

# You Better Shop Around: Litigant Characteristics and Supreme Court Support

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Groups seeking to advance rights have often appealed to the Supreme Court. But the justices are hesitant to engage with such cases, especially when it means siding with a traditionally unpopular group. Attorneys consequently look to make these cases more appealing. One way of doing this is identifying counter-stereotypical litigants, or litigants whose identities do not align with the expected beneficiaries of a decision. Counter-stereotypical litigants should change the conversation about who benefits from a rights-affirming decision and increase support for the Court making that decision. Using survey experiments, we find that counter-stereotypical litigants can make a difference but not universally. Our results show that Black male litigants increase support for overturning affirmative action, while Asian American men decrease it. We also find that White female litigants draw broad support for upholding gun rights. These results suggest that attorneys must carefully consider identity politics when seeking to increase decision support.

Since the Supreme Court ruled in *Regents of the University of California v. Bakke* (1978) that universities could consider an applicant's race when making admissions decisions, organized interests have sought out litigants willing to publicly and forcefully challenge that decision (Ball 2000). The Center for Individual Rights found Cheryl Hopwood, Jennifer Gratz, and Barbara Grutter, three accomplished women who failed to get into top public universities despite having the grades, test scores, and experiences to contend for seats (Burka 1996; Perry 2007). Hopwood, Gratz, and Grutter sued the institutions that denied them admission, contending the schools' race-based admissions policies discriminated against well-qualified White applicants. When the Supreme Court rejected their argument in *Grutter v. Bollinger* (2003), strategist Edward Blum helped Abigail Fisher, another White woman, use a nearly identical argument to sue the University of Texas over its admissions policies (Coyle

2013). When Fisher failed to win over the justices, Blum changed tactics. He found talented Asian Americans denied admission to top public and private universities and convinced them to sue those schools, arguing that universities considering race in admissions discriminated against well-qualified White and Asian American applicants (Hsu 2018). Blum reasoned that maybe presenting the same argument on behalf of a different identity group, specifically one that affirmative action should help, would land the argument instead.

The Center for Individual Rights and Edward Blum's efforts to use the federal judiciary to overturn policies unfavorable to their causes are not unique. After all, the judicial branch has a mandate to affirm constitutional rights (Pacelle 1991), and parties seeking to advance civil rights or liberties in spite of the status quo consequently attempt to do so through the judicial system (Rice 2020). What makes Blum and cause lawyers like him different is their approach to advancing

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The experiments in this study were conducted in compliance with all relevant laws and approved by the institutional review boards at the University of South Carolina, Louisiana State University, and Georgetown University. Both experiments are preregistered (see <https://tinyurl.com/yaa9979c> and [https://aspredicted.org/blind.php?x=ZHP\\_6JC](https://aspredicted.org/blind.php?x=ZHP_6JC)). Replication files are available in the *JOP* Dataverse (<https://dataverse.harvard.edu/dataverse/jop>). The empirical analysis has been successfully replicated by the *JOP* replication analyst. An online appendix with supplementary material is available at <https://doi.org/10.1086/732956>.

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rights. When facing a Court that cares about and depends on public support and approval (Gibson, Caldeira, and Spence 2003), attorneys making status quo changing arguments do everything they can to fortify their legal positions so the justices side with them (Perry 1991). Attorneys like Blum also try to alter support for the issue, and they do this using the litigants themselves (Coyle 2013). Acknowledging that group-based identity, like race and gender, plays a major role in how people respond to policies and the institutions that make them (White and Laird 2020; Zilis 2021), rights-affirming attorneys try to increase support for an outcome using “counter-stereotypical” litigants whose identity characteristics appear incongruous to their legal arguments. Ideally, these litigants, who are heavily marketed to the media (Park and Penner 2022; Winkler 2011), should appeal to different identity groups and alter popular narratives about who benefits from a rights-affirming decision, thus raising its popularity and giving the justices cover for issuing it. In a world where attorneys seek every advantage before the justices, strategically marrying legal arguments and identity politics could make all the difference.

We want to know if this strategy actually works. Does seeing a counter-stereotypical litigant increase support for the Court after it makes a rights-affirming decision? If yes, from whom does that increased support come? We examine two areas of rights-based litigation associated with particular identity groups: challenges to affirmative action admissions policies that benefit White college applicants (Gilens, Sniderman, and Kuklinski 1998) and pro-gun rights litigation favored by conservative White men (Filindra and Kaplan 2017). Using data from two original survey experiments in which we varied the race and gender of the litigant bringing the lawsuit, we find the public responds to counter-stereotypical litigants, though not all identity groups respond the same way. Our findings show that male and Black participants are more supportive of a Court that rules against affirmative action policies when the litigant is a Black man and that all participants are less likely to support the Court if an Asian American man brings the suit. The results also indicate the Court is slightly more popular when it expands gun rights at the behest of a White female litigant. These findings suggest engaging in strategic litigant selection can be useful, as long as great care is taken to understand which litigant works and to which identity group they appeal.

By examining the relationship between litigant selection and public support for the Court and its decisions, we make two significant contributions to the literature on the Supreme Court and public opinion. First, we connect personalized litigant characteristics to public response to the judiciary. Past research demonstrates that decision characteristics like coalition size and the decision to overrule precedent can influ-

ence acceptance or compliance with Supreme Court decisions (Salamone 2014; Zink, Spriggs, and Scott 2009). More recent work by Armaly (2021) and Zilis (2021) focuses on in-group dynamics, suggesting acceptance of a decision and the Court’s authority to make it can change based on an individual’s identification with or approval of the type of group—ideological, racial, or gendered—that benefits from the Court’s decision. We also examine the role that identity politics play in Supreme Court decision acceptance, but we do so by examining how an individual litigant, purposefully selected for public presentation because of his or her identity group appeal, influences an individual’s approval of the Court in the wake of a rights-affirming decision.

Second, our work builds on a larger conversation in public opinion research that seeks to better understand identity’s influence on institutions. Previous work notes the influence of racialized attitudes on the presidency broadly (Hopkins and Washington 2020) and presidential agenda setting specifically (Tesler 2012). Similarly, members of Congress understand that identity politics permeate political issues and influence their legislative behavior (Garcia and Stout 2020). While the Supreme Court is not a legislative policymaker, it is responsible for a number of landmark decisions that shape the American political landscape. Moreover, interest groups use the Court as a policy change venue because the justices are willing to produce decisions that fundamentally alter the legal status quo (Hall 2010). In this article, we offer a systematic study that speaks to identity’s impact on the public’s support for the Supreme Court as well as the implications of tying a case to a face.

## LITIGANTS AND LEGITIMACY

After the Supreme Court ruled in *Brown v. Board of Education* (1954) that separate educational facilities for Black and White students were inherently unequal, rights-based interest groups began using the federal court system to advance their causes in earnest (Marshall and Hale 2014). Groups questioning the legal status quo typically found themselves locked out of traditional policymaking venues, where polarization and reelection incentives kept legislators from engaging with all but the most popular issues (Baumgartner and Jones 1991). Recognizing these venues would likely never engage in the unpopular fight to affirm Black rights, the NAACP Legal Defense Fund took its fight to the federal judiciary, an institution that offers access to anyone with standing to sue and is tasked with protecting citizens’ rights (James 2010; Pacelle 1991). While the courts do not always abide by their counter-majoritarian mandate (Hall and Ura 2015), they responded positively to the Legal Defense Fund’s arguments, and that sent a signal to groups attempting to overturn the status quo that

the judiciary might affirm their rights regardless of their popularity (Hall 2010). While not all rights-affirming litigation pursuits are successful, enough are that groups advocating certain rights-based interests find the process worth their time.

Getting a case to the Supreme Court requires massive time and resource commitments. Cause lawyers, the attorneys who argue rights-affirming cases, have to identify litigants whose cases could produce favorable outcomes for an entire group of people, initiate litigation, develop favorable legal arguments, and then follow those cases through multiple appeals, all on the small chance the justices agree to review them and rule in their favor (Lane 2022; Marshall and Hale 2014). While cause lawyers and interest groups can join the litigation team later in the process (Collins 2008), the cost of litigating a case is high regardless of the entry point (Barnes 2019). Interest groups with limited resources consequently tend to wait for a case to exhibit potential before getting involved, with some groups filing amicus briefs encouraging the Court to hear a case (Schoenherr and Black 2019), and more filing policy-centric amicus briefs after the Court grants review (Hansford 2004). For the groups actively engaging in the legal process from the beginning, however, the burden of carrying the initial expense drives them to do everything they can to increase the likelihood of getting a case to the Supreme Court and then winning it.

Because rights-affirming interests seek to upend the legal status quo, their task is particularly difficult. At a minimum, upending the legal status quo costs the justices public standing, with even the most ardent policy supporters expressing wariness at a Court that reverses itself and thus looks unprincipled (Bartels and Johnston 2013). Moreover, these cases often invoke strong negative sentiments from some part of the public (Rice 2020), and the justices, for many reasons, tend to avoid being countermajoritarian when possible (Casillas, Enns, and Wohlfarth 2011). The justices have and maintain a “reservoir of good will” that allows them to issue unpopular but constitutional opinions when necessary (Gibson et al. 2003), and they try to tame public response by writing opinions the public can read and understand (Black et al. 2016). But when the justices fail to tame popular opinion, unpopular decisions drain the reservoir faster than popular decisions or commitment to legal principles can fill it, which makes the justices reluctant to use their authority for anything but the most necessary of countermajoritarian decisions (Hall and Ura 2015; Nicholson and Hansford 2014; Zilis 2021). Add in that decisions upending the legal status quo tend to involve issues that garner media coverage (Collins and Cooper 2012), and rights-affirming cases brought by cause lawyers are exactly the cases the justices are reluctant to review.

Americans’ use of social group identity to understand policies and their implications drives popular reaction to such opinions. Social identities, which people define using socially constructed group categories (Omi and Winant 2014), play an important role in structuring how people describe themselves and others (Tajfel 1981). Group identity creates heuristics that people use to categorize their social and political worlds (Dawson 1994; McClain et al. 2009), and it affects policy preferences as well (Lau and Redlawsk 2001). Race and gender are the two identities most often used to codify group-based membership and behavior (Davis 2010; Jardina 2019; Stout, Kretschmer, and Ruppanner 2017). Because there are long-standing positive and negative stereotypes associated with each racial or gender group (see Phills et al. 2018), recognizing that in-groups or out-groups benefit from a policy or decision can seriously affect receptivity of that policy or decision (Hayes, Fortunato, and Hibbing 2021). At the Supreme Court, in-group affection increases support for the Court and its work when the Court issues pleasing decisions (Armaly 2021; Gibson and Nelson 2018), and negative affect toward out-groups decreases support when the Court favors those groups instead (Armaly and Enders 2022; Zilis 2021). Importantly, group-based information is readily available in media coverage of Supreme Court cases, which discusses cases in terms of broad winners and losers (Hitt and Searles 2018). Consequently, the attorneys coordinating these legal fights look for ways to make their cases palatable to the justices so they are willing to endure the cost of deciding in their favor.

Cause lawyers can use the very group identities that damn their prospects to broaden the appeal of a rights-affirming decision, however. They attempt to do this by identifying “counterstereotypical” litigants, or litigants whose identity characteristics appear at odds with the benefits being sought. If an attorney already has a good case and strong argument, why not also try to find a litigant whose identity can change the narrative about who benefits from a decision upending the legal status quo and get new identity groups to buy into the outcome? Consider, for example, that lawyers with the ACLU Women’s Rights Project sought out male caretakers denied government benefits that female caretakers received so they could show the justices and the public that legal sex discrimination hurts men and women (de Hart 2018). Similarly, the Becket Fund for Religious Liberty showed the breadth of its commitment by representing a Muslim prisoner seeking to grow a beard for religious reasons (Dias 2014). Neither organization was shy about their strategy, and they proudly explained it to media outlets because they wanted the public to see their litigants and hear their arguments. These litigants fronted legal cases that made strong rights-based arguments

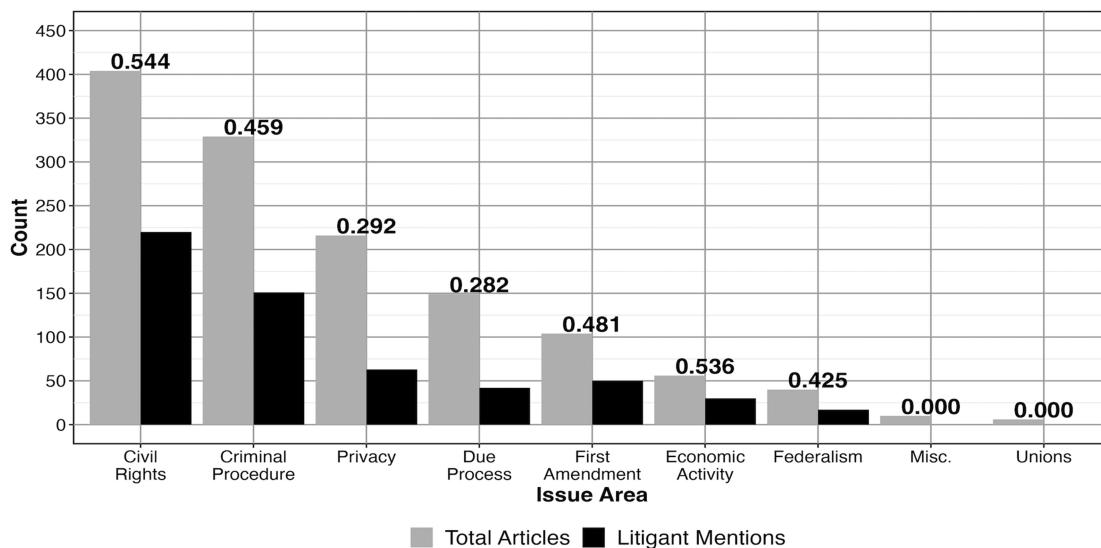


Figure 1. Mentions of a litigant in 1,315 newspaper articles covering 112 salient Supreme Court cases heard between the 1998 and 2014 terms, broken down by issue area. Gray indicates the total number of newspaper articles in that issue area across the time period, while black shows the number of those articles that mention the litigant. Numbers denote the proportion of articles that mention the litigant.

to the justices, but they also showed that rights-affirming decisions in their favor offered benefits to a far wider swath of the population than one would typically believe, leading to stronger support and coverage for the justices to rule in their favors.

To be clear, identifying a counter-stereotypical litigant is not always an available or advisable option. For one thing, successful cause lawyering depends first and foremost on good case facts and a strong argument, and attorneys are hesitant to deploy counter-stereotypical litigants at the expense of case quality (Marshall and Hale 2014). For another, counter-stereotypical litigants do not exist in all situations; consider that the NAACP Legal Defense Fund could not feasibly argue that White people suffered legal harm under Jim Crow (James 2010). Additionally, people need to know who the litigant is before they can respond to that litigant's presence, which requires media coverage. As we show in figure 1, which examines coverage of litigant characteristics in high-salience cases between 1998 and 2014,<sup>1</sup> newspapers are more likely to mention the litigant in some types of cases than they are in others, which makes it difficult to effectively deploy a counter-stereotypical litigant in certain situations.<sup>2</sup> Finally, engaging in expansive litigant selection efforts is resource expensive, and most causes

cannot afford to take it on as a result (Coyle 2013). Thus, many causes have the litigants they have, and only a select group can effectively deploy this strategy. But cause lawyers do bring lawsuits on behalf of counter-stereotypical litigants across a small subset of salient issues that have broad popular impact.

## HYPOTHESES AND EMPIRICAL APPROACH

Does putting a counter-stereotypical litigant at the front of a case actually increase support for a Court that makes a rights-affirming decision? If yes, from where does that increased support come? To answer these questions, we used experimental survey manipulation to examine how support for the Supreme Court changes after participants learned that litigants of different races and genders brought a rights-affirming case to the Court. By "support," we mean short-term satisfaction with the Court reflecting immediate reactions to its work, or what is more commonly known as "specific support," which we measure using a feeling thermometer (Armaly and Enders 2022). This is different from "diffuse support," more commonly known as legitimacy, which is related to institutional arrangements and remains reasonably stable over time and is therefore less likely to change due to one single decision (Gibson et al. 2003).

Across two experiments, we presented participants with a newspaper article about one of two hypothetical rights-affirming Supreme Court decisions. In the first case, participants read about a litigant using an equal protection argument to successfully challenge a public university's affirmative action program, and in the second, participants read about a litigant

1. Following Collins and Cooper (2012), we examined cases that received front-page coverage in the *New York Times*, *Washington Post*, *Los Angeles Times*, and *Chicago Tribune* between the 1998 and 2014 terms, from one year before the case got decided to one year after.

2. For mentions of race and gender, see figures A1 and A2 in the appendix.

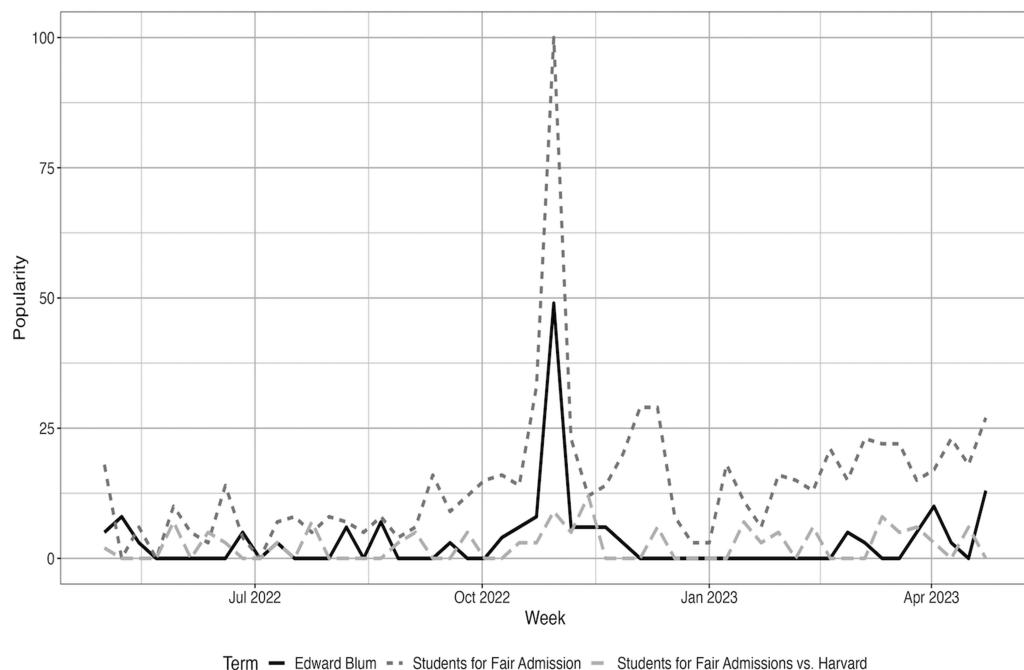


Figure 2. Google Search Trends for terms associated with *Students for Fair Admissions v. Harvard*. The popularity measure ranges from 0 to 100, with value of 100 representing peak popularity and a value of 0 indicating no one searched the topic that day.

successfully arguing that a state gun law violated their Second Amendment rights. In each vignette, we varied the race and gender of the litigant.<sup>3</sup> We focus on affirmative action and gun rights because they are (1) salient Supreme Court issues where attorneys have (2) utilized counter-stereotypical litigants because these types of cases are (3) associated with certain identity groups, which means they (4) lend themselves to different types of counter-stereotypical litigants. All of these factors increase the external validity of our experiment.

Regarding affirmative action, race-based college admissions policies exist to help racial and ethnic minorities (Ball 2000), and most racial and ethnic minorities consequently support them (Leung and Song 2021; White and Laird 2020). Conversely, most White people seek to overturn affirmative action policies (Gilens et al. 1998), and White women fronted the three most famous challenges to affirmative action that went before the Court (Coyle 2013).<sup>4</sup> But they are not the only identity group that credibly challenges affirmative action poli-

cies; in fact, anti-affirmative action campaigns regularly place Black and Asian Americans who do not support affirmative action in leadership positions, at least in part because their participation draws attention and intrigue (Tate 2010).<sup>5</sup> Importantly, attorneys and other interested parties search for counter-stereotypical litigants in these types of cases, just as Edward Blum did and continues to do (Hsu 2018; Idfrense 2023). These counter-stereotypical litigants take positions that appear at odds with their identity group preferences and draw attention to their causes in the process (Stephens-Dougan 2020; White and Laird 2020), which can affect responses to policy outcomes across racial and gender groups. And, perhaps most importantly, people engage with these cases and want to learn more about them. As we show in figure 2, when the Supreme Court heard two affirmative action challenges in late 2023, people sought out information about Edward Blum, Students for Fair Admissions (the group of Asian Americans bringing suit), and the cases themselves, which means people were learning about the litigants through media outlets.

The gun rights movement similarly lends itself to the use of counter-stereotypical litigants. Gun culture and Second Amendment rights are best associated with conservative, rural

3. Sample vignettes are available in the appendix.

4. We asked 1,000 participants if they would associate (1) a man or a woman or (2) a Black, White, or Asian American person with a lawsuit challenging affirmative action in college admissions. Participants split on whether they thought a male (58%) or female (42%) litigant was more likely, but 89% of participants said they thought the litigant would be White (see app. table A1).

5. For a broader discussion about Black and Asian American support for affirmative action and involvement with affirmative action cases, please see the appendix.

White men (Winkler 2011),<sup>6</sup> and White men are consequently more likely to support them, while women and racial and ethnic minorities are significantly less likely to do so (Filindra and Kaplan 2017). But support can, and does, change based on the identity of the person asking for gun rights. In fact, the decision that ultimately advanced gun rights, *D.C. v. Heller* (2008), began with gun-rights advocates looking for counter-stereotypical litigants so they could change the conversation about who wants to own a gun and why (Coyle 2013). Research suggests people are more supportive of White women seeking gun rights than they are of Black men who do the same, at least in part because they associate White women's desire for guns with a need for protection and Black men's desire for guns with violence and crime (Hayes et al. 2021). Gun rights groups like the National Rifle Association have spent considerable time and effort expanding the national understanding of who owns a gun (Middlewood, Joslyn, and Haider-Markel 2019). As with affirmative action, seeing a counter-stereotypical litigant would draw intrigue and conversation, not disbelief.

Aligning our theory with the rights-affirming interests' beliefs, we hypothesize that support for the Supreme Court will increase among those least likely to agree with a rights-affirming decision if they see that a counter-stereotypical litigant brought the suit. Starting first with attempts to overturn race-based college admissions policies, we expect:

**H1a.** Non-White participants should be more supportive of the Court eliminating affirmative action programs when told a non-White litigant brought the lawsuit than they would be if a White litigant brought the suit.

**H1b.** White participants should be most supportive of the Court eliminating affirmative action programs, regardless of the litigant's identity.

Because support for gun rights is both racialized and gendered, we also expect to see:

**H2a.** Non-White participants should be more supportive of the Court that expands gun rights when told a non-White litigant brought the lawsuit.

**H2b.** Female participants should be more supportive of the Court that expands gun rights when told a female litigant brought the lawsuit.

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6. We also asked about litigants in Second Amendment cases (app. table A1). Participants said the litigant would be a man (92%) and White (50%).

### Experiment 1: Black and White litigants

In our first experiment, we used Lucid to recruit 1,087 participants to take our survey between October 19 and November 4, 2020.<sup>7</sup> Because Black attitudes toward the judiciary can be significantly different from White attitudes (Gibson and Nelson 2018), we recruited a demographically representative sample of 652 White participants and a geographically representative sample of 435 Black participants.<sup>8</sup> Participants began the survey by addressing a battery of questions that measured their feelings of legitimacy toward the Court as well as their responses to recent decisions involving affirmative action and gun rights (Gibson et al. 2003), after which they worked through the racial resentment battery (Nelson and Kinder 1996) and the modern sexism scale (Schaffner 2022).<sup>9</sup>

After completing the preliminary questions, each participant was randomly sorted into one of two different issue area groups, and we then divided participants between treatment and control groups. In the treatment groups, participants learned about either James or Brianna Smith, the Black or White litigant who initially brought a case either challenging an affirmative action policy or fighting to further gun rights.<sup>10</sup> Participants in the control group read about the case but received no information about the litigant who brought it. We thus conducted a  $2 \times 2 \times 2$  experiment with control groups. In table 1, we provide a summary of the treatments as well as the number of participants assigned to each group. Participants read a newspaper article about a case in which a rights-affirming litigant challenged the legal status quo and won. After reading the vignette, we asked participants to evaluate the Supreme Court using a 100-point feeling thermometer and then asked them if they agreed or disagreed with the decision. We closed out the survey by asking participants to identify the name and race of their litigant (our manipulation check) and then re-asked several of the legitimacy questions that appeared at the beginning of the survey.<sup>11</sup>

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7. Studies find Lucid obtains valid and reliable results (Coppock and McClellan 2019).

8. The demographic breakdowns are available in table A3 in the appendix.

9. Racial resentment traditionally captures White racial attitudes, but we follow Kam (2019) and consider that racial resentment might say something about Black in-group attitudes. We present these results in tables A6 and A24 in the appendix.

10. To avoid tapping into implicit bias connecting names and race (Gaddis 2017), we pretested first names for race neutrality. Results are in table A4 in the appendix.

11. Manipulation check results are available in tables A5, A6, and A7 in the appendix. As the analyses in tables A8, A9, and A10 show, the results do not significantly change if we only analyze the responses of participants who answered the question correctly.

Table 1. Experiment 1 Conditions

Issue Area	Identity of Litigant	Summary of Condition	n
Affirmative action	Control	Litigant challenged a race-based admissions program at a state school.	109
	White male	White man challenged a race-based admissions program at a state school.	106
	Black male	Black man challenged a race-based admissions program at a state school.	107
	White female	White woman challenged a race-based admissions program at a state school.	111
	Black female	Black woman challenged a race-based admissions program at a state school.	112
Gun control	Control	Litigant challenged a state restriction on the transportation of legally registered handguns.	106
	White male	White man challenged a state restriction on the transportation of legally registered handguns.	108
	Black male	Black man challenged a state restriction on the transportation of legally registered handguns.	111
	White female	White woman challenged a state restriction on the transportation of legally registered handguns.	109
	Black female	Black woman challenged a state restriction on the transportation of legally registered handguns.	108

### Experiment 2: Asian American and White litigants

In our second experiment, we again asked participants to read about a challenge to an affirmative action admissions policy at a state university. This time, however, we randomly assigned participants to the control or to read about a White litigant, James or Brianna Smith, or an Asian American litigant, Christopher or Christina Wang, bringing the lawsuit. By including Asian American litigants in the vignette, we mirrored the real-life cases that Edward Blum coordinated. We provide a breakdown of this randomization in table 2.

We launched our second survey with Lucid on February 8, 2022, two weeks after the Court announced it would review Blum's real-life cases in the next year, to avoid any priming based on coverage of the case. Between February 8 and 14, Lucid recruited a demographically representative sample of 999 participants.<sup>12</sup> The survey questions were the same as those asked in the first experiment with one exception: We replaced the racial resentment scale, which measures attitudes toward African Americans (Kinder and Sanders 1996), with a measure of racial attitudes toward Asian Americans (Kim n.d.).<sup>13</sup>

## RESULTS

### Experiment 1: affirmative action (Black and White litigants)

We begin our analysis of the results by examining Black and White support for the Supreme Court when Black and White litigants challenge the use of affirmative action in college

admissions. Our dependent variable is the participant's feeling toward the Court after reading about the decision, measured using a 0 to 100 degree feeling thermometer, and we analyze our results using ordinary least squares (OLS) regression.<sup>14</sup> Figure 3 shows the direct treatment effects across groups for participants who read about a case challenging the use of affirmative action in college admissions.<sup>15</sup> Each point represents the average predicted value of the control or treatment group's post-treatment feelings toward the Court. We follow Julious (2004) and graph 84% confidence intervals around these points to ease interpretation; if the confidence intervals in figure 3 do not overlap, there is a statistically significant difference at a 0.05 alpha level, and if they do overlap, there is not a statistically significant difference between the groups.

Looking at figure 3, we see that participants who know nothing about the litigant are supportive of the Court after it issues a rights-affirming decision overturning a public university's affirmative action policy (65). This is also true when participants know about the litigant's identity characteristics, as there is not a statistically significant difference between any treatment group's feelings toward the Court and the control group's. These results suggest no one litigant draws

12. The demographic breakdowns are available in table A11 in the appendix.

13. Full survey questionnaires are available in the appendix.

14. We also asked participants whether or not they agreed with the Court's decision in the affirmative action case. The results remain substantively the same if we use this dependent variable, as we show in tables A12 and A13 of the appendix.

15. Models for the entire analysis are available in table 3. Models with additional controls for demographic characteristics and attitudinal measures are available in table A18 in the appendix.

Table 2. Experiment 2 Conditions

Issue Area	Identity of Litigant	Summary of Condition	<i>n</i>
Affirmative action	Control	Litigant challenged a race-based admissions program at a state school.	196
	White male	White man challenged a race-based admissions program at a state school.	197
	Asian American male	Asian American man challenged a race-based admissions program at a state school.	196
	White female	White woman challenged a race-based admissions program at a state school.	204
	Asian American female	Asian American woman challenged a race-based admissions program at a state school.	206

mass support, including counter-stereotypical Black litigants. This does not comport with our theory, which suggests people are broadly more supportive of the Supreme Court when they see that a counter-stereotypical litigant brought the case.

With that said, what we see in the aggregate might mask individual group effects. To see how participants with different identity characteristics respond to counter-stereotypical litigants, we turn to the indirect treatment effects, presented in figure 4. Our analysis begins with figure 4A, which shows the differences in support for the Supreme Court between women (black circles) and men (gray triangles). Our results suggest that gendered differences in support exist. Men in the control group intuitively express significantly more positive feelings toward the Court than women (71 versus 61 on the thermometer,  $p < .05$ ).<sup>16</sup> Figure 4A also shows that male participants feel significantly more positive toward the Court than female participants when the litigant is a Black man (76 versus 63,  $p < .05$ ). Within-group differences for male participants reveal that male participants are 12 degrees more likely to support the Court when a Black male litigant brought the case than a Black female (76 versus 64,  $p < .05$ ). These findings are likely a product of participants' perceptions of who benefits from affirmative action, as affirmative action is often framed as beneficial to Black people, and the public largely associates race-based stereotypes with Black men (Purdie-Vaughns and Eibach 2008). Thus, it is likely the case that our male participants see Black men as the ideal counter-stereotypical litigant. Female participants' support for the Court in light of a decision overturning affirmative action remains steady across all treatment areas, however, and is typically lower than their male counterparts'.

Figure 4B shows the difference in responses to the Supreme Court thermometer question between White (gray triangles) and Black (black circles) participants. As we expected, figure 4B shows that White participants express more positive feelings toward the Court than Black participants after learning the

Court overturned an affirmative action policy. And, in alignment with hypothesis 1b, White participants approve of the Court at a significantly higher level than Black participants when they received the control, White male, White female, or Black female treatment ( $p < .05$ ). Black and White participant response is indistinguishable only when they read about a Black male litigant bringing the case, which leads to a slight (but not significant) increase in Black support for the Court. We believe Black conservative beliefs, which are strong despite overall attachment to the Democratic party, help explain this result, as they suggest a preference for merits-based success (see Philpot 2017).<sup>17</sup> We are thus left with mixed evidence in support of hypothesis 1a, which suggested that Black participants would be more supportive of the Court if it made the decision after a Black litigant brought the case. While we see some potential for increased support when male and Black participants see a Black male litigant bringing the challenge, our results suggest other participants were unpersuaded by counter-stereotypical litigants in this particular situation.

### Experiment 2: affirmative action (Asian American and White litigants)

We next examine White and non-White attitudes toward the Supreme Court when Asian American and White litigants challenge the use of affirmative action in college admissions.<sup>18</sup> Figure 5 shows the direct treatment effects for feelings toward the Court across treatment groups. As figure 5 shows, there are significant differences in feelings toward the Court based on the treatment participants received: Those who read

16. All *p*-values reported for two-tailed test.

17. This is not to say that we do not recognize that structural racism can stem from policies and have implications for Black people. We are simply speaking to the potential, well-documented thought process that may be at work in the minds of Black participants.

18. Models for this analysis are available in table 4. Models with additional controls for demographic and attitudinal measures are available in table A19 in the appendix, as well as models for whether or not participants agreed with the Court's decision in the case, which we present in tables A14 and A15.

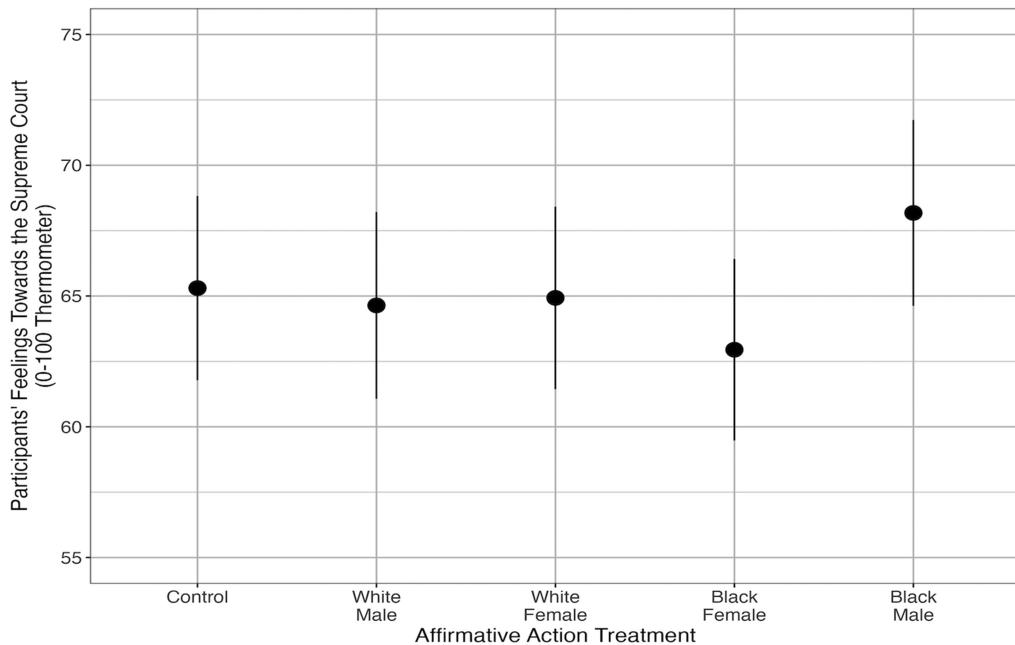


Figure 3. Predicted support for the Supreme Court after reading about a decision overturning affirmative action, broken down by treatment group. Vertical bars are 84% confidence intervals to show probability of confidence intervals overlapping at a 0.05 significance level.

about a White man, White woman, or Asian woman challenging an affirmative action policy were significantly more likely to support the Court than those who read about the same case brought by an Asian American male ( $p < .05$ ).

To better understand this initial finding, we again examine the indirect treatment effects and break down the results by the participant's identity profile, specifically their gender and race, which we show in figure 6. We begin figure 6A, which shows how male (gray triangles) and female (black circles) participants' feelings toward the Court differ across treatments. While there are no significant differences between men and women, some interesting patterns emerge among female participants. First, relative to the Asian American male treatment (55), women's feelings toward the Court are significantly higher when they read about a White female (63,  $p < .05$ ), an Asian American female (61,  $p < .10$ ), or an unidentified litigant (control) bringing the suit (61,  $p < .10$ ). We see similar patterns in support among male participants, though the differences are not statistically significant. We believe there are several explanations for this decrease in support when Asian American men bring the lawsuit. First, Asian American men are the new face of overturning affirmative action. Participants may have known of these efforts and responded negatively to Asian American men, who are generally praised for being apolitical (Chou and Feagin 2015), getting involved in politics. Additionally, the myth of the "model minority," which connects Asian Americans to academic suc-

cess and a lack of political participation (Kim 1999), might make it difficult for participants to believe Asian Americans need affirmative action and raise resentment toward them for getting involved in overturning it (see Lee 2021).

Figure 6B reveals how non-White (black circles) and White (gray triangles) participants' responses differed across treatment groups. Figure 6 shows that when White participants read about a White man (64), a White woman (66), or an Asian American woman (65) challenging affirmative action policies in college admissions, they express significantly more support for the Supreme Court than their non-White counterparts do ( $p < .05$ ). This again aligns with the expectation we outlined in hypothesis 1b that White participants would show higher overall support for the Court overturning policies. Similar to the results we found in the first experiment, non-White participants are not more likely to support the Court when they see one litigant or another, suggesting we lack evidence for hypothesis 1a here. But we found an interesting exception to the rule, specifically one that suggests hypothesis 1a might need refining in light of identity politics: There is not a significant difference in support between White and non-White participants when they are told an Asian American male brought the lawsuit, and that is because White participant support is significantly lower here than it is for the other treatment groups. It may be the case that Asian American men are not perceived as an identity group that shocks the public or is counter-stereotypical when they

Table 3. Experiment 1: OLS, Feelings Toward Supreme Court, Affirmative Action Treatment

	(1)	(2)	(3)
White male treatment	−.661 (3.567)	1.663 (5.071)	.903 (5.593)
Black male treatment	2.875 (3.558)	2.073 (4.699)	5.621 (5.773)
White female treatment	−.375 (3.526)	.0473 (4.817)	−.00537 (5.542)
Black female treatment	−2.356 (3.518)	0.767 (4.817)	−3.255 (5.620)
Male participants		9.713+ (4.986)	
White male treatment		−5.884 (7.111)	
× male participants			
Black male treatment		3.071 (7.129)	
× male participants			
White female treatment		−1.422 (7.008)	
× male participants			
Black female treatment		−6.999 (6.992)	
× male participants			
White participants			11.45* (5.153)
White male treatment			−.859 (7.189)
× White participants			
Black male treatment			−3.811 (7.249)
× White participants			
White female treatment			1.242 (7.111)
× White participants			
Black female treatment			2.732 (7.128)
× White participants			
Constant	65.30*** (2.504)	60.85*** (3.377)	57.84*** (4.159)
Observations	545	545	545

Note. Standard errors in parentheses.

+  $p < .10$ .

\*  $p < .05$ .

\*\*  $p < .01$ .

\*\*\*  $p < .001$ .

support eliminating affirmative action. This result suggests that certain counter-stereotypical litigants might actually lessen support for a decision, particularly when broader group identity relationships are complicated.

The public has long associated affirmative action programs with marginalized identities, and conversations about and responses to affirmative action programs are racialized (and to an extent, gendered) as a result. Using counter-stereotypical litigants to challenge affirmative action programs is thus a

complicated process, and it is one that cause lawyers and interest groups have yet to figure out successfully. Our results suggest there is a reason for that, as there is no ideal litigant, either stereotypical, counter-stereotypical, or targeted at a group with a shared identity narrative, that can increase approval for a rights-affirming Supreme Court decision that overturns an affirmative action program.

### Experiment 1: gun control

#### (Black and White litigants)

For the final part of our analysis, we examine Black and White attitudes toward the Supreme Court when Black and White litigants challenge gun laws as violating their Second Amendment rights.<sup>19</sup> Figure 7 shows the direct treatment effects across the control and treatment groups for participants who read about a Supreme Court decision overturning a gun law and fortifying gun rights. Similar to the affirmative action vignette from the same survey, we do not observe any significant differences across treatments. That is, no one litigant identity profile increases support for the Supreme Court after it issues a gun rights decision. To examine this relationship further, we once again turn to the indirect effects to examine how these results may differ across the identity characteristics of the participants.

Figure 8 displays the indirect treatment effects for support for the Court after it makes a gun rights decision based on the participant's gender and race. Figure 8A shows female (black circles) and male (gray triangles) participants' support for the Court after learning that different litigants won a pro-gun rights decision before the Court. Looking first at the control group, we see a clear and significant difference between male and female support for the Court, with male participants feeling 12 degrees more warmly toward the Court after it issues a pro-gun rights decision than female participants (73 versus 61,  $p < .05$ ). Figure 8 suggests there are similarly large and significant differences between male and female participants when they are told that a White woman (72 versus 64,  $p < .10$ ) or a Black man (71 versus 61,  $p < .05$ ) brought the lawsuit. Contrary to our expectations in hypothesis 2b, however, female participants' feelings toward the Court do not significantly change when a female litigant brings the case; while they are slightly more positive toward the Court when a White or Black female litigant challenges affirmative action,

19. Models for this analysis are available in table 5. Models with additional controls for demographic and attitudinal measures are available in table A20 in the appendix, as well as models for whether or not participants agreed with the Court's decision in the case, which we present in tables A16 and A17.

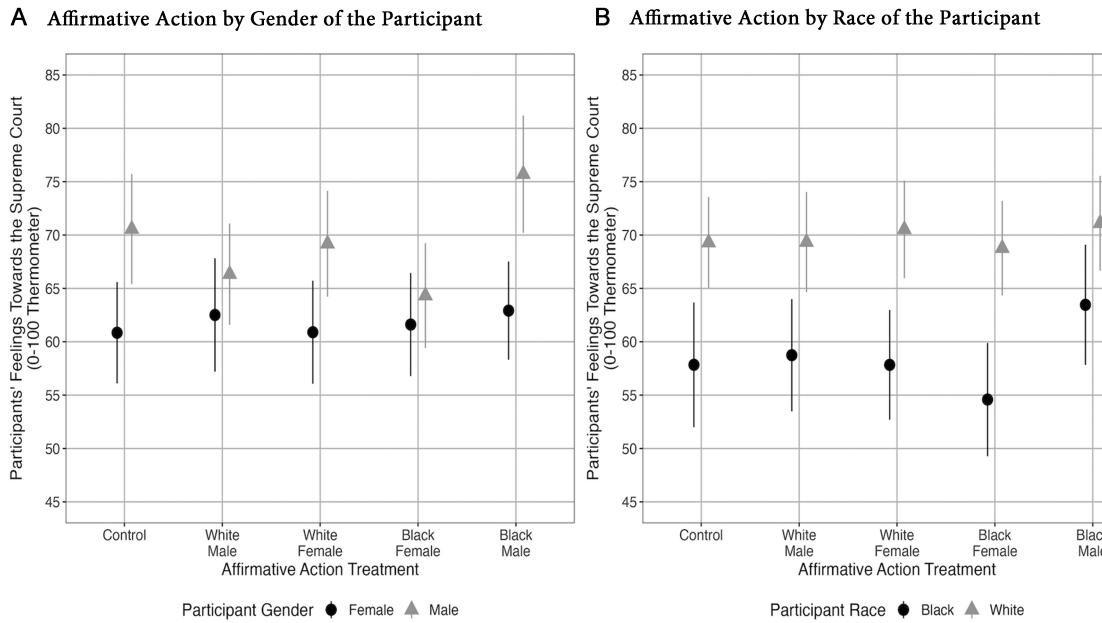


Figure 4. Predicted support for the Supreme Court after reading about a decision overturning affirmative action, broken down by treatment group, based on participant gender (A) and race (B). Vertical bars show 84% confidence intervals to show the probability of confidence intervals overlapping at a 0.05 significance level.

the differences here are not statistically significant. It appears that male participants, who are already predisposed to support gun rights, are more responsive to counter-stereotypical litigants than female participants are.

Moving to figure 8B, we can see how race influences attitudes toward the Supreme Court following a pro-gun rights

decision. As we expected, there are marked differences between Black and White respondents. Even when race is not mentioned in the control, White participants (gray triangles) approve of the Supreme Court at an average rating of 72 out of 100. This is 13 points higher than Black participants (black circles) ( $p < .01$ ). White participants also feel nine degrees

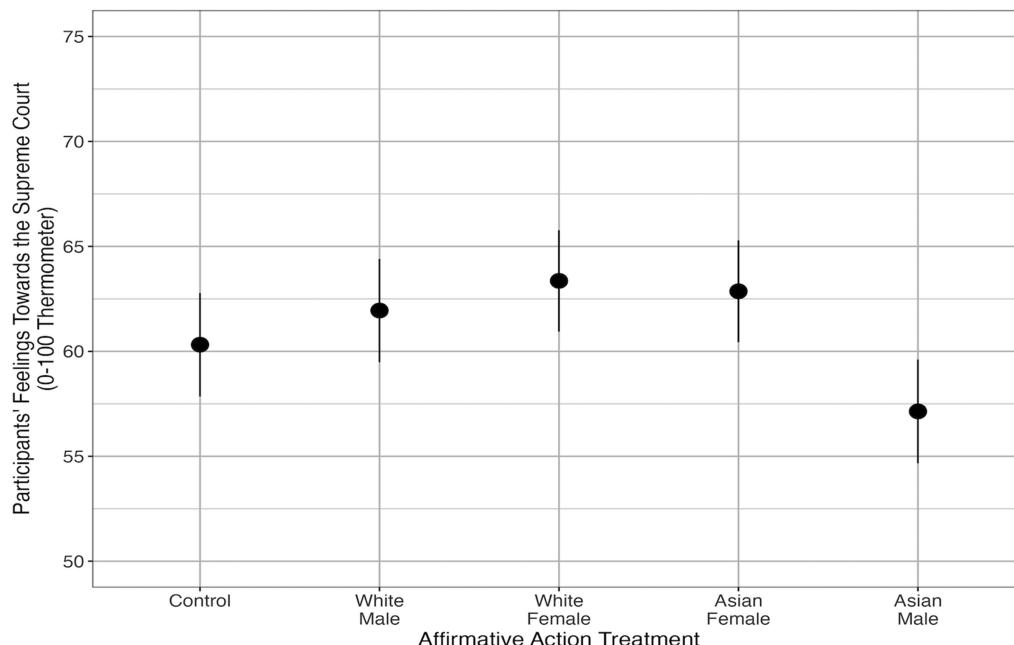


Figure 5. Predicted support for the Supreme Court after reading about a decision overturning affirmative action, broken down by treatment group. Vertical bars are 84% confidence intervals to show probability of confidence intervals overlapping at a 0.05 significance level.

Table 4. Experiment 2: OLS, Feelings Toward Supreme Court, Affirmative Action Treatment

	(1)	(2)	(3)
White male treatment	1.628 (2.477)	.580 (3.384)	-3.226 (4.549)
Asian American male treatment	-3.178 (2.483)	-5.908 (3.355)	-3.524 (4.361)
White female treatment	3.042 (2.456)	1.422 (3.355)	-1.415 (4.467)
Asian American female treatment	2.545 (2.462)	.0355 (3.400)	-1.355 (4.571)
Male participants		-1.605 (3.515)	
White male treatment		2.239 (4.973)	
× male participants			
Asian American male treatment		6.230 (5.002)	
× male participants			
White female treatment		3.507 (4.931)	
× male participants			
Asian American female treatment		5.283 (4.934)	
× male participants			
White participants		1.530 (3.774)	
White male treatment		6.666 (5.417)	
× White participants			
Asian American male treatment		.570 (5.297)	
× White participants			
White female treatment		6.222 (5.340)	
× White participants			
Asian American female treatment		5.231 (5.420)	
× White participants			
Constant	60.32*** (1.754)	61.08*** (2.421)	59.26*** (3.132)
Observations	994	994	994

Note. Standard errors in parentheses. Reference categories include the control, female participants, and non-White participants.

\*  $p < .05$ .

\*\*  $p < .01$ .

\*\*\*  $p < .001$ .

more warmly about the Court than do Black participants when told that a White male litigant brought the case ( $p < .10$ ). The same racial gap exists when participants read about a Black female litigant challenging a gun law. White participants have

an average approval of the Court of 72 points, whereas Black participants rated the Court at an average of 59 out of 100 ( $p < .01$ ). Interestingly, there is not a racialized gap when a White female litigant brings the case, as Black participant support increases. This does not provide evidence for hypothesis 2a, which suggested Black participants would respond more positively to the Court when a Black litigant brought the case, but it does suggest that a broadly counter-stereotypical litigant might appeal to groups typically inclined to dislike pro-gun rights decisions. That a Black litigant would buy into this “source of White moral empowerment” has racial attitude implications (Filindra and Kaplan 2016) but also does the work of countering stereotypical assumptions of what White women, Black men, and Black women think about guns.

## DISCUSSION AND CONCLUSION

Going back to at least the 1940s, interest groups engaged in cause lawyering have sent “perfect” cases with “ideal” litigants to the Supreme Court in an attempt to overturn the legal status quo and affirm or advance the rights of their members. Their goal is to expand support for a rights-affirming decision by convincing people predisposed to dislike a decision that they just might benefit from it. They do this by looking for counter-stereotypical litigants, or litigants whose identity characteristics are at odds with the expected beneficiaries of a rights-affirming decision and thus change the conversation about who benefits from a decision. In their search for the perfect case and the perfect litigant to front it, cause lawyers will make cold calls, launch websites, give speeches, and even put advertisements in newspapers (Hsu 2018). These parties firmly believe that if they have the right case with the right litigant, they can encourage the justices to make a rights-affirming decision and get the public to support them making it.

In this article, we seek to understand if making a counter-stereotypical litigant the face of rights-affirming Supreme Court case reaps the rewards that cause lawyers seek. Using two different survey experiments, we find that certain litigant identity profiles actually can alter support for the Supreme Court after it makes a rights-affirming decision regarding affirmative action or gun rights, but that support does not always move in the direction cause lawyers prefer. Our results suggest that male and Black participants respond positively to the Court when it rules in favor of a Black man challenging affirmative action. But we also find that all participants are less likely to support the Court if it overturns affirmative action programs based on an Asian American man’s lawsuit. Finally, we find that people predisposed to support gun rights are the ones most likely to respond positively to counter-stereotypical litigants fighting to expand them; Black and female participants

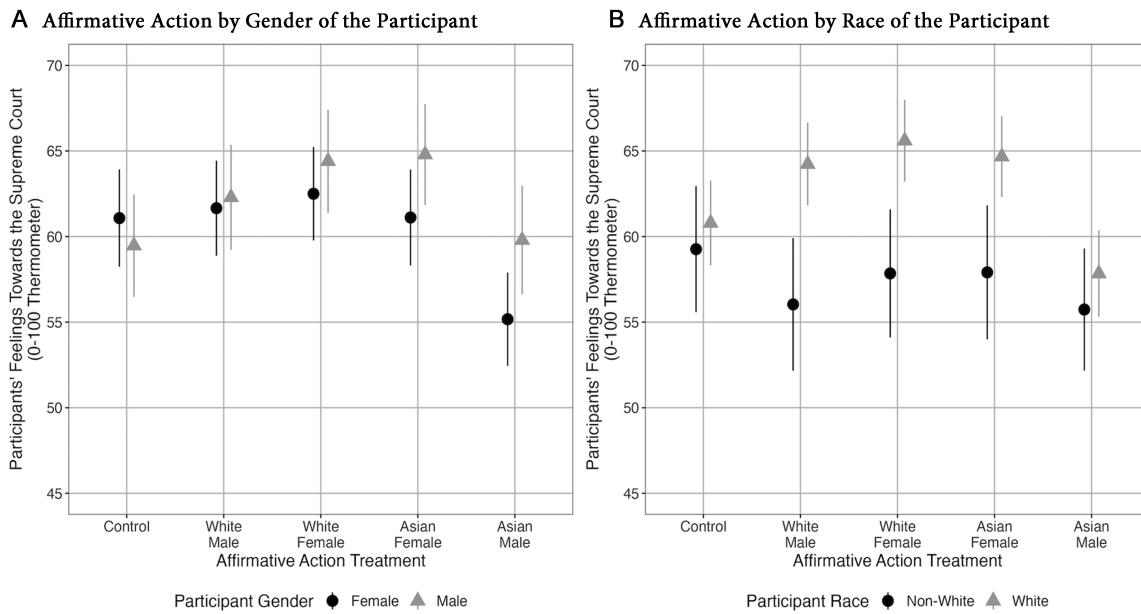


Figure 6. Predicted support for the Supreme Court after reading about a decision overturning affirmative action, broken down by treatment group, based on participant gender (A) and race (B). Vertical bars show 84% confidence intervals to show the probability of confidence intervals overlapping at a 0.05 significance level.

were mostly unmoved by counter-stereotypical litigants. These results suggest that cause lawyers need to carefully consider identity politics before seeking a counter-stereotypical litigant, as they might not like the results they get if they do not.

These findings build on important research by Armaly (2021), Nicholson and Hansford (2014), and Zilis (2021) that shows people without policy preferences will evaluate the Court's decisions based on their identification with the group that benefits most from that policy. Work in this vein also

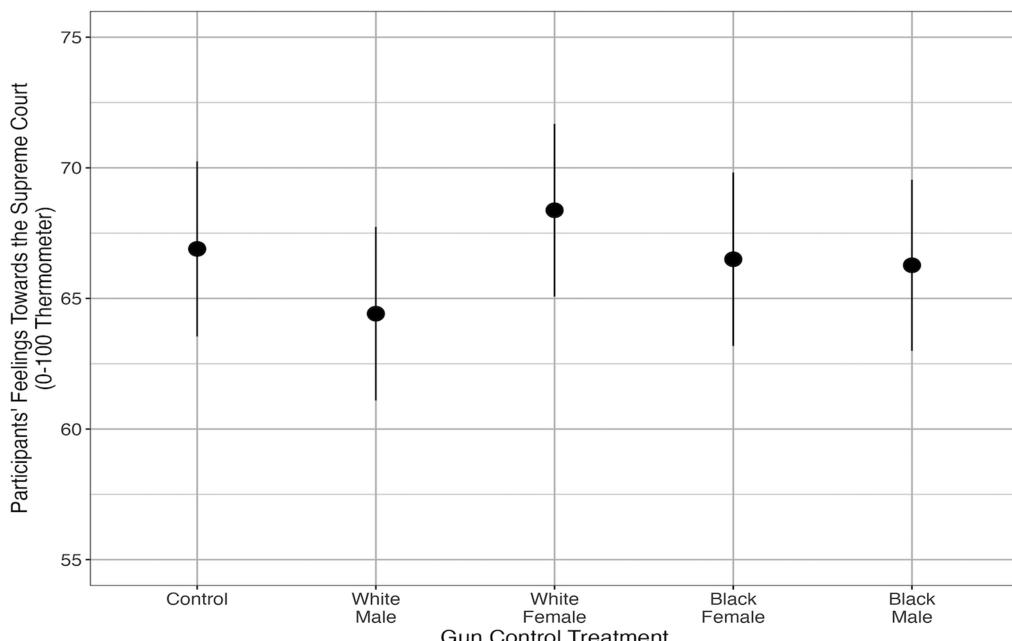


Figure 7. Predicted support for the Supreme Court after reading about a decision upholding gun rights, broken down by treatment group. Vertical bars are 84% confidence intervals to show probability of confidence intervals overlapping at a 0.05 significance level.

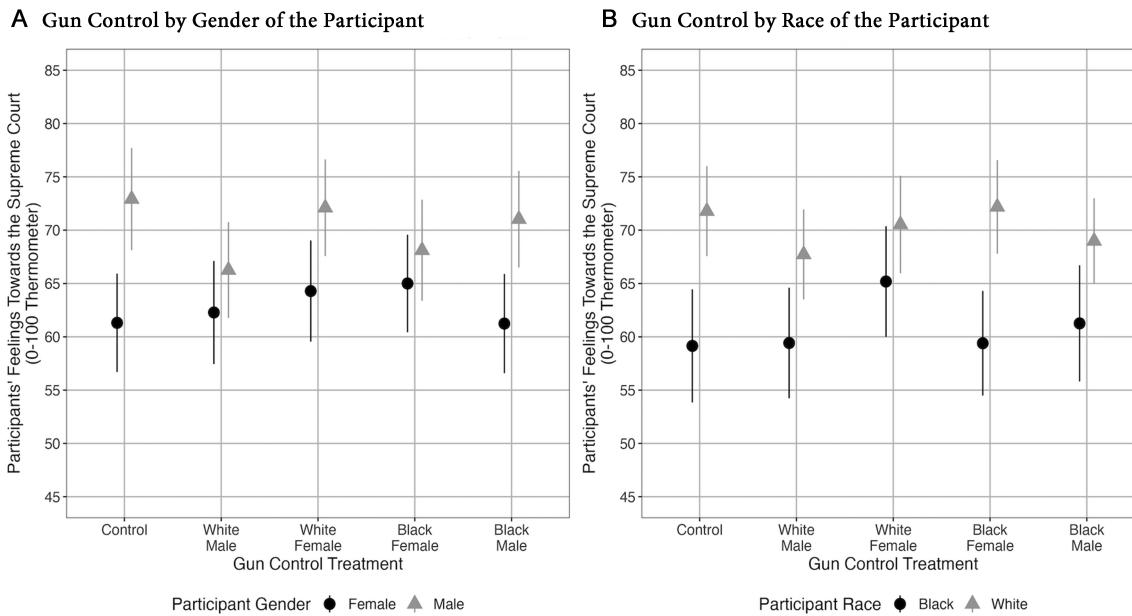


Figure 8. Predicted support for the Supreme Court after reading about a decision upholding gun rights, broken down by treatment group, based on participant gender (A) and race (B). Vertical bars show 84% confidence intervals to show the probability of confidence intervals overlapping at a 0.05 significance level.

indicates the media, with its limited coverage of the Court and its framing of the decisions as having winners and losers, contributes to this evaluation process (Hitt and Searles 2018; Zilis 2015). Cause lawyers' use of counter-stereotypical litigants suggests that parties bringing cases to the Supreme Court understand this dynamic and attempt to manipulate media coverage and outcomes if they think it can provide an advantage (Coyle 2013; Perry 2007; Winkler 2011). We find that counter-stereotypical litigants can make a difference in public acceptance of the Court and the decisions it makes. Future research should continue to explore the ways in which interest groups and cause lawyers attempt to control or alter these group-centric dynamics.

Our results have practical implications for interest groups as well. We systematically and empirically consider the influence that interest group case selection can have on outcomes in cause litigation cases. Past research widely acknowledges that outside interests use amicus briefs to influence the decision to grant review (Schoenherr and Black 2019) and the eventual decision on the merits (Collins 2008). But interest groups can—and do—do more than file amicus briefs. By seeking out test cases and building arguments from the bottom up, interest groups control every step of the litigation process, including public relations. While analyses like James's (2010) study of the dismantling of "separate but equal" offer rich examinations of interest groups' use of public law litigation, we offer a more systematic study of how interest groups'

litigation decisions influence the public's acceptance of a case, particularly when it comes to selecting the people who become the faces of cases.

There are, of course, limitations to this study. For one thing, by focusing on the race and gender of the litigant, we ignored several other group-centric identities that people can use to evaluate Supreme Court decisions. The most obvious identity is ideology or partisanship, which plays a role in the public's evaluation of public policy broadly and the Supreme Court specifically (Zilis 2021). Affirmative action and gun rights are notoriously partisan issues, and playing up counter-ideological litigants could affect how the public views a decision that alters the status quo as well (Filindra and Kaplan 2017). Additionally, given power and cost limitations, we did not examine the role that intersectional identities—beyond race and gender—might play in strategic litigant selection. Are interest groups and cause lawyers trying to find litigants whose intersectional identities might interact with the public at large? Does the public respond differently to a gay Black male litigant than they would a presumably straight Black male litigant? We leave these questions for future researchers to answer.

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**Table 5.** Experiment 1: OLS, Feelings Toward Supreme Court, Gun Control Treatment

	(1)	(2)	(3)
White male treatment	−2.480 (3.357)	.971 (4.756)	.272 (5.281)
Black male treatment	−.626 (3.335)	−.0684 (4.663)	2.110 (5.412)
White female treatment	1.480 (3.350)	2.979 (4.708)	6.040 (5.281)
Black female treatment	−.396 (3.357)	3.691 (4.621)	.249 (5.145)
Male participants		11.61* (4.732)	
White male treatment		−7.634 (6.668)	
× male participants			
Black male treatment		−1.818 (6.615)	
× male participants			
White female treatment		−3.796 (6.647)	
× male participants			
Black female treatment		−8.497 (6.661)	
× male participants			
White participants		12.64** (4.825)	
White male treatment		−4.334 (6.775)	
× White participants			
Black male treatment		−4.909 (6.813)	
× White participants			
White female treatment		−7.370 (6.765)	
× White participants			
Black female treatment		.149 (6.725)	
× White participants			
Constant	66.90*** (2.385)	61.31*** (3.282)	59.15*** (3.778)
Observations	542	542	542

Note. Standard errors in parentheses. Reference categories include the control, female participants, and Black participants.

\*  $p < .05$ .

\*\*  $p < .01$ .

\*\*\*  $p < .001$ .

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