerance or intolerance, the effect of a Constitutional Court decision is not large—12.4% would acquiesce to the outcome (whatever it is) due to a ruling by the Court (data not shown). That is, if we combine both the tolerant and the intolerant, 34.7% would accept the initial decision on whether to allow the speech; a total of 47.1% would accept the outcome after the Court ruled.
The Total Effect of the Court’s Intervention

How successful would the Constitutional Court be in getting acquiescence to an unpopular decision? With the aid of a few simple assumptions, we can simulate the effects on the South African mass public of a ruling by the Court.

Before the intervention of the Constitutional Court, 69.7% of the South Africans were intolerant; 21.3% were tolerant. Let us assume that a Court decision with which the respondent agrees does not change her or his initial opinion. Thus, those who are tolerant remain tolerant after the Court makes a tolerant decision. Let us also assume that a Court decision has no effect on those without an opinion on the dispute. Thus, those agnostic about whether a speech should be allowed remain agnostic after the Court decides the case. With these two simple assumptions, we need only examine the reactions of those who oppose the decision in order to estimate public opinion as it would exist after the Court intervened in the dispute.

Assume that the Court makes a tolerant decision. Neither the 21.3% who are tolerant nor the 9.0% who are agnostic would change their views. Among the 69.7% who are initially intolerant, the Court decision converts some to grudging tolerance, converts others to uncertainty, and does not influence the views of yet another portion of the sample. If we apply the calculations, a tolerant court decision would result in 48.8% of the South Africans accepting/supporting the decision, 16.2% being uncertain, and 35.0% persisting in their intolerance. Thus, the Court would be able to boost tolerance from 21.3% to 48.8%, an increase of 27.5%.

Now, let us assume the Court makes an intolerant decision. Then, the tolerant segment of society shrinks to 5.5%, while intolerance (real or grudging) balloons to 84.1%. Thus, the effect of the Court in this situation is to diminish political tolerance by 15.8 percentage points and to increase intolerance by 14.4 percentage points.

These simulations demonstrate that the effect of a Court decision can be rather dramatic. Indeed, the “tolerance interval”—the range of opinion depending on what the Court decides—varies from 5.5% to 48.8%, a sizable and politically meaningful interval. Even though not all of this effect can properly be attributed to the legitimacy of the institution (because acceptance may result from a variety of factors—see below), the Court decision makes a politically significant difference.

Note that no empirical test of this proposition is possible, since by the design of the experiment, all respondents were presented only with a court decision contrary to their own preferences. It is entirely reasonable to assume, however, that when a court decides the way someone wants it to decide, the decision does little to change the opinion of the person (except perhaps to reinforce and strengthen it).

Neither is this assumption testable, since those with no opinion were not told anything about a decision by the court. Note that this assumption may require a corollary to the effect that most of these people would rarely become aware of court decisions.
These figures represent the total effects of a Court ruling. But to what degree is acquiescence a function of the perceived legitimacy of the Court? Some (e.g., Hyde 1983) have argued that legitimacy has little to do with accepting court decisions, and rational choice theorists would surely be loathe to endorse anything but instrumental calculations about whether to comply with a court ruling. Thus, we now turn to consideration of the legitimacy hypothesis and to tests of alternative explanations for the persuasiveness of the Court’s decisions.

**The Effect of Institutional Legitimacy**

Tables 4A and 4B report the bivariate relationships between the acquiescence measure and the perceived legitimacy of the Constitutional Court. The dependent variable is acceptance of the Constitutional Court decision (on a five-point scale). The by-now-familiar hypothesis is that those who attribute more legitimacy to the Court will be more likely to accept a contrary decision on this dispute over the group’s right to give a speech.

Consider first those who are initially tolerant (Table 4A). Among Africans, greater support for the Constitutional Court is associated with more acceptance of the Court’s decision (which is in this instance, of course, a decision favoring intolerance). Even at the lowest level of support, a majority (51.4%) of tolerant Africans would acquiesce, but among strong supporters of the Court, about two-thirds (66.7%) would accept a court decision with which they disagreed. This is a moderate and highly significant relationship ($r = .21$).

By contrast, among whites, we observe no such effect (although note that small numbers of respondents are involved in this analysis, since tolerance is not very widespread in South Africa). Whites overwhelmingly accept a court decision, and it matters not at all whether they are supportive of the Court or not. Something other than the legitimacy of the Court causes whites to be willing to (or resigned to) accept a decision with which they disagree.

A weak tendency for legitimacy to contribute to acquiescence can be found among Coloured South Africans, although again we must be especially cautious in analyzing only 41 people. Among South Africans of Asian origin, however, court legitimacy matters little: 77.8% of the least supportive and 82.4% of the most supportive Asians would not challenge an unpopular court decision, and the correlation, though not statistically significant, is even in the wrong direction.

Several conclusions emerge from analysis. First, great majorities of tolerant whites, Coloureds, and those of Asian origin are likely to accept a court decision contrary to their preferred position. Because acquiescence is so widespread, the legitimacy of the Court matters little. One might speculate that these South

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20 To reiterate, the question read: “And finally suppose that the Constitutional Court ruled that the speech [should/should not] be allowed to take place. How likely is it that you would try to get the Court’s decision reversed by another government department or court?” For the purposes of illustration in Tables 4A and 4B, we have trichotomized the responses to this question.
Africans would accept a decision of most political institutions, legitimate or not. This finding reinforces the view that legitimacy is not the only cause of acquiescence.

Second, tolerant Africans are not nearly so inclined to acquiesce. Only a bare majority of Africans would accept such a court decision. Nonetheless, institutional legitimacy makes a difference—those who perceive the institution as more legitimate are more likely to desist from challenging the decision. Yet, to put this into perspective, even among Africans extremely supportive of the Court, the proportion accepting the decision is lower than the proportions among non-Africans who are the least supportive of the Court.

Table 4B reports similar data for those who stated initially that they would support a ban on the speech. Among Africans, perceptions of the Court have nothing to do with acquiescence. Similar conclusions characterize Coloured South Africans and those of Asian origin. Among whites, however, some (positive) relationship exists. Moreover, except among whites, levels of acceptance of
the Court’s decision (in this instance, a tolerant decision) are considerably lower than those found among the tolerant. Generally, for the intolerant, the hypothesis that perceived Court legitimacy contributes to acquiescence must be rejected for all but white South Africans. Putting the two portions of the table together, perceptions of a legitimate Court only have a substantively significant effect on three groups: Africans and Coloureds who are tolerant, and intolerant whites. This is quite limited support for the central hypothesis of research on institutional legitimacy.

The substantive implications of these findings are important from the point of view of political tolerance. Among white South Africans, tolerance is obdurate and intolerance is pliant. That is, tolerant whites are likely to resist an intolerant decision from the Constitutional Court; their tolerance trumps their support for the institution, resulting in a tolerant conclusion. Moreover, intolerant whites can be persuaded by a tolerant Court decision. Combining the initial preferences and acceptance of the Court decision, the scenario represented by this experiment

<table>
<thead>
<tr>
<th>Reaction to Court Decision</th>
<th>Number of Responses Supportive of the Court</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>0</td>
</tr>
<tr>
<td><strong>African</strong></td>
<td>0.03</td>
</tr>
<tr>
<td>Challenge</td>
<td>46.9</td>
</tr>
<tr>
<td>Uncertain</td>
<td>15.5</td>
</tr>
<tr>
<td>Accept</td>
<td>37.7</td>
</tr>
<tr>
<td>Total (N)</td>
<td>100 (207)</td>
</tr>
<tr>
<td><strong>White</strong></td>
<td>0.30</td>
</tr>
<tr>
<td>Challenge</td>
<td>18.6</td>
</tr>
<tr>
<td>Uncertain</td>
<td>0.0</td>
</tr>
<tr>
<td>Accept</td>
<td>81.4</td>
</tr>
<tr>
<td>Total (N)</td>
<td>100 (43)</td>
</tr>
<tr>
<td><strong>Coloured</strong></td>
<td>0.08</td>
</tr>
<tr>
<td>Challenge</td>
<td>22.7</td>
</tr>
<tr>
<td>Uncertain</td>
<td>13.6</td>
</tr>
<tr>
<td>Accept</td>
<td>63.6</td>
</tr>
<tr>
<td>Total (N)</td>
<td>100 (22)</td>
</tr>
<tr>
<td><strong>Asian Origin</strong></td>
<td>0.12</td>
</tr>
<tr>
<td>Challenge</td>
<td>16.3</td>
</tr>
<tr>
<td>Uncertain</td>
<td>16.3</td>
</tr>
<tr>
<td>Accept</td>
<td>67.3</td>
</tr>
<tr>
<td>Total (N)</td>
<td>100 (49)</td>
</tr>
</tbody>
</table>

*Correlation of institutional loyalty and acquiescence: $r = -.03$.  
*Correlation of institutional loyalty and acquiescence: $r = .30$.  
*Correlation of institutional loyalty and acquiescence: $r = .08$.  
*Correlation of institutional loyalty and acquiescence: $r = -.12$.  

TABLE 4B  
The Effect of Court Legitimacy on Acquiescence, Those Initially Intolerant

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The substantive implications of these findings are important from the point of view of political tolerance. Among white South Africans, tolerance is obdurate and intolerance is pliant. That is, tolerant whites are likely to resist an intolerant decision from the Constitutional Court; their tolerance trumps their support for the institution, resulting in a tolerant conclusion. Moreover, intolerant whites can be persuaded by a tolerant Court decision. Combining the initial preferences and acceptance of the Court decision, the scenario represented by this experiment
is associated, in the end, with a fairly high level of tolerance among white South Africans. The results among Africans are entirely the opposite. Intolerant Africans are not persuaded by a tolerant Court decision; tolerant Africans allow their support for the Court to trump their tolerance. Thus, among Africans, the effect of the Constitutional Court’s legitimacy is to exacerbate intolerance, the opposite of the tendency among whites. Coloured South Africans react somewhat similarly to Africans. A legitimate court can persuade the tolerant to accept an intolerant outcome; it has little effect on those initially intolerant. Thus, among whites, the Court has the capacity to foster democratic practices; among most of the South African population, the Court can do little to convert those opposing the exercise of democratic freedom to a more tolerant and democratic position.

**Alternative Explanations**

We have found support for the legitimacy-acquiescence hypothesis among only three groups: Africans and Coloured South Africans who are tolerant, and intolerant whites. The relatively small number of white, Coloured, and Asian respondents, as well as the lack of variation among them in the measure of acquiescence, prohibits us from conducting more extensive multivariate analysis on these groups. Such limitations do not apply to the African subsample, which of course represents the vast majority of South Africans. Therefore, it is useful to consider whether these findings are sustained by a broader multivariate analysis. We have two specific objectives. First, we wonder whether there are alternative explanations that in a multivariate model would undermine the legitimacy-acquiescence finding among tolerant Africans. And, among intolerant Africans, if legitimacy does not account for acquiescence, then what does?

If people do not acquiesce because they believe the policy-making institution legitimate, then why do they accept unpleasant decisions? Previous research suggests several possibilities.\(^{21}\)

\(^{21}\) Note that these hypotheses concern acquiescence, not acquiescence in any particular direction. Thus, \(H_1\) says that people who care little about the issue will acquiesce to the Court ruling. If that ruling is tolerant, they will become tolerant. If it is intolerant, they will become intolerant.
that those who generally believe they have little ability to influence the
government to be the most likely to accept the unwelcome court decision.

**H4:** Acquiescence may stem from a more general commitment to democracy
and the rule of law. After all, however the respondents feel about the
Constitutional Court, it is formally legitimate in the sense of being a legally
constituted South African political institution. Thus, we expect those who
are committed to democratic institutions and processes in general to be
more likely to accept the Court’s decision.

**H5:** Finally, the salience of the institution itself may contribute to acquies-
cence. Earlier research (Gibson, Caldeira, and Baird 1998) has shown that
those more attentive to courts tend to support them more; it is reasonable,
therefore, to test whether attentiveness contributes to acceptance.

Appendix B reports the operationalization of each of these concepts.

The data in Table 5 support several conclusions about black South Africans.
First, the equation predicts the acquiescence of intolerant blacks much better than
it predicts the final position of blacks who are tolerant (compare the coefficients
determination). This is mainly due to the influence of initial behavioral propen-
sities. Among the intolerant, one’s final position on the civil liberties controversy
is closely related to one’s initial position, indicating that the effects of the institu-
tional interventions are not great. Among those initially tolerant, however,
initial behavioral propensities are dramatically less predictive of the respondent’s
final position, indicating that the institutional decisions do indeed influence most

**TABLE 5**

Predictors of Acquiescence, Africans Only

<table>
<thead>
<tr>
<th></th>
<th>Tolerant</th>
<th></th>
<th>Intolerant</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>b</td>
<td>s.e.</td>
<td>β</td>
<td>r</td>
</tr>
<tr>
<td>Initial Behavioral Propensity</td>
<td>.32</td>
<td>.08</td>
<td>.33***</td>
<td>.38</td>
</tr>
<tr>
<td>Salience of the Issue</td>
<td>.13</td>
<td>.11</td>
<td>.10</td>
<td>.02</td>
</tr>
<tr>
<td>Perception of Group Threat</td>
<td>.05</td>
<td>.11</td>
<td>.04</td>
<td>.12</td>
</tr>
<tr>
<td>Court Legitimacy</td>
<td>.47</td>
<td>.18</td>
<td>.24**</td>
<td>.20</td>
</tr>
<tr>
<td>Court Salience</td>
<td>-.28</td>
<td>.16</td>
<td>-.15</td>
<td>-.09</td>
</tr>
<tr>
<td>Democratic Values</td>
<td>-.02</td>
<td>.02</td>
<td>-.08</td>
<td>-.07</td>
</tr>
<tr>
<td>External Political Efficacy</td>
<td>-.06</td>
<td>.13</td>
<td>-.04</td>
<td>-.12</td>
</tr>
<tr>
<td>Equation Statistics</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Intercept</td>
<td>1.31</td>
<td>.80</td>
<td>.59</td>
<td>.37</td>
</tr>
<tr>
<td>Standard Deviation—Dependent Variable</td>
<td>1.47</td>
<td>1.62</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Standard Error of Estimate</td>
<td>1.34</td>
<td>1.17</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

\[ R^2 = .20** \quad .49*** \]

* p < .05, ** p < .01, *** p < .001.
tolerant South Africans. The strong effect of the propensity variable among the intolerant substantially increases the amount of variance explained while reducing the influence of the other independent variables. The contrary is true of the intolerant South Africans.

Second, confirming the results from above, the perceived legitimacy of the Court has a substantial impact on tolerant blacks but only a slight impact on intolerant blacks. Thus, the multivariate analysis adds confidence to our findings above regarding the asymmetry of the legitimacy-acquiescence linkage.

Two of the independent variables should be considered together—the salience of the issue and the perception of group threat—since they both reflect the importance of the dispute to the respondent. Among the intolerant, neither variable has much influence on acquiescence. The moderate bivariate relationship of issue salience is reduced to insignificance in the multivariate equation (perhaps through its relationship with initial behavioral propensities). Among the tolerant, a slight (and insignificant) tendency exists for greater salience to be associated with greater acquiescence. Since the coefficient is wrongly signed (and in light of the trivial bivariate relationship), we treat this hypothesis as rejected.

The impact of the salience of the Court is confusing. Among intolerant Africans, salience matters little. But among the tolerant, the more the respondent is aware of the Court, the less likely is he or she to acquiesce to its decision. We have no ready explanation for this finding except to note that it is independent (of course) of the effect of court legitimacy. Perhaps those more aware of the Court have learned displeasing things about it, such as its racial composition. Finally, the effects of democratic values and political efficacy are trivial for both the tolerant and intolerant. The weak effect of the former may be accounted for by the weak (and perhaps uncrystallized) commitment to democratic institutions and processes among most Africans (see Gibson n.d.), while the trivial influence of efficacy may have to do with the fact that any impact of efficacy is already represented in the much more influential “initial behavioral propensity” variable.

In terms of the two objectives of this multivariate analysis, we conclude that (1) legitimacy is in fact an important predictor of acquiescence among tolerant blacks, and (2) intolerant blacks are little affected by the Court or other aspects of the dispute.

Summary and Concluding Remarks

This analysis supports conclusions about two important aspects of South African politics: political tolerance and judicial legitimacy. Though the central purpose of the article has not been to dissect tolerance, several substantive findings are important and should give pause to those favoring the protection of civil liberties in South Africa. This research has shown that:

- South Africans are not very tolerant of their political enemies, with only a small minority being willing to put up with political activities by their hated political opponents.
Two important asymmetries characterize the structure of tolerance attitudes. First, research has shown that intolerance is a more strongly held attitude than tolerance, and that is true in South Africa as well. This greater intensity surely has a host of political implications. Second (and perhaps one such implication), attitudinal intolerance is more likely to be associated with taking action against the exercise of civil liberties than tolerance is likely to be associated with acting in favor of protecting civil liberties. Thus, intolerance is both more efficacious and pernicious than tolerance.

Several conclusions about the Constitutional Court and its power to legitimize are warranted:

• The Constitutional Court has not yet developed a broad stock of institutional legitimacy. The Court is very young, to be sure; but even compared to newly created constitutional courts in Europe, the legitimacy of the institution within the South African mass public is fairly limited.

• What legitimacy the Court enjoys is not readily convertible into acquiescence: Those who ascribe greater legitimacy to the Court are, generally, not much more likely to accept a Court decision with which they disagree. This is especially true of intolerant South Africans, and therefore the ability of the Court to constrain the intolerant majority is limited.

• Race plays an enormous role in this analysis. Most important, the Court seems to have the ability to persuade blacks not to tolerate, but not vice versa; among whites, it seems to be able to create tolerance, but not intolerance. The group that supports the Court the most—blacks—is least likely to accept its decisions. From the point of view of protecting minority rights, these are ominous findings.

• Acquiescence does not necessarily require legitimacy. This is an important finding. Many are willing to accept a Court decision irrespective of how much legitimacy they ascribe to the institution. Our research has not been very successful at accounting for this aspect of acquiescence (e.g., it is not a function of general political efficacy, nor of democratic values). Future research must do a better job of formulating and testing rival hypotheses.

• Generally, we are compelled to conclude that the Court has only limited ability to foster political tolerance and to protect unpopular political minorities from the wrath of the South African majority.

Thus, we conclude that theories of the legitimacy-acquiescence linkage do not work well in South Africa; the findings from research on stable democracies do not seem to be easily and directly generalizable to transitional regimes. Future research should specifically address the conditions under which institutional legitimacy contributes to acquiescence and, thus, to institutional effectiveness.

In terms of broader theories of courts and transitional politics, this analysis suggests several conclusions. First, courts are not always born with an endowment of legitimacy. Especially where legal institutions have been at the center of
political struggles, as they were in South Africa, newly created courts must earn the respect and trust of their constituents. Second, when a society is riven by cleavages, even disagreements over the desirability of democratic institutions and processes, achieving broad-based legitimacy may be difficult indeed. For many ordinary people, courts are the least “democratic” institutions, the most difficult to understand and grasp. That people would differ over extending legitimacy to largely unaccountable judicial institutions seems inevitable, especially in deeply divided polities.

Moreover, a legitimacy shortfall may be exacerbated if a court fails to appreciate the need for mass legitimacy (a common failing of judges, given the elitist nature of lawyers) and therefore seeks anonymity rather than publicity for the institution’s work. Judges have access to powerful symbols—even if they are only symbols of authority—that can contribute mightily to legitimacy, especially since extant research so strongly suggests that “to know” courts is “to love them.” Failure to mobilize these resources can only limit the effectiveness of judicial institutions.

Finally, courts may require some time to acquire legitimacy. Because they are typically denied the legitimizing imprimatur of the ballot box, courts in transitional regimes may begin with a legitimacy shortfall. At present, we understand precious little about how courts build legitimacy, in part because longitudinal studies are virtually nonexistent. Returning to the South African Constitutional Court to examine whether and how it succeeds in building legitimacy is therefore a crucial research task.

South Africa is greatly in need of a strong, legitimate (and independent) Constitutional Court. The country is badly divided by race and class, and politics currently provides little hope of bridging that gap. Moreover, a serious potential threat to the country’s fledgling democracy is unchecked majoritarianism. The hegemony of the ANC—with its as yet unused ability to mobilize its supermajority to modify the Constitution—frightens many, including those who support the substantive (as opposed to procedural) goals of the party. A strong constitutional court may at some point be essential to “veto” popularly supported governmental excesses (e.g., government efforts to combat the recent escalation of crime and urban terrorism). If the Constitutional Court is to become an effective defender of democracy, it must build a stronger and deeper reservoir of goodwill among ordinary South Africans.

Appendix A

We measured political tolerance by means of the “least-liked” technology (see, e.g., Sullivan, Piereson, and Marcus 1982). The respondents were asked to indicate which political group they disliked the most, second most, third most, and fourth most. Tolerance questions were then asked with reference to the most and fourth most disliked groups. Those unable to name four groups were asked about their third most disliked group; respondents unable to name three groups were
asked about their second most disliked group, and those unable to name two disliked groups were asked about either “those who would re-impose apartheid in the country” or “those who would force all whites to leave South Africa,” depending on which was disliked the most. These groups provide the “objection precondition” for the respondents, a necessary condition for valid measurement of political intolerance and institutional legitimacy.

The Legitimacy Experiment in 1996 used either the most disliked group or the other highly disliked group, with random assignment of respondents to the type of group. One consequence of this strategy is that there is more variability in group affect (and consequently threat perceptions and political tolerance) than would be the case were the most disliked group used for all respondents.

Most of this analysis is based on responses in the second interview, since that is where the Court legitimacy items were asked. The Legitimacy Experiment in 1997 used exactly the same group asked about in the experiment in 1996 (hence, the detail here about group selection in 1996). From the point of view of measurement validity, the requirement that tolerance be measured by reference to groups toward which the respondents hold a great deal of antipathy is therefore satisfied for all respondents.

The groups used in the experiment are generally mainstream competitors for political power in South Africa. The most commonly named group (26.2%) is the Afrikaner Weerstandsbeweging (Afrikaner Resistance Movement), a radical white separatist group, but 49.6% named as their political enemy the following political parties: the Inkatha Freedom Party, the National Party, the Democratic Party, the Pan-Africanist Congress, the African National Congress, and the South African Communist Party. Another 10.2% identified Afrikaners as their enemy.

Appendix B

The analysis in Table 5 employs several indices not elsewhere described. The measures used are:

Perceptions of Group Threat

As we have noted in Appendix A, the respondents were asked the Legitimacy Experiment in relationship to a political group they dislike a great deal. Using a seven-point semantic differential response set, perceptions of the threat posed by this group were measured as follows:

Here is a list of words that can be used to describe various political groups. Taking them one at a time, please tell me how you feel about (THE GROUP). The first pair of words is “not dangerous to society” versus “dangerous to society”. If you consider (THE GROUP) to be not dangerous at all, tell me the number 1. If you see (THE GROUP) as very dangerous, tell me the number
7. The numbers 2 through 6 represent increasing degrees of danger. How dangerous to society do you think (THE GROUP) is?

1. Not dangerous to society
1. Predictable
1. Committed to democracy
1. Danger to the normal lives of people
1. Likely to affect how well my family and I live
1. Angry toward the group
1. Willing to follow the rules of democracy

7. Dangerous to society
7. Unpredictable
7. Not committed to democracy
7. No danger to normal lives of people
7. Unlikely to affect how well my family and I live
7. Indifferent toward the group
7. Not willing to follow the rules of democracy

When factor analyzed, these items produce a strongly unidimensional factor structure. Factor scores from this single factor are used as the index of threat perceptions.

Democratic Values

The index used is a factor score from a second-order factor analysis of the responses to following items (collected on a five-point Likert response set):

Relative Valuation of Order and Liberty.
It is better to live in an orderly society than to allow people so much freedom that they can become disruptive.
Free speech is just not worth it if it means that we have to put up with the danger to society of radical political views.
Society shouldn’t have to put up with political views that are fundamentally different from the views of the majority.
Because demonstrations frequently become disorderly and disruptive, radical and extremist groups shouldn’t be allowed to demonstrate.

Support for Competitive, Multiparty Elections.
There are better ways to choose our political leaders than elections amongst candidates from several parties.
If the leaders we elect cannot improve the situation in the country, then it is better not to have competitive elections in the future.
Those supporting multiparty elections are doing harm to the country.

Support for Multiparty System.
All this country really needs is a single political party to rule the country.
A country made up of many ethnic groups should be ruled by only one party to prevent too much ethnic conflict from occurring.
Democracy in South Africa is too fragile to allow many political parties to compete with each other.
Support for the Rule of Law.

Sometimes it might be better to ignore the law and solve problems immediately rather than wait for a legal solution.
It’s all right to get around the law as long as you don’t actually break it.
In times of emergency, the government ought to be able to suspend law in order to solve pressing social problems.
It is not necessary to obey the laws of a government that I did not vote for.

As expected, the first-order factor analysis produced a four-factor solution, which was then rotated using oblique criteria. With one exception, the items load on the expected subdimension of support for democratic institutions and processes. The exception is instructive—the last rule of law item (laws I did not vote for) loaded most strongly on the competitive elections factor, suggesting that the respondents were reacting more to the voting part of the statement than its law part.

The second-order factor analysis extracted only a single significant factor (the eigenvalue of the second factor is .74). Three of the four subscales load at approximately .6; the competitive elections subscale loads at .8. Factor scores from this second-order solution are used as the index of support for democratic institutions and processes.

External Political Efficacy

The following items were used as measures of the respondent’s feeling of external political efficacy.

The people who run the country are not really concerned with what happens to people like me.
If public officials are not interested in hearing what people like me think, there is really no way to make them listen.
In our country, all political power is concentrated in the hands of a small group of people, and it is impossible for the rest of us to influence what the government does.

Responses were collected on a five-point Likert response set. When factor analyzed, these items reveal a strongly unidimensional structure. The efficacy index is simply the mean of the three responses.

Manuscript submitted 9 October 2001
Final manuscript received 29 April 2002

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