

Making Sense of the Supreme Court-Public Opinion Relationship¹

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Abstract

Does life tenure, legal precedent, judicial ideology, and the facts of cases insulate U.S. Supreme Court justices from the public's shifting preferences, or do Supreme Court decisions follow public opinion? Despite decades of scholarship on this topic, the question of a Court-opinion connection—and the precise causal mechanism linking them together—still invites disparate perspectives, evidence, and substantive conclusions. In this chapter, we summarize the diverging theories, analytical approaches, and empirical results in the debate over public opinion's relationship with Supreme Court decisions. We then offer a theory of how the mass public, despite being generally uninformed about judicial decisions, can influence the decisions of the highest court in the land. We then discuss the sizeable evidence in support of this perspective, how this relationship could be changing in the modern era, and avenues for future research.

¹ A previous version of this paper was presented at the Annual Meeting of the Southern Political Science Association, January 2016, San Juan, Puerto Rico. We would like to thank Robert Howard and Kirk Randazzo for their helpful comments and guidance.

The Supreme Court of the United States decides that a corporation cannot hide itself behind the plea of self-incrimination, when called upon to produce its letters and documents. This no doubt is gain; there are lawyers who think it doubtful if the question would have been so decided a few years ago. The judicial indicator is beginning to turn to the pressure of the greater social force, the public.

--- Melville M. Bigelow, *The Atlantic Monthly*, December 1906

Does the prevailing state of popular opinion shape the content of Supreme Court decisions? The answer to this question raises important implications about the Court's role in the American political system, the democratic nature of its decisions, and the determinants of legal policy change. But, the answers proposed by existing literature have fostered little agreement. At the turn of the 20th century, esteemed legal scholar Melville M. Bigelow, while lamenting the state of 19th-century corporate economic regulation, noted how prevailing popular sentiment seemed to alter (for the good of society, in his view) the state of the law (Bigelow 1906). And, history is replete with similar suggestions that public opinion has critically shaped legal interpretation and policymaking by the U.S. Supreme Court (see, e.g., Friedman 2010). Yet, scholars continue to provoke a lively debate over the merits of the theoretical arguments and empirical evidence used to suggest justices, and thus the Court's policy outputs, actually respond to the mass public's preferences. Despite decades of continued scholarship, the question of a Court-opinion connection---and the precise causal mechanism linking them together---still invites disparate perspectives, evidence, and substantive conclusions.

While most scholars would agree that the democratic process induces some degree of indirect responsiveness through the election of the President and U.S. Senate,² wide disagreement exists over the presence of a direct linkage beyond the selection of justices. Some studies argue there is little reason, or evidence, to suggest public opinion has any direct impact on justices (Norpoth and Segal 1994; Segal and Spaeth 2002). Other scholars acknowledge empirical evidence supporting the appearance of a direct causal linkage, but they doubt the (direct) causal mechanism to justify the apparent relationship. For instance, it may be the apparent relationship is largely a function of how justices' changing attitudes might parallel changes in public opinion. That is, justices' attitudes are not fixed (Ulmer 1973, 1981; Baum 1988; Epstein, Martin, Quinn, and Segal 2007), and the same social forces that shape public opinion also influence the justices' preferences, thus creating the mere appearance of a direct linkage (Giles, Blackstone, and Vining 2008).³

Yet, many scholars have argued that mass opinion directly constrains the Court's decisions, as justices strategically adjust decisions (at the margins) to match shifts in the public mood and ensure the efficacy of those decisions.⁴ And, proponents of public opinion's direct impact have

² See, e.g., Barnum (1985); Casper (1972); Cook (1977); Dahl (1957); Flemming and Wood (1997); Funston (1975); Giles, Blackstone, and Vining (2008); Marshall (1989, 2008); McGuire and Stimson (2004); Mishler and Sheehan (1993, 1994, 1996); Norpoth and Segal (1994).

³ Even studies arguing for a direct linkage have acknowledged that unobserved social forces may be leveraging their empirical results (Epstein and Martin 2011; Flemming and Wood 1997; Link 1995; Mishler and Sheehan 1993, 1996).

⁴ The public mood (or the public's policy mood) refers to the extent the public supports more liberal or more conservative government policy (Stimson 1991). See, Casillas, Enns, and

offered considerable empirical evidence. For instance, there is compelling qualitative, historical legal scholarship (e.g., Friedman 2010) and systematic social scientific evidence linking public opinion (to some degree) to Court decisions (e.g., Mishler and Sheehan 1993; McGuire and Stimson 2004, Casillas, Enns, and Wohlfarth 2011).⁵

But, these scholars examining a direct impact have presented a variegated mix of analytical strategies and drawn competing conclusions about the extent of public opinion's constraining effect. Existing studies have analyzed the Court's aggregate case outcomes each term,⁶ or the aggregate votes of each justice during each term,⁷ or individual case outcomes and justice votes.⁸ Many studies have considered whether the impact of public opinion might vary across different justices.⁹ Scholars have examined differences in responsiveness across issue areas, with some

Wohlfarth (2011); Epstein and Knight (1998); Flemming and Wood (1997); Hall (2014); Link (1995); McGuire and Stimson (2004); Mishler and Sheehan (1993, 1996); Murphy (1964).

⁵ See also, Bryan and Kromphardt (2016); Enns and Wohlfarth (2013); Epstein and Martin (2011); Flemming and Wood (1997); Hall (2014); Link (1995); Mishler and Sheehan (1994, 1996); Stimson, MacKuen, and Erikson (1995).

⁶ Casillas, Enns, and Wohlfarth (2011); Link (1995); McGuire and Stimson (2004); Mishler and Sheehan (1993); Stimson, MacKuen, and Erikson (1995).

⁷ Flemming and Wood (1997); Giles, Blackstone, and Vining (2008); Mishler and Sheehan (1996).

⁸ Bryan and Kromphardt (2016); Enns and Wohlfarth (2013); Epstein and Martin (2011); Hall (2014); Marshall (1989, 2008).

⁹ Enns and Wohlfarth (2013); Flemming and Wood (1997); Giles, Blackstone, and Vining (2008); Mishler and Sheehan (1996).

studies finding general consistency (Flemming and Wood 1997; McGuire and Stimson 2004), and also inconsistency (Link 1995). Others have examined the potential conditionality of public opinion's impact within different case contexts, such as political salience, policy content, public support, and coalition size.¹⁰ And, many studies have explicitly considered varying theoretical and empirical implications of the relationship's temporal dynamics.¹¹ Despite this diverse and extensive body of research, there is still no clear consensus on the nature of the relationship.

In this chapter, we first review the existing literature, including the predominant theoretical arguments made in the debate on public opinion's impact on Supreme Court decisions and empirical evidence presented to support those arguments. Next, we present our theoretical perspective of how public opinion influences the justices and their consideration of cases. In particular, we posit the public mood establishes a bounded, yet dynamic, zone of consensus that, on average, may constrain justices' behavior across all types of cases. And, while grounding our discussion in literature on public opinion in American politics, we argue the public has a latent policy preference of which justices should find it prudent to anticipate. Thus, even for cases perceived to be under the public's radar, justices should perceive their decisions risk attracting the attention of the news media, the public, and other branches of government if they repeatedly issue judgments outside the public's zone of consensus. Lastly, we consider several analytical challenges present in this debate and discuss potential directions for future research.

¹⁰ Bryan and Kromphardt (2016); Casillas, Enns, and Wohlfarth (2011); Enns and Wohlfarth (2013); Giles, Blackstone, and Vining (2008); Hall (2014).

¹¹ Fleming and Wood (1997); Giles, Blackstone, and Vining (2008); Mishler and Sheehan (1993, 1996); Norpoth and Segal (1994).

The State of the Debate

A primary means through which public opinion may shape Supreme Court decisions is the selection of justices.¹² At least since the seminal work of Dahl (1957), many scholars have argued that Court decisions should indirectly reflect public opinion to some degree, given that citizens elect the president and U.S. Senators that nominate and confirm justices. Thus, so long as these officeholders select justices who hold policy views consistent with the mass public that elected them into office – and to the extent those justices decide cases consistent with their own legal policy preferences – Supreme Court decisions should remain in step with the public. In short, as “judicial replacement” occurs, public opinion should indirectly shape the Court's composition and subsequent judicial policymaking. And, some studies argue the personal protection afforded by life tenure and general lack of progressive ambition offer little reason to expect justices to be directly responsive to public opinion beyond this selection effect (Norpoth and Segal 1994; Segal and Spaeth 2002).¹³

While this indirect “judicial replacement” argument receives wide scholarly agreement, it neither ensures a strong Court-opinion relationship, nor precludes the operation of additional causal mechanisms. One limitation inherent with this perspective is the constitutional protection

¹² Barnum (1985); Casper (1972); Cook (1977); Dahl (1957); Funston (1975); Marshall (1989); Mishler and Sheehan (1993); Norpoth and Segal (1994); Segal and Spaeth (2002).

¹³ What is more, Norpoth and Segal (1994) argue that, to offer meaningful evidence of a direct causal linkage, contemporaneous (and not simply lagged) public opinion should be predictive of Court decisions.

of life tenure. Public opinion is dynamic and fluctuates considerably over time (e.g., Enns and Wlezien 2011; Erikson, MacKuen, and Stimson 2002; Page and Shapiro 1992; Stimson 1991). Thus, as justices serve longer (and absent significant attitudinal drift that mirrors public opinion change), it is likely that prevailing public sentiment diverges from the policy views that reigned when they received their appointments.

Next, it is possible that when justices hold personal policy views that differ from prevailing popular opinion, they deviate from those policy preferences to ensure decisions match public sentiment (at least at the margins). This suggests public opinion might directly affect justices such that they are strategically cognizant of, and responsive to, public mood.¹⁴ Scholars commonly justify this “strategic behavior” hypothesis on the basis of justices' perceptions that they must protect the Court's institutional legitimacy, justices' lack of formal institutional power to compel the elected branches to faithfully comply with the Court's judgments, or both.¹⁵

First, the Court's legitimacy depends (at least in part) on public support for decisions.¹⁶ As Murphy (1964) states: “a series of wrong or imprudent judgments...can undermine public faith in

¹⁴ Bryan and Kromphardt (2016); Casillas, Enns, and Wohlfarth (2011); Epstein and Knight (1998); Flemming and Wood (1997); Hall (2014); McGuire and Stimson (2004); Mishler and Sheehan (1993, 1996); Murphy (1964); Stimson, MacKuen, and Erikson (1995).

¹⁵ The use of the “strategic behavior” label follows Giles, Blackstone, and Vining (2008), while Mishler and Sheehan (1996) refer to “political adjustment,” and McGuire and Stimson (2004) call it “rational anticipation.”

¹⁶ It is also possible that justices' responsiveness to public opinion is the result of their personal, psychological desire to seek approval and avoid social criticism (e.g., Baum 2006; McGuire 2010).

the [judiciary]...” (20). And, this faith may be endangered when ruling contrary to prevailing public sentiment. For example, Caldeira (1986) finds, in part, that the Supreme Court's legitimacy decreases as it strikes more federal laws and supports criminal defendants. Likewise, Bartels and Johnston (2013) suggest ideologues who oppose specific Court decisions are less likely to perceive the institution as legitimate than those who approve of decisions. And, Gibson, Caldeira, and Spence (2003a, 365) suggest that, even in the presence of a deep reservoir of diffuse support, frequent counter-majoritarian decisions could erode that legitimacy. In short, citizens respond negatively to judicial decisions they dislike. Thus, as McGuire and Stimson (2004, 1019) note, “a Court that cares about its perceived legitimacy must rationally anticipate whether its preferred outcomes will be respected and faithfully followed by relevant publics.”

Next, proponents of the “strategic behavior” argument often contend justices should be mindful of public opinion to ensure faithful compliance and implementation. Justices must anticipate the prospect that elected officials – who are directly subject to the constraint of popular elections – will neglect to implement, or possibly choose to ignore, unpopular decisions (Murphy 1964). As McGuire and Stimson (2004, 1022) state: “The [Supreme] Court requires the cooperation of legislative and executive officials, many of whom are themselves careful auditors of mass opinion. For that reason, the members of the Court must reflect on how well their preferred outcomes will be received and supported by implementers.” Hall (2014, 352) similarly argues public opinion constrains judges because of their “fear of nonimplementation.” What is more, Congress and the president have the power to undermine the Court's institutional power (e.g., Owens 2010; Sala and Spriggs 2004; Segal, Westerland, and Lindquist 2011), and issuing counter-majoritarian decisions may possibly provoke negative responses. Clark (2009), in a similar vein, argues that when members of Congress propose court-curbing bills, it is an indication of

public disapproval, which in turn diminishes the likelihood justices will strike congressional laws in their decisions. In sum, according to the “strategic behavior” perspective, justices must concern themselves with public perceptions of decisions, how those perceptions may shape the Court's institutional legitimacy, and how the public opinion-minded motives of elected officials may undermine their willingness to implement those decisions.

In addition to various flavors of the specific theoretical proposition, the scholarly debate over a direct causal linkage has considered varying assumptions, entertained multiple analytical strategies, and generated little empirical consensus. In their seminal study, Mishler and Sheehan (1993) employ an aggregate time series analysis (using “prewhitened” cross-correlations) of the Court's decisions each term, finding that Stimson’s (1991) public mood predicts the aggregate liberalism of decisions at a five-year lag. Stimson, MacKuen, and Erikson (1995) also analyze the Court's aggregate decisions during a similar time period (1953-1990), but their structural time series model specifying both long- and short-run effects suggests a change in public mood has a small, but immediate impact. Mishler and Sheehan (1996) later analyze the percentage of liberal votes for each justice-term and find that public opinion's impact exists primarily among politically moderate justices. And, a year later, Flemming and Wood (1997) consider a pooled time series analysis of each justice's aggregate behavior during each term. But, they find public mood affects more than just a few justices' behavior, exhibits consistent effects across most issue areas, and operates quickly on the justices (i.e., a one-term lag).¹⁷

¹⁷ The differences in empirical results between Mishler and Sheehan (1996) and Flemming and Wood (1997) may reflect different choices in the specification and estimation of their statistical models.

A decade after Mishler and Sheehan's (1993) article spurred a number of studies on the Court-opinion connection, McGuire and Stimson (2004) continue the debate by arguing that affirmances represent a poor indicator of the ideological content of the Court's decisions (see also, McGuire et al. 2009). Using an aggregate dynamic time series model predicting the Court's reversals, McGuire and Stimson (2004, 1033) conclude that "public opinion is a powerful influence on the decisions of the Supreme Court." In a similar vein, Casillas, Enns, and Wohlfarth (2011) employ a dynamic time series specification to analyze the liberalism of the Court's reversals each term and find that public opinion's impact was most evident among nonsalient cases (i.e., those that did not appear on the front page of the *New York Times* (Epstein and Segal 2000)).¹⁸ And, lastly, Hall (2014) – attempting to distinguish between the motives of ensuring faithful implementation and preserving institutional legitimacy – analyzes individual Court decisions and concludes that public mood only constrains justices in politically salient and "lateral" cases (i.e., those whose policy content Hall characterizes as requiring implementation by the elected branches and not lower courts).

Although many studies have documented some degree of an empirical association between Court decisions and public opinion even after controlling for the Court's political composition,¹⁹

¹⁸ What is more, Casillas, Enns, and Wohlfarth (2011) also consider public mood's impact when combining both reversals and affirmances, and find the results are robust.

¹⁹ Barnum (1993); Bryan and Kromphardt (2016); Casillas, Enns, and Wohlfarth (2011); Enns and Wohlfarth (2013); Epstein and Martin (2011); Flemming and Wood (1997); Giles, Blackstone, and Vining (2008); Hall (2014); Link (1995); McGuire and Stimson (2004); Mishler and Sheehan (1993, 1994, 1996); Stimson, MacKuen, and Erikson (1995).

some scholars do not find the results empirically convincing of a direct relationship.²⁰ That is, a central challenge to the “strategic behavior” perspective – and the evidence presented to support it – is that Court decisions may simply reflect the impact of attitudinal drift that parallels mass opinion change over time (e.g., Giles, Blackstone, and Vining 2008). According to this “attitudinal change” argument, the relationship between public opinion and the Supreme Court results (at least partly, if not exclusively) because justices' political preferences change in response to the same social forces that influence the public. Justices' voting behavior is largely a product of their own ideological preferences (Segal and Cover 1989; Segal and Spaeth 1993, 2002). But, these attitudes are not fixed over the course of their tenures (Baum 1988; Epstein, Martin, Quinn, and Segal 2007; Ulmer 1973, 1981). And, thus, the prevailing social forces that influence the public mood also influence the justices' policy preferences, thereby leaving only the impression of a direct causal linkage. Former Supreme Court Justice Benjamin Cardozo once expressed a view consistent with this “attitudinal change” perspective when he stated: “[t]he great tides and current which engulf the rest of men do not turn aside in their course and pass the judge by” (Cardozo 1921, 167-168). More recently, Powe (2001, xiv) conveyed a similar sentiment: “Law is not just politics, but judges are aware of the political context of their decisions, and are, like everyone else, influenced by the economic, social, and intellectual currents of American society.”

²⁰ Epstein and Martin (2011) find significant evidence of an empirical association between public mood and individual case outcomes, but they do not make a conclusive inference about the theoretical mechanism to justify the relationship.

While multiple studies arguing for a direct relationship have acknowledged that unobserved social forces may be leveraging their empirical results,²¹ Giles, Blackstone, and Vining (2008) first attempted to distinguish between “attitudinal change” and “strategic behavior.” Following the theoretical assumption that justices only have the incentive to strategically respond to public opinion in politically salient cases (and without a time lag), they analyze the aggregate voting behavior of each justice during each term and conclude that “strategic considerations...are not sufficiently frequent and systematic to be identified” (Giles, Blackstone, and Vining 2008, 303).²² That is, their analysis suggests contemporaneous public mood is not systematically predictive of justices' votes among politically salient cases. Yet, in contrast, Casillas, Enns, and Wohlfarth (2011) argue there is substantial reason to think justices are constrained by public mood even in nonsalient cases, given the likely endogeneity inherent in public attention to decisions. Indeed, after devising a strategy to explicitly control for the simultaneous, dynamic impact of social forces on public mood and judicial ideology, they find evidence of a public opinion effect among all cases and nonsalient cases, (but not salient cases).²³ Thus, while one may find some

²¹ Epstein and Martin (2011); Flemming and Wood (1997); Link (1995); Mishler and Sheehan (1993, 1996).

²² Giles, Blackstone, and Vining (2008) also consider how the impact of public mood (as conditioned by case salience and different lag specifications) might vary across individual justices and find generally mixed results.

²³ As Casillas, Enns, and Wohlfarth (2011) note, however, this result does not necessarily mean that the Court responds to public opinion differently in salient and nonsalient cases. The coefficient on public mood among salient cases was in the expected direction and not statistically

degree of similarity in the empirical results of Giles, Blackstone, and Vining (2008) and Casillas, Enns, and Wohlfarth (2011), disagreement still exists over the theoretical basis for justices' strategic behavior. In fact, Casillas, Enns, and Wohlfarth (2011) speculate that by staying within the public's zone of acquiescence on nonsalient cases, the justices may preserve diffuse support for the Court, which allows them to adhere more closely to their political or legal ideology in the cases that appear most salient.

The Constraining Capacity of Public Opinion on the U.S. Supreme Court

In this section, we explain how the prevailing policy sentiment of even a largely uninformed public can constrain the decisions of Supreme Court justices.²⁴ We start with the observation that, in general, the public displays minimal awareness of many Supreme Court decisions. The U.S. public's attention to, and knowledge of, politics is notoriously low (e.g., Delli Carpini and Keeter 1996) and the Supreme Court is no exception (Caldeira 1991).²⁵ This

different from the estimated effect among nonsalient cases. What is more, Enns and Wohlfarth (2013) demonstrate that the pivotal swing justice's votes are significantly related to public mood in closely divided 5-4 decisions – many of which are likely quite salient politically.

²⁴ This discussion builds on the theoretical ideas we developed in Casillas, Enns, and Wohlfarth (2011) (see also, Black, Owens, Wedeking, and Wohlfarth 2016a, 2016b; Enns 2016).

²⁵ But, recent evidence also suggests public knowledge of the Court is greater than many often assume (Gibson and Caldeira 2009).

observation has often served as the basis for some scholars' contention that justices should have little reason to perceive public opinion as a constraint, especially in less politically salient cases that are presumed to be under the public's radar. Yet, we argue the public has a latent preference which the justices should feel compelled to anticipate. And, for *any case*, a range of possible rulings exist; some that fall within a region of public acceptability and some that fall outside of this region. The notion of a region of acceptability parallels what some legal scholars have referred to as a “boundary of consensus” (Gillman 2004; Klarman 1996).²⁶ This perspective also comports with McGuire and Stimson’s (2004) view that, “a Court that strays too far from the boundaries imposed by public mood risks having its decisions rejected” and Mishler and Sheehan’s (1993) comment that, “the Court's concern for its authority makes it reluctant to depart too far or too long in its decisions from prevailing public sentiment.”

Even for many politically salient cases, it is difficult to imagine that more than a few individuals have a preferred, precise decision outcome. Yet, it is not hard to believe that individuals could notice if a decision coincided with an unpopular extreme. Consider, for example, *Griswold v. Connecticut* (1965), where the Court ruled against a state ban on the use of contraceptives by married couples. We speculate that most individuals have not thought about, nor could articulate, a preferred specific contraception policy. At the same time, we concur with Klarman (1996) that, in 1965, most Americans would have opposed an outright contraception ban. In other words, even inattentive and politically uninformed individuals can identify when a decision falls outside their region of acceptability.

²⁶ In a similar vein, Graber (1998) refers to a “dominant national coalition.”

Focusing on legislative policies, Stimson (1991) describes the public's region of acceptability as a “zone of acquiescence.” As long as policymakers act within the zone of acquiescence, the public would rather pay attention to things other than politics. If policymakers stray outside of this zone, however, the media may bring the deviation to light, igniting the public's ire. Similarly, Key (1961, 97) notes: “Mass opinion may set general limits, themselves subject to change over time, within which government may act.” We hold the same applies to Supreme Court decision making. Most of the time, the public is content to ignore the activities of the Court.²⁷ But if the Court strays beyond the zone of acquiescence, this deviation could be newsworthy. Thus, rulings outside the zone of acquiescence increase the probability that negative news about the Court will come to the attention of the public.

This argument partially operates from the premise that negative news can erode the public's support for the Court. While this claim receives support in the literature (Grosskopf and Mondak 1998; Hoekstra 2000), others argue deference to the Court creates a “positivity bias,” which limits the corrosive influence of even controversial rulings (Gibson, Caldeira, and Spence 2003b). Accepting the existence of positivity bias, we also accept the conclusion that, “Nevertheless, no one can doubt that the loyalty towards an institution is influenced by the policy

²⁷ Indeed, attempts to observe the extent (or lack) of public responsiveness to Supreme Court decisions have produced markedly mixed results (e.g., Franklin and Kosaki 1989; Hetherington and Smith 2007; Johnson and Martin 1998; Marshall 1989; Ura 2014). Nonetheless, our framework for explaining the Court's behavior is not contingent on whether the public generally notices Court decisions; rather it rests on the contention that the probability of the public noticing a deviant ruling is nonzero and nontrivial.

outputs of that institution, at least in the long term” (Gibson, Caldeira, and Spence 2003b, 555). And, recent research suggests the link between perceived ideological divergence and legitimacy may be more substantial than previously thought (e.g., Bartels and Johnston 2013; Christenson and Glick 2015).²⁸ What is more, justices need only perceive that deviating from popular sentiment *could* provoke a backlash and undermine public support.

Thus, in order to preserve the long-term legitimacy of its rulings and maximize faithful compliance by other actors, justices must ensure the Court's decisions largely conform to the policy boundaries established by the zone of acquiescence.²⁹ This is not to say that justices may never (or even infrequently) follow their ideal preferences irrespective of public opinion. The Court's reservoir of diffuse support enables justices to selectively issue judgments that might contradict prevailing public opinion. However, Supreme Court policymaking that repeatedly violates the zone of acquiescence risks attracting negative attention that could compromise institutional legitimacy and compliance. Justice Thurgood Marshall's dissenting opinion in *Milliken v. Bradley* (1974) illustrates this sentiment. He wrote:

²⁸ See, cf., Gibson and Nelson (2015). Posner (2008, 274) also makes the point by contrasting the visibility of Supreme Court decisions with less visible lower court decisions. He writes: “the [Supreme] Court is more constrained by public opinion than the lower federal courts are because of its much greater visibility...A radically unpopular decision by the Supreme Court could provoke swifter and fiercer retaliation than the same decision by a lower court.”

²⁹ Baum (2006) suggests justices also respond to public opinion because they seek the mass public's approval. If this linkage exists, justices would have further reason to rule within the zone of acquiescence.

Today's holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is the product of neutral principle of the law. In the short run, it may be the easier course to allow our great metropolitan areas to be divided up each into two cities – one white, the other black – but it is a course, I predict, our people will ultimately regret. I dissent.³⁰

According to Justice Marshall, the decision that suburban school districts could not be compelled to integrate with racially segregated urban districts reflected the Court's desire to remain within the public's zone of acquiescence.

The Implications of a Zone of Acquiescence

Although not all decisions will fall within the zone of acquiescence, we maintain the Supreme Court faces incentives to respect the boundaries imposed by public mood in all types of decisions (on average). At first, our claim that the Supreme Court will consider public opinion for less politically salient cases seems counterintuitive. As Giles, Blackstone, and Vining (2008, 296) note, “if strategic behavior is a mechanism linking public opinion to judicial behavior, then it is only among cases that are salient to the public that we should expect to observe its operation.” However, media and public attention can be endogenous to the Court's decisions. Media may choose to report on a case *because* the ruling runs counter to public opinion. As Slotnick and Segal (1998, 81) observe, part of what makes a case noteworthy “may be dictated by the nature of the

³⁰ *Milliken v. Bradley* (1974), 418 U.S. 717, 94 S. Ct. 3112, 41 L. Ed. 2d 1069.

case's outcome.”³¹ The heightened attention surrounding a deviant opinion is precisely what may cause a previously non-salient issue to become politically important to the public. Thus, ruling outside the zone of acquiescence risks drawing negative attention to an otherwise non-salient decision.

What is more, this theoretical argument only depends on justices' expectations that the public and media *might* pay attention. Indeed, politicians regularly make decisions based on the threat their actions *might* receive significant attention (see also, Black, Owens, Wedeking, and Wohlfarth 2016b, 2016a). Consider Key's (1961) seminal study of public opinion in American democracy, where his argument about the motives of policymakers serves as a foundation for this perspective:

Even though few questions attract wide attention, those who decide may consciously adhere to the doctrine that they should proceed as if their every act were certain to be emblazoned on the front pages...and to command universal attention (Key 1961, 261).

This argument reverberates in research on congressional policymaking, as Arnold (1990, 68) suggests: “Latent or unfocused opinions can quickly be transformed into intense and very real opinions with enormous political repercussions. Inattentiveness and lack of information today should not be confused with indifference tomorrow.” In short, even if the public is not always

³¹ The expectation that extreme rulings can attract attention also parallels Scherer, Bartels, and Steigerwalt's (2008) work on lower court nominations. They show that when nominees are ideologically extreme, interest groups sound a “fire alarm” bringing information to senators and making the nomination politically salient.

attentive to court decisions, justices cannot assume that their decisions will not attract substantial attention, especially if they violate the public's zone of acceptability. Thus, justices should behave as if there is generally a nontrivial threat of attracting significant, or even widespread, attention. What is more, it is changes in the public's policy preferences that offer the best indication of latent public opinion (Enns 2016, 28-31).

The Supreme Court's relationship with other branches of government also reinforces the potential influence of public opinion. As Hamilton suggested in *Federalist No. 78*, the Court must consider whether the elected branches, which are directly accountable to popular opinion, will faithfully execute judicial policy. Just as the Court risks attracting negative public attention by ruling outside of the zone of acquiescence, legislators risk negative attention if they support unpopular decisions. For the majority of decisions that do not appear on the front page of the *New York Times*, reelection-minded legislators should still consider the ruling in the context of the public's zone of acquiescence. In turn, assuming justices, on average, prefer to see the elected branches faithfully execute their decisions or to protect the Court's institutional capacity (see, e.g., Clark 2009; Ura and Wohlfarth 2010), they must be mindful of a legislative response in all types of cases.³² Thus, in addition to the Court's desire to avoid deviant decisions to maintain high levels of diffuse support, the Court should also consider public opinion in order to produce policy outputs that the other branches of government will be more likely to support. Either mechanism,

³² Other studies also discuss how Congress and the president can undermine the Court and its decisions, such as stripping its jurisdiction, enacting overrides, altering its budget and composition, regulating court procedure, and holding judicial salaries constant (e.g., Owens 2010; Sala and Spriggs 2004; Segal, Westerland, and Lindquist 2011).

or most likely both working concurrently, creates an incentive for the Court to consider public opinion.

Lastly, the notion that the public mood creates a bounded zone of acquiescence implies that this zone constrains the Court as a whole. However, our theoretical perspective does not depend on every justice concerning him/herself with the Court's authority and subsequent compliance in every decision issued. Likewise, the argument does not require each individual justice to recognize when this authority may be threatened. Instead, this perspective operates from the premise that, as a body, a majority of justices will often be concerned with the Court's power and threats to its legitimacy. And, as Enns and Wohlfarth (2013) show, it may be sufficient for only the pivotal swing justice's votes to keep the Court's decisions largely consistent with prevailing public mood. In turn, we expect the overall behavior of the Court to be one that follows, in most cases, the shifting boundaries of this zone of acquiescence as established by the public mood.

Knowledge of the Zone of Acquiescence

We have argued that for any particular case, a range of rulings will exist within the public's region of acceptability. Instead of actively considering public opinion, the Court simply needs to avoid deviant opinions. Given the potential institutional benefits and desire to preserve its esteemed legitimacy, we propose the Supreme Court will generally strive to rule within the public's zone of acquiescence for all types of cases. But we also grant that this zone is not directly observable. There is some inherent uncertainty, from justices' perspective, about whether a particular decision would fall within or outside the zone of acceptance. A public that is largely inattentive and uninformed may not react to deviant behavior in an entirely predictable manner

across all issue domains of the Court's docket. In some cases, such as those that relate to abortion, the Court can rely on past reactions, public opinion polls, or media coverage to obtain a relatively firm expectation of the boundaries of public opinion. For many cases, however, the precise boundaries of the zone are unobservable, perhaps only becoming evident after the Court has issued a ruling drawing the attention of the previously inattentive public. Key (1961) echoes this argument in the realm of legislative and executive branch politics, noting that “uncertainty exists in the extent to which latent opinions of the mass of people not immediately concerned with the questions will be activated.”

Yet, there is also substantial reason to suggest justices can form reliable predictions of the public's latent opinion most of the time. Public opinion moves systematically and predictably, and numerous indicators, such as election results, polls, and media reports, provide clues about the general state and direction of public opinion (Erikson, MacKuen, and Stimson 2002; Page and Shapiro 1992; Stimson 1991).³³ For instance, the news media offer one important source of information (Davis 1994). As Justice Breyer once said: “Judges read newspapers, just like everybody else” (Farias 2015). What is more, justices are likely to acquire information about policy and general public attitudes from amicus curiae briefs (e.g., Collins 2004; Epstein and Knight 1999). And, as Kingdon (1984, 153) notes: “People in and around government sense a national mood. They are comfortable discussing its content, and believe they know when the mood shifts.”

³³ Within the context of interpreting the Eighth Amendment, Justice Rehnquist also points to “laws passed by legislatures and the practices of sentencing juries” as indicators of “national consensus” (*Atkins v. Virginia*. 2002. 536 U.S. 304.).

But even those who are not Washington-insiders can recognize the broad movements in public opinion. Without much effort, most people recognize that the public that voted Kennedy into office was more liberal than the public that elected Reagan. What is more, public opinion on issues as diverse as crime, race, welfare spending, military spending, and environmental protection often moves in tandem (Stimson 1991). Thus, even if justices only consider public opinion in the most general sense, their assessment may automatically reflect opinion movement on specific issues. We concur with Rehnquist (1986, 768), who once noted: “This is not a case of judges ‘knuckling under’ to public opinion, and cravingly abandoning their oaths to office.” Rather, “Somewhere ‘out there’ – beyond the walls of the courthouse – run currents and tides of public opinion which lap at the courthouse door.” And, as long as the Court respects these boundaries in a majority of its cases, shifts in public opinion should constrain, and thus directly influence, Supreme Court decisions. When we combine this theoretical argument with the large body of research that documents a strong over-time relationship between public opinion and Supreme Court decisions, we believe the result is compelling evidence that the mass public influences the behavior of the nation's highest Court.

Analytical Challenges & New Directions

Despite the theoretical argument and evidence presented above, the debate over an opinion-policy connection on the U.S. Supreme Court continues to grapple with multiple analytical challenges. First, one central challenge to sorting out causal mechanisms has always been accounting for justices' sincere policy preferences. In theory, if scholars had pure, direct measures of justices' sincere attitudes that are independent to their votes and fully capture change over time, one could simply specify such a measure in a model to directly control for the possibility

of “attitudinal change.” Yet, no such measure exists. The scholars that have devised existing measures (with varying strengths and weaknesses) have transformed our ability to reliably capture justices' attitudes and dramatically improved the rigor of empirical analyses (Bailey 2007; Epstein, Martin, Segal, and Westerland 2007; Martin and Quinn 2002; Segal and Cover 1989). And, important work has sought to offer more precise measures of justices' attitudes across different issues – and even individual cases – over time (Lauderdale and Clark 2012). But, as other scholars in this book attest, the challenge to improve the accuracy of this measurement is important to the study of judicial politics in general, and the debate over public opinion's impact in particular.³⁴

Next, much recent debate has explored the potential conditionality of public opinion's impact, including the role of case salience. Notwithstanding reasonable differences in theoretical expectations for justices' strategic behavior, how scholars operationalize case salience is also an important challenge for future research. The predominant indicator in the literature to date –

³⁴ Indeed, different strategies of capturing, and controlling for, Court composition are likely a source of some mixed results in the Court-public opinion literature. For instance, Hall (2014) includes both the Epstein, Martin, Segal, and Westerland (2007) indicator for the Court's median justice (derived from the Martin and Quinn (2002) estimates) and fixed effects dummies for natural courts. While one might argue it is beneficial to control for the idiosyncrasies of each natural court, statistically, this choice represents an important tradeoff when the primary substantive predictor capturing public opinion – Stimson's (1991) policy mood – only varies with respect to time. Changes in natural court account for nearly 90% of the variance in public mood, which means that with this approach it is nearly impossible to disentangle the relative influence of public opinion and the Court's composition.

whether a case appeared on the front page of the *New York Times* (Epstein and Segal 2000) – has served as a vital (and valuable) component of many scholars' empirical analyses for over a decade. And, its continued use as a reliable indicator of media-based salience in much of the literature is certainly worthwhile. Yet, in the context of the Supreme Court-public opinion debate, scholars arguably require an indicator that is not at all endogenous to the decisions justices make. After all, to the extent that media studies like Slotnick and Segal (1998) are correct, a counter-majoritarian decision is likely to be more newsworthy, and thus more “salient,” simply due to the nature of the decision (see also, Casillas, Enns, and Wohlfarth 2011). Recent advances in the measurement of case salience may prove to be valuable avenues for future inquiry in this debate (e.g., Clark, Lax, and Rice 2015; Black, Sorenson, and Johnson 2013).

Another limitation within this literature has been the nearly exclusive focus on predicting dispositions, without an explicit regard for opinion content. While much can be (and continue to be) learned from studying dispositional outcomes, it is important to gain a better understanding of how public opinion might shape legal rules and the written justification for those dispositions. And, some studies have begun to do so. Black, Owens, Wedeking, and Wohlfarth (2016b, 2016a), for instance, analyze how justices alter the clarity of majority opinions based on public opinion. They argue, in part, that justices may view opinion clarity as a means to better explain the logic of their decisions and to preserve public support. And, consistent with this logic, they find justices enhance opinion clarity when ruling against prevailing public opinion, thereby offering a different way to think about, and analyze, the Court-public opinion relationship.

Among other potential directions for future research, the debate could benefit from a continued focus on bridging the micro-macro divide. Most existing studies document public opinion's association with justices' decisions (or the Court's policy outputs) at the aggregate level.

Yet, there are many case-level factors at work in the Court's decision making. And, furthermore, individual justices display substantial heterogeneity in their responsiveness to public opinion (Enns and Wohlfarth 2013). Future research may also consider further the theoretical and empirical implications of using reversals and affirmances to quantify the ideological content of the Court's decisions (e.g., McGuire, Vanberg, Smith, and Caldeira 2009; Ura and Higgins N.d.). Lastly, continued advances in public opinion measurement – e.g., issue- or case-specific public opinion indicators and individual-level survey design (Jessee and Malhotra 2013) – can offer scholars with new, alternative analytical strategies to further explore the Court-public opinion connection. Indeed, the Court's decision in *Lawrence and Garner v. Texas* (2003), which overturned *Bowers v. Hardwick* (1986), coincides with shifting public attitudes on same-sex marriage (e.g., Lax and Phillips 2009, Figure 6). Similarly, Enns (2016, 38 & 163) shows that recent Supreme Court decisions that have eliminated the death penalty or greatly restricted life sentences for juveniles (e.g., *Roper v. Simmons* (2005), *Graham v. Florida* (2010), *Miller v. Alabama* and *Jackson v. Hobbs* (2012), and *Montgomery v. Louisiana* (2016)) have followed the public's shift in a less punitive direction.³⁵ Understanding the extent to which the Supreme Court considers public opinion on specific policy issues is an important avenue for future research that will benefit from new measurement techniques as well as from continued use of historical public opinion surveys such as those archived with the Roper Center for Public Opinion Research.³⁶

³⁵ Although these rulings moved juvenile sentencing in a slightly less punitive direction, these cases also serve to highlight the extreme punishments juveniles face in the United States (Enns 2016).

³⁶ For additional studies related to issue-specific opinion, see Bryan and Kromphardt (2016); Link (1995); Marshall (1989).

Lastly, we maintain that to better understand the Supreme Court, scholars must consider the possibility that the Court's responsiveness to the public's policy preferences may vary over time. On one hand, the institutional features of the Court mean that the justices' always face incentives to avoid decisions that might ignite negative latent opinion and to avoid decisions that they believe other branches of government will ignore. The opening quote in this chapter, in fact, suggests that these incentives have offered a longtime guide to the Court. On the other hand, exactly how much attention justices pay to these considerations may vary over time. As Enns and Wohlfarth (2013, 1104) explain, it would not be surprising if the partisan polarization that has increasingly dominated U.S. politics has also influenced the Supreme Court. It may be, for example, that as the political environment has become more polarized, the weight that justices attach to political considerations has increased. Such a result would not change the theoretical argument or evidence presented in this chapter, but it would suggest that the constraining influence of the public's policy mood may have decreased in recent decades. Of course, the previous examples of same sex marriage and juvenile sentencing decisions offer recent evidence of potential responsiveness to specific policy preferences. However, the influence of public opinion may be less than in the past. This is an important possibility for future research to consider.

Conclusion

Former Chief Justice William Rehnquist (1987, 98) once remarked: "No judge worthy of his salt would ever cast a vote in a particular case simply because he thought the majority of the public wanted him to vote that way, but that is quite a different thing from saying that no judge is ever influenced by the great tides of public opinion." Rehnquist's statement underscores the

potential importance – and analytical challenges – of the study of public mood as a meaningful determinant of Supreme Court decision making. Although justices' collective policy preferences surely influence Court policy output, as the late Chief Justice suggested, the Court may not be free to ignore the prevailing sentiment of the mass public.

In this chapter, we set out to summarize the diverging theories, analytical approaches, and empirical results in the debate over public opinion's relationship with Supreme Court decisions. In doing so, we further elaborated on a theoretical basis to expect prevailing popular sentiment to constrain justices in all type of cases – even those presumed to be under the public's radar. We also highlighted several enduring analytical challenges and potential avenues for future research, including the possibility that the public's influence on the Supreme Court varies with time and may have diminished during the current hyper-partisan era of U.S. politics. This continued debate over the existence of a Supreme Court-public opinion connection in American politics holds important implications for the democratic nature of the U.S. Supreme Court as an institution and how the public might shape the meaning of the U.S. Constitution. Thus, this lively debate offers an important mode of future inquiry into the decisions of Supreme Court justices and the policy outputs they produce.

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