### 2NC Overview

#### The CP fiats that the Supreme Court take up the aff for consideration but that it explicitely rule against the aff on suspect grounds. That solves the whole case:

#### A) solidified organizational identity – losses force organizations in favor of the affirmative to pool human resources to revive a more administrative push for the plan

#### B) fundraising – litigation losses better raise the financial capital to influence people in high places. Mobilizes support more productively and efficiently than the aff

#### C) diffusion – forces political movements for the affirmative to lobby at multiple layers of government, multiplying solvency for the CP

#### The Supreme Court victories are a black hole for policy action – they act as flypaper that crushes progressive political pushes in congress and the executive – ONLY the CP solves

### 2nc perm

**1). The CP is mutually exclusive-you can’t have the court rule both for and against the aff**

**2). Links to the net benefit- includes a litigation win that kills action**

### 2NC Net Benefit - Enforcement

#### Only the CP provides a threat that sufficiently mobilizes action – the plan alone signals that no further action is necessary – only voting neg lights the fire under those that matter

Douglas NeJaime (Associate Professor of Law, Loyola Law School, Los Angeles) 2011 “Winning Through Losing” <http://lime.weeg.uiowa.edu/~ilr/issues/ILR_96-3_NeJaime.pdf>

I now move from organization-specific effects of litigation loss to movement-wide effects—from the mobilization of organizational constituents to the mobilization of movement constituents more generally. I argue that loss may produce for a movement some of the positive indirect effects of litigation that legal mobilization scholars have identified in the context of litigation victory and process. Litigation loss may raise consciousness, mobilize constituents, build resolve, and raise funds. It does so, however, in ways rooted uniquely in loss. The indirect effects associated with litigation loss depart from the possibilities and potential of litigation already identified in the legal mobilization literature and instead relate to the constraints on courts and the limitations of litigation in the more pessimistic account of courtcentered strategies. Litigation strategies might stall in the face of judges’ bias, their reluctance to extend rights to subordinated groups, or their unwillingness to undermine perceived legislative and community preferences. Yet they might do so in ways that allow advocates to speak effectively to constituents, elites, and the public based specifically on courts’ failures. When a court validates a claim, the group’s claim enjoys the legitimacy that comes with the state’s approval. When a court rejects the group’s claim, however, the demand that the legal claim embodies might be made more pressing and the deprivation more acute. That is, denial of the claim might serve to highlight more intensely the injustice suffered by the group. While victory might signal that continued or increased activism is no longer necessary, loss might incentivize more aggressive organization and advocacy.197 In this way, loss creates a distinct threat and provides a sense of urgency for a movement.198 This is the flip side of Rosenberg’s critique of court-centered strategies as demobilizing. Whereas legal victory might lull movement members into a false sense of security, legal defeat might encourage new, more vibrant mobilization and direct action by bringing awareness to courts’ ineffectiveness and explicitly demonstrating the failed promise of litigation. Scholars have shown how in the wake of Roe v. Wade, the abortion-rights movement’s activism declined, while the activity of opponents increased dramatically.199 Losing movements might experience a new (or renewed) motivation, while winning movements might relax, believing judicial victory has secured the desired change.200 Movement advocates, therefore, have an interest in highlighting legal defeat.201 Indeed, they may even frame ambiguous outcomes as defeats in order to create a new threat against which to rally.202

#### Court wins only produces limited motivation for action – only the CP can put enough pressure on political actors to budge

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Even where courts manage to overcome key constraints and order significant social reform, they often lack adequate independent power to ensure that such reform materializes. Courts may need help from other actors, particularly ground-level administrators, to implement and enforce their decisions.26 Through tactics ranging from stalling and withholding necessary funds to overt opposition and defiance, those resistant to the decision can make realization of the court’s ordered reform exceedingly difficult.27 Scholars who adhere to this pessimistic view of courts point to the Supreme Court’s Brown v. Board of Education28 decision as a paradigmatic example of litigation’s failed promise.29 Even though this decision followed in a line of desegregation and racial-equality decisions, it met with intense resistance from both elites and ordinary citizens. Absent action by other governmental branches, implementation and enforcement surfaced as significant problems that severely limited the effectiveness of the Court’s decision.30 Despite the Court’s impassioned rhetoric and commitment to desegregation, school integration remained elusive in the decade following Brown.31 As legal historian Michael Klarman puts it, “Brown had almost no immediate direct impact on desegregation.”32 Accordingly, Rosenberg concludes that “Brown and its progeny stand for the proposition that courts are impotent to produce significant social reform.”33 In addition to the claim that courts are generally incapable of directly producing significant reform, scholars in the “constrained courts” camp make the more contested and controversial claim that litigation rarely yields positive extra-judicial effects. In other words, litigation not only fails to directly produce reform, but also fails to produce indirect effects that might contribute to reform. Under this approach, the ancillary benefits supposedly generated by litigation are illusory. More specifically, these scholars argue that litigation often fails to mobilize movement constituents, positively influence public opinion, convince elites, or accelerate the pace of legislative change.34

### 2NC Solvency – Losing = Winning

#### Judicial losses are key to framing policy issues to mobilize political action – empirically spurs higher fundraising and shifts in strategy to the state level that solve the aff

Steven A. Boutcher (Department of Sociology University of California, Irvine) 2005 “Making Lemonade: Turning Adverse Decisions into Opportunities for Mobilization” <http://www.umass.edu/asalaw/content/newsletters/v013.n01-fall.2005.pdf>

Framing the Post-Bowers Environment. Much of the work that social movements do involves framing. Frames are “schemata of interpretation” which serve to interpret the world outside of a social movement and mobilize individuals into action. As Benford and Snow (2000) note, “frames help to render events or occurrences meaningful and thereby function to organize experience and guide action” (614). Collective action frames do not originate in a vacuum; activists strategically employ frames that they think will resonate with a larger audience. Following the Court’s ruling in Bowers, movement leaders responded to the defeat in two ways. First, the defeat was framed narrowly as an example of continued homophobia and discrimination against lesbians and gay men. Second, the decision was framed more broadly as an attack on democracy and basic freedoms enjoyed by all Americans. The first frame was targeted towards lesbians and gay men and the second frame sought to enlist the sympathies of others who may otherwise have ignored the decision. Grassroots Mobilization. Immediately following the decision, activists staged protests throughout the nation. The largest occurred in New York City where one protest included over 1,000 people blocking traffic in Greenwich Village, and another occurring during the July 4 celebration where 6,000 people marched against the decision chanting slogans such as “civil rights or civil war” and “Privacy: A Basic American Right” (Advocate 1986b). Protests were also immediately staged in other cities across the country, including Washington D.C., Boston, San Francisco and Dallas. The outrage produced by the Supreme Court decision was so intense that it continued to reverberate after the initial protests. In Phoenix, activists initiated the “national sexual privacy challenge.” This plan sought to establish media campaigns and rallies in states where sodomy laws were still on the books as well as those that decriminalized. In those states that still criminalized sodomy, the campaign urged activists to engage in requests for prosecution with their local authorities (Washington Blade 1986). Innovative protest campaigns such as these were initiated throughout the nation. Organizations held “kiss-ins” outside many state court buildings and legislatures to symbolically protest the sodomy ruling. Protests outside the Supreme Court building in Washington D.C. continued for months after the initial decision. These protests included speakers from many of the national organizations as well as Michael Hardwick, the plaintiff in the Bowers. These scattered protests occurring in various cities around the country were all leading up to a national march on Washington in 1987. Plans for the national march began after Bowers. The ongoing AIDS crisis was the main focus of the march, but the Bowers decision proved to be a great motivator for the event. A large civil disobedience rally was planned for the Supreme Court during the week’s events. The rally was so important to organizers that a full time coordinator was hired by the march committee to coordinate just this one event. Activists saw the national march as a complete success with attendance estimated at 500,000 by organizers. This was a substantial increase over the 1979 march on Washington where the estimated attendance was only 100,000. The highlight of the week’s events was the Supreme Court protest where over 600 arrests were made. Fundraising. Lesbian and gay rights organizations saw increased returns in their fundraising campaigns due to the Bowers decision. Lambda, The National Gay and Lesbian Task Force, and the Human Rights Campaign, a gay rights lobby organization, all saw significant increases in funding. In one fundraising campaign targeted specifically by the Bowers decision, NGLTF received more than $40,000 in July and August immediately following the decision. Lambda also saw its donations double. The oldest gay legal organization received close to $200,000 during July and August (Advocate 1986c). The post-Bowers flow of donations continued to increase after the initial reaction. NGLTF projected an increase of over $250,000 in its 1987 budget because of the increased funding. HRC projected a ten percent increase from 1986 to 1987 in its budget due to the loss in Bowers (Washington Blade 1987). The growth from the defeat followed into the 1988 organizational budgets as well. The Task Force received over $900,000 in funding for 1988, an increase of almost fifty percent for the organization from the previous year. Organizational Founding. Along with the steady rise in organizational funding following the Hardwick defeat, the lesbian and gay rights movement saw a growth of organizational founding, both at the national and local grassroots levels. Another key organization for the movement was the Ad Hoc Task Force to Challenge Sodomy Laws, known as the “sodomites,” which was founded in 1983. This organization was created to bring legal groups and lawyers together to help coordinate the fight for sodomy repeal throughout the nation. With the Bowers defeat, the Ad Hoc Task Force regrouped and changed its name to the National Lesbian and Gay Civil Rights Roundtable. This group continued as an informal coalition of various organizations headed by Lambda to coordinate litigation strategies among a variety of different issues, with sodomy laws being the prevalent issue. The National Gay and Lesbian Task Force also initiated a side project in response to Bowers. With the rise in funding the Task Force created the Privacy Project with the aim of contributing to the anti-sodomy campaign. The movement also saw an increase in organizational founding following the 1987 March on Washington. The biggest effect of the march was politicizing the large numbers of participants. These attendees left the March with a feeling of resolution and went home to form over 40 new groups, most of which focused on local and grassroots issues. Similar to the post-Stonewall era where activists became politicized and formed new organizations, the postBowers era accomplished similar effects. These groups were mostly formed at the grassroots level across the nation. One such group, the Alexandria Gay Community Association, was formed to combat Virginia’s sodomy law. These local grassroots organizations provided the groundwork for the larger national organizations to assist with sodomy law repeal. Venue Shifting. Immediately following the defeat, movement leaders recognized the impact that the decision would have on their campaign in the federal courts. The Ad Hoc Task Force to Challenge Sodomy Laws, a national network of lawyers and activists committed to repealing the sodomy laws, met less than three weeks after the Bowers decision. During the conference, activists set an alternative agenda for repealing the remaining sodomy laws. This agenda included lobbying state legislatures to repeal sodomy statutes, filing lawsuits in the state courts claiming the sodomy statutes are unconstitutional to state constitutions, and using the media to channel the public’s attention to the need for repeal. The strategy to focus on state venues courts and legislatures was largely successful for the movement. Following Bowers, eleven states decriminalized their sodomy statutes, three through the legislative process and eight through the judicial process. The state campaign in Texas led to the Supreme Court in Lawrence v. Texas. Cultivating New Alliances. Similar to the NAACP’s campaign against Southern school segregation, the campaign for sodomy repeal initially began as a legal campaign centered on the use of litigation. Following the defeat of Bowers, gay legal organizations were caught in a bind. Litigation strategies, when effective, do not require a broad coalition. However, when litigation fails, as it did with Bowers, legal activists must seek to cultivate alliances with other groups. Following Bowers, alliances were formed in two ways; first, gay legal organizations opened up a dialogue with non-legal gay rights organizations and second, the movement sought alliances with non-gay organizations, such as women’s, labor, and religious organizations. The Bowers decision was helpful in building a coalition of broad support to the issue of sodomy repeal. Immediately following Bowers, Vic Basile of the Human Rights Campaign said of the decision, “it will help to do for us what we thus far have been unable to do for ourselves, which is to form a broader coalition with people – whether gay or straight, black or white – who can’t help [but] see the egregiousness of this decision. I think we will find support from people who we didn’t expect to find support from.” (Advocate 1986a). An instance of this was seen immediately following the decision when the Ad Hoc Task Force to Repeal Sodomy Laws met less than a month after the decision. Traditionally only open to lawyers, the Ad Hoc Task Force, for the first time invited the executive directors of two major national gay rights organizations, Jeff Levi of the National Gay and Lesbian Task Force and Vic Basile of the Human Rights Campaign, were invited to coordinate the postBowers sodomy repeal strategy. The movement also sought to build a coalition with non-gay organizations in the post-Bowers environment. The framing strategies mentioned above provided the impetus for this coalition building. By arguing that the defeat was a threat to the basic rights enjoyed by all Americans, the movement was able to successfully enlist the assistance of non-gay groups. The Privacy Project, initiated by the NGLTF, was partially created to build these alliances. Conclusion The connection between law and social movements has been slow going (but I must plug the Collaborative Research Network (CRN) for law and social movements in the Law and Society Association – which, consists of a great group of scholars building this connection). This essay has tried to strengthen the connection between the two literatures. I have argued that legal decisions should play a larger role in movement analyses that focus on the role of political context on mobilization – legal defeats can provide a context, which activists can turn into an opportunity for mobilization. By tracing the LGBT movement after the fallout of Bowers v. Hardwick, I have tried to illustrate how such a defeat can lead to a proactive response and the various ways this might occur.

#### Several empirical examples prove our thesis

#### First, LGBT movement

Steven A. Boutcher (Department of Sociology University of California, Irvine) 2005 “Making Lemonade: Turning Adverse Decisions into Opportunities for Mobilization” <http://www.umass.edu/asalaw/content/newsletters/v013.n01-fall.2005.pdf>

The example of Bowers provides a good case to study the effects of a negative court decision on a social movement. Bowers illustrates a decisive turning point for the LGBT movement and presents an interesting question for social movement scholars: in the face of negative state action, how will the movement respond? Current social movement literature tends to focus on the opening or expansion of political opportunities (McAdam 1982) preceding movement mobilization. However, in the case of the post-Bowers LGBT movement, mobilization was, in part, a reaction to external threat. How do we explain this seemingly contradictory case? Fortunately, there is a burgeoning literature that examines the impact of political threats on movement mobilization (Tilly 1978; Van Dyke 2002). This literature argues that threats can mobilize movements into action, especially when opportunities for mobilization are absent or constrained. I intend to contribute to current social movement literature in two ways: first, I expand the threats by including negative legal decisions into the framework. I argue that losing an important legal decision can in many ways propel a movement into proactive activity. Second, I extend the idea of threat by examining how negative outcomes can lead to shifts in overall movement strategy. I trace the movement following the decision in Bowers and argue that the negative decision affected the trajectory of the movement in important ways.

#### Second, Roe v Wade and Brown decisions

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Legal victories for one side, however, are a threat to the other. The decision in Brown and the subsequent state pressure pushing for desegregation in Southern schools mobilized white supremacist constituencies as well as sympathetic Southern elites (Rosenberg 1991; Morris 1984). Roe v. Wade (410 U.S. 113) had a similar effect; the decision mobilized anti-abortion activists to block the implementation of the decision and subsequently forced abortion activists into a defensive position (Staggenborg 1991). For these movements in particular, the threatened status quo was enough to spark action. Just as Brown mobilized Southern elites and Roe pushed anti-abortion advocates into action, Bowers propelled the LGBT movement into a proactive position.

#### Losing produces wins

Douglas NeJaime (Associate Professor of Law, Loyola Law School, Los Angeles) 2011 “Winning Through Losing” <http://lime.weeg.uiowa.edu/~ilr/issues/ILR_96-3_NeJaime.pdf>

Are we to assume, then, that the losers pack up and go home, that a negative judicial decision is debilitating, and that the benefits the winners enjoy never accrue to the losers? While scholarship on judicial impact and social movements might suggest as much, this Article argues otherwise. Our preoccupation with winning and our assumption that the winner–loser divide governs the distribution of tangible and intangible assets blind us to the function of loss. Litigation loss may, counterintuitively, produce winners. When savvy advocates lose in court, they may nonetheless configure the loss in ways that result in productive social movement effects and lead to more effective reform strategies. Loss may yield many of the indirect effects that scholars have identified in the context of litigation victory and litigation process, but it may do so in ways that are uniquely tied to loss itself. A range of social movement tactics, aimed at a variety of audiences, may draw strength from litigation loss precisely because such loss demonstrates and documents the limitations of court-centered change.

#### Organizational identity

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The first aspect of litigation loss that I highlight has an organizationspecific

component and depends on the social movement organization’s relationship to other organizations and constituents within the larger movement. Here I contend that litigation loss may be constitutive of organizational identity and may, counterintuitively, contribute to an organization’s stature and longevity within a movement. To make this claim, I distinguish a social movement’s loss from a loss experienced by an organization within a social movement. Of course, I do not mean to imply that consistent loss over the long term may not harm an organization and contribute to its decline; I merely argue that organizational representatives may use loss, at least in the early years of the organization’s life, to stake out a position in a competitive social movement.

### 2NC Solvency – CP = States CP

#### CP revitalizes state based court movements – they can bar it from federal review – solves the aff

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In the wake of a litigation loss, advocates might shift venues at the same time that they use the loss to render more compelling the appeal to decision makers in these new venues. This Subpart addresses two significant shifts: (1) shifts across levels of government, e.g., from federal to state-based activism and (2) shifts across branches of government, e.g., from courts to legislative and executive officials.a. Shifts Across Levels of Government Loss in the U.S. Supreme Court, or more generally in the federal courts, might prompt a reworked strategy that focuses on state-based venues. In this sense, litigation loss might lead to a critical rethinking of tactics that may ultimately yield a more robust and effective movement. More significantly, though, advocates may use the federal litigation loss to encourage players at the state level to act.224 The loss itself may specifically aid the appeal to the targets of the new tactics. Furthermore, consistent with theories of state constitutionalism and interactive federalism, state constitutional interpretations that contravene analogous federal interpretations may contribute to eventual shifts in federal jurisprudence.225 In this sense, a two-way street exists between the federal and state levels of government. The LGBT-rights movement again provides relevant examples. After the Supreme Court loss in Bowers, LGBT-rights advocates were essentially shut out of federal court; it would be difficult to bring successful claims under the federal Constitution so long as it remained constitutional to criminalize the conduct that largely defined the group.226 With little reason for optimism at the federal level, advocates reworked their strategy to focus on state-level actors.227 First, new state-based LGBT organizations emerged to develop novel strategies for overturning anti-sodomy laws.228 Between the Bowers and Lawrence decisions, at least twenty-one state advocacy organizations formed.229 Some achieved legislative victories, convincing state lawmakers to repeal sodomy prohibitions.230 These same organizations ultimately evolved into the massive Equality Federation, which today spearheads much of the state-based legislative advocacy on LGBT parenting rights and relationship recognition.231 Rosenberg’s pessimistic account of litigation would endorse this institutional shift from federal courts to state legislatures.232 Yet in pushing beyond courts in my analysis of law and social change, I do not want to suggest, as Rosenberg does, that litigation is “bad” and legislative advocacy is “good.” Instead, my focus on litigation loss shows that sophisticated social movement lawyers engage in multidimensional advocacy that moves beyond, but not without, litigation.233 Indeed, within a federal system of government, opportunities to achieve court-based reform exist on more than one scale. Advocates can achieve meaningful reform through litigation at the state level when, and often because, litigation has failed at the federal level. While federal, state, and local levels of government form a hierarchy in which constraints from above limit state and local action, state courts can at times shield their decisions from federal review, and LGBT-rights advocates have encouraged them to do so on significant issues.234

### 2NC Theory Helper

#### The CP is legitimate – discussion of the impacts of losses versus wins in the courts is critical to policymaking

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My aim in this Part, then, is to show how even though legal mobilization and cause lawyering scholarship fails to theorize litigation loss, it supplies the foundations for such a theory. In what follows, I rely on a dynamic, multidimensional framework of law and social change—one in which litigation, from filing to resolution, shapes and is shaped by activity in other institutional domains. I claim that appreciating courts’ potential and recognizing courts’ limitations are both critical to understanding the ways in which litigation influences movement activity and policy formation across the full range of law-making avenues.

### 2NC Link – Controversial Decision Costs Judicial Capital

#### Plan consumes court’s limited capital – controversial rulings cost capital.

Grosskopf and Mondak, 1998 Profs of Poli Sci Long Island U and U of Illinois, 1998

(Anke Grosskopf, Assistant Prof of Political Science @ Long Island University, & Jeffrey Mondak, Professor of Political Science @ U of Illinois, 1998, “Do attitudes toward specific supreme court decisions matter? The impact of Webster and Texas v Johnson on Public Confidence in the Supreme Court” Political Research Quarterly, vol. 51 no 3 633-54 September1998)

The existence of a strong link between basic values and diffuse support does not necessarily preclude a role for specific decisions, particularly when we seek to understand how support comes to change over time (e.g., Caldeira and Gibson 1992: 658-61). We believe that any claim that the Supreme Court is fully immune to backlash against controversial decisions can be rejected on a prima facie level. First, consider the extreme case. Were the Supreme Court to make its occasional blockbusters-Brown v. Board of Education, Roe v. Wade, Texas v. Johnson, etc.-the norm by routinely ruling on the thorniest social questions, we see it as implausible that such actions would bring no cumulative impact on how people view the Court. Second, the Supreme Court's typical mode of operation suggests that justices themselves view institutional support as an expendable political capital (Choper 1980). That is, the Court recognizes its own political limitations, and thus justices pick their spots carefully when approaching potentially controversial cases. From this perspective, the apparent dominance of democratic values as a determinant of institutional support (e.g., Caldeira and Gibson 1992) means not that the Court is insulated from backlash, but that strategic justices tread cautiously so as to keep backlash to a minimum. Consequently, how and where we examine whether public response to Supreme Court decisions affects institutional support may shape what answer we find.

#### Court needs to save capital – controversial decisions burn capital.

Peretti, Prof PoliSci Santa Clara U, 2001

(Terri Jennings Peretti, Prof of Poli Sci at Santa Clara University, 2001, In Defense of a Political Court, p.152)

To the degree that a justice cares deeply about her policy goals, she will be quite attentive to the degree of support and opposition among interest groups and political leaders for those goals. She will be aware of the re— sources (e.g.. commitment, wealth, legitimacy) that the relevant interest groups possess who bear the burden of both carrying forward the appropriate litigation necessary for policy success and for pressuring the other branches for full and effective implementation. Only the policy motivated justice will care about the willingness of other government officials to comply with the Court’s decisions or carry them out effectively. And only the policy motivated justice will care about avoiding the application of political sanctions against the Court that might foreclose all future policy options. The school desegregation cases illustrate these points quite nicely. The Court could not pursue the goal of racial integration and racial equality until there was an organized and highly regarded interest group such as the National Association for the Advancement of Colored People willing and able to help. The Court further was required to protect that group from political attack, as it did in NAACP v. Alabama and NAACP v. Button. Avoidance of other decisions that might harm its desegregation efforts was also deemed necessary. Thus, the Court had legal doctrine available to void antimiscegenation statutes, but refused to do so on two occasions.‘°° (Murphy notes that one justice was said to remark upon leaving the conference discussion, "One bombshell at a time is enough."'°‘) The Court additionally softened the blow by adopting its “deliberate speed" implementation formula. Even so, the Court still needed the active cooperation of a broad range of government officials. in all branches and at all levels of government, in order to carry out its decisions effectively. Thus, significant progress in racial integration in the southern schools did not in fact occur until Congress and the Department of Health, Education, and Welfare decided to act. The Court further had to consider whether the political opposition that it knew would ensue would be sufficient to result in sanctions against the Court, such as withdrawal of jurisdiction or impeachment. These considerations arose only in the process of caring deeply about the policy goal at hand—racial equality in public education. They were not a by-product of caring only about the logical or precedential consistency of an opinion or of worrying only about deriving a decision from the Framers’ intentions.

#### Judicial capital is key to rulings.

Gibson and Caldeira, Profs of Political Science at Wash U in St. Louis and Ohio State U, 2009

(James L. Gibson, prof of PoliSci @ Wash U in St. Louis, and Gregory A. Caldeira, Prof of PoliSci @ Ohio State U, January 2009, *“*Confirmation Politics and The Legitimacy of the U.S. Supreme Court” *American Journal of Political Science*, Vol. 53, No. 1, January 2009, Pp. 139–155)

We reiterate our view that institutional legitimacy is an enormously important source of political capital. The conventional hypothesis is that legitimacy is significant because it contributes to acquiescence to decisions of which people do not approve (e.g., Gibson, Caldeira, and Spence 2005). We have devoted considerable effort toward investigating that hypothesis throughout the world. To the extent that we are correct in our analysis of the theory of positivity bias, we suggest here that legitimacy has an even more significant role in the political process: Citizens who extend legitimacy to the Supreme Court are characterized by a set of attitudes that frame a variety of expectations and choices. These frames provide a standing decision that is difficult to rebut in contemporary American politics. This consequence of institutional legitimacy is perhaps the most significant.