ABSTRACT

Title of Document: PUBLIC OPINION AND THE ROBERTS COURT

Scott A. Racek, Doctor of Philosophy, 2014

Directed By: Professor Wayne McIntosh, Department of Government and Politics

The Supreme Court theoretically acts as a counter-majoritarian institution considering its small and appointed membership. Despite this, it largely makes decisions that are in line with the opinions of Americans. This study examines the Roberts Court to determine the extent to which it references and reflects public opinion. The scholarship on previous courts shows that its decisions are generally consistent with public opinion. Although the Roberts Court is relatively new, this study aims to shed some light on whether the court continues to follow its tradition of agreeing with the mass or more narrow public opinion. Results were largely inconclusive, yet this examination shows that the Roberts Court does agree with public opinion about sixty-three percent of the time.

PUBLIC OPINION AND THE ROBERTS COURT

By

Scott A. Racek

Dissertation submitted to the Faculty of the Graduate School of the
University of Maryland, College Park, in partial fulfillment
of the requirements for the degree of
Doctor of Philosophy
2014

Advisory Committee:

Professor Wayne McIntosh, Chair
Professor Irwin L. Morris
Professor Frances Lee
Professor Karen Kaufmann
Professor Trevor Parry-Giles, Dean's Rep (COMM)

Table of Contents

List of Tables

List of Figures

Chapter 1: Introduction

In a 2005 paper on the relationship between the death penalty and public opinion, I argued that the justices "pay attention" to public opinion in their decisions about the death penalty. In particular, I found that Justice O'Connor used public opinion as one barometer for her decisions in, but not limited to, death penalty cases. In an audience with Justice O'Connor in 2006, I had that opportunity to ask her directly about the correlation between public opinion and court rulings. She affirmed that while the justices do take public opinion into consideration in their rulings, the weight of public opinion is not uniformly applied by all justices in their deliberations. This is particularly true on high profile cases. Justice O'Connor went on to explain that public opinion is one important factor in her judicial decision making because she was a part of the society for which she was making rules. The root of this dissertation is found in both the aforementioned paper and the revelations of my audience with Justice O'Connor.

This dissertation will assess the decisions by the Roberts Court to test this hypothesis, and argue that the Roberts Court reflects public opinion on par with earlier courts.[1] This study builds upon the work of Thomas Marshall, who, in two books (1989, 2008) argues that the Supreme Court reflects public opinion between three-fifths and two-thirds of the time. In his latter book, Public Opinion and the Rehnquist Court, he studied all the opinions of the court and found 123 direct references to public opinion polls. He surmised, with an average of six mentions per term, the justices were agreeing with public opinion relatively often. Moreover, this percent was consistent with other

[1] Thomas Marshall uses the term "reflects public opinion" in his books, which is never clearly defined. I argue that is using reflects in the same way that I use "agrees with and "is consistent with".

historical courts. In addition to the direct-mention model, Marshall also used the pairwise method, a system of matching polls to decisions, and found that the Rehnquist Court largely reflected public opinion between sixty and sixty-six percent of the time.

This project is divided into three parts. Part one deals with a general introduction and history of the relationship between public opinion and the Supreme Court, including discerning the difference between narrow interests and mass public opinion. Part one also contains the methodology and a literature review of the significant works on the relationship between Supreme Court decisions and public opinion. Finally, part one goes on to examine various court cases and how they were likely influenced by public opinion.

Part two discusses other factors that influence the decisions of the Supreme Court, specifically considering ideology, the media, legitimacy and judicial activism and restraint; examining the influence of public opinion on these other factors that sway court outcomes. Part three finishes the thesis with a discussion of the model for this project, the results and implications for future research.

Marshall's work reveals that counter to Rehnquist's personal convictions on the subject, his court was, in fact, quite influenced by public opinion polls. Long before he was Chief Justice Rehnquist, he was the 'lone ranger' of the Burger Court. Many of the Burger Court's opinions were in line with popular opinion at the time (Marshall, 1989), and Rehnquist often wrote the lone dissents challenging both majority opinions and the majority of public opinion. He indicated at one point that "the Court's duty is to ignore

public opinion and criticisms on issues that come before it."[2] By the 1990s, then Chief Justice Rehnquist had a number of ideological allies on the court. However, and despite his influence over Justices Scalia, Thomas, and Kennedy, upon whom Rehnquist generally could rely to help him reverse some rulings he disagreed with, his court actually fell in line with public opinion, thus contradicting his own goal to disconnect public opinion from court decisions. This is largely because Justice O'Connor, who was the critical fifth vote and in the majority over eighty percent of the time, (Marshall, 2008), almost singlehandedly, kept the Rehnquist Court in line with public opinion.

Justice O'Connor was among the justices whose voting record most reflected public opinion. Marshall (2008) argues that ideological moderates like O'Connor are more deferential than other justices in using public opinion in their decision-making. Her opinions with regard to crime and the death penalty, for example, were in line with public opinion eighty-four percent of the time. Her votes on other issues, such as abortion and other "gender-related" policy agreed with public opinion seventy-two percent of the time. As the swing vote[3] on dozens of cases in her career, she often (intentionally or not) kept the court from drifting out of the public mainstream (Marshall, 1989, 2008). Scholars, including Marshall (2008) and Behuniak-Long (1992) have posited that, as the first woman justice, she often defended the interests of women. Indeed, sixty-one percent of the time she agreed with the majority of women, according to opinion surveys on issues

[2] *Planned Parenthood of Southeastern Pennsylvania v. Casey*. Public Opinion and the Rehnquist Court 958-959. Supreme Court. 29 June 1992. Print.

[3] The swing voter on the Supreme Court is usually defined as the median justice; the one who is closest to the center, whose vote could determine the outcome of case. This person is usually the 5th vote in 5-4 cases, especially in cases where a justice can be convinced to vote in an unpredictable manner.

associated with cases on the court's docket (Marshall, 2008, 61) thus implicating her as a centrist generally in line with public opinion. This was reinforced by Justice O'Connor's belief that the law ought to evolve parallel to the development of the country, underscoring the importance she placed on the role of public opinion in court rulings. Her philosophy contrasts with that of Justice Scalia, who argues that public opinion, polling or surveys have no role in the law. Scalia and Rehnquist both agreed that juries and state legislatures are more reliable indicators of public opinion than are polls. Yet even Scalia, according to Marshall's (2008) analysis, agrees with public opinion fifty-eight percent of the time and will mention public opinion when it fits his argument.

Marshall (2008) claims that the Rehnquist Court predominately made decisions that were in line with public opinion. He further contends that a three-fifths agreement with public opinion is largely consistent with other courts since the mid-1930s and that the sixty percent figure has stayed stable over time. One exception is with First Amendment cases, where often the court reaches conclusions that contrast with public opinion (Marshall 2008, 89). This is specific to religion cases, which, as many scholars of the court have noted, are unusual in that the court that is usually bucking public opinion, steadfastly denying efforts to insert more religion in public areas, despite public support for these religious initiatives. The court's denial of a more public role of religion has held true from the earliest days of polling to the current court, countering polls from the 1950s to the 2000s which consistently show that a majority of Americans are in favor of a more robust role of religion in public life.

1.1 Defining Public Opinion- Narrow Interest and Mass Opinions[4]

There is a bit of a chicken-and-egg aspect to the relationship between public opinion and the Supreme Court. Does the Supreme Court follow public opinion, or does the public follow the cues from the court? Johnson and Martin (1998) and Hoekstra and Segal (1996), among others have argued that the court influences the public on issues such as gay rights and abortion. Unger (2008) explains the public is willing to revisit their views in light of Supreme Court decisions. Scholars such as Page and Shapiro (1992), Segal, Spaeth and Benesh (2005) and Perry (1999), have argued that there is some flexibility in the views of the public. Despite the fact that only a small minority of people can identify members of the Supreme Court and even fewer can recognize specific cases before the court, the Supreme Court has the highest approval ratings among all government institutions, despite their declining ratings in recent years. The health care law affirmed in 2012 was a good example of this. The approval ratings for the law increased after the ruling.[5] It certainly possible that as the court is influenced by public opinion, the reverse may be as true as well, that the public concludes that if the court approves of the law, it must be right.

---

[4] Narrow Interest Opinion refers to groups that have one or two specialized interests they focused on and push to have those interests protected at the executive, legislative or judicial level. Examples of this type of group include the National Rifle Association and the Chamber of Commerce. Mass opinion refers to what the "average citizen" thinks about a broad range of issues. Mass public opinion can have a robust impact on policy especially at the legislative level. Since elections are a key component of both the legislative and executive branches, the mass public opinion's policy preferences are often heeded.

[5] A NBC/Wall St. Journal Poll in July 2012, taken less than a month after the June 28, 2012 ruling found that those agreeing that the law was a good idea jumped five points, from 35% to 40% saying it was a good idea twenty days later. Notable is that the new support for the law was temporary, as support decreased every month thereafter until late 2013. A similar ABC/ Washington Post poll found an eight point jump in support from April 2012 until June 2012.

Recognizing the distinction between mass public opinion and narrow interest public opinion is critical in gaining a complete understanding of how public opinion is reflected and influenced by Supreme Court decisions. Narrow interest opinion is a subset of public opinion and includes elite opinion makers. Members of presidential administrations, interest groups, members in academia, editors and think tanks, all of whom have specialized interests they want represented. Such narrow and elite opinion makers often influence policy through executive and legislative action, while interest groups write amicus briefs and editorial boards craft editorials. Their opinions often weigh heavily in the minds of decision makers, including Supreme Court justices. Political scientist Thomas Dye (2000) has dedicated several books to the conclusion that decisions in Washington DC are made by "non-profit foundations, think tanks, special-interest groups, and prominent lobbyists and law firms". In contrast, Unger (2009) believes that despite the fact that the court has more direct access to these narrow and elite opinions than popular opinion, both groups can be influential.

Mass opinion is reflected in polling and surveys conducted by media and other organizations. This encapsulates the general population of citizens regardless of their awareness of issues before the court. While both narrow interest groups and the mass populace generally hold the Supreme Court in high esteem, the general population usually does so without a real understanding how the court works, nor the major decisions that come from it. On a very practical level, the general population does not need to pay attention to the court since arguably Supreme Court decisions have less influence than Congress or the President. In fact, as Baum and Devins (2010) argue, the court does not direct opinions towards the mass public whereas their decisions have a

profound impact on the more narrow groups in society, largely because it is these groups who will be implementing the decisions. In essence, justices and narrow interests have forged a reciprocal relationship that does not exist between the justices and the masses. As Devins and Baum put it, "Supreme Court Justices care more about the views of academics, journalists, and other elites than they do about public opinion."[6]

Such narrow and elite public opinion is an important driver of information and a significant contributor to what the masses believe. Zaller's work on public opinion shows that most people do not have a concrete position on issues and consequently are more open to receiving political messages. Thus, elites influence the masses. Zaller's RAS model reveals that the masses parrot the messages they receive and have sampled. They especially respond to elite messages and, while they often receive conflicting messages, they adhere to the ones that reflect their own preferences.

The relationship between elite interests and mass public opinion is complicated. Converse (1964) found that most people's beliefs were random and malleable rather than well-defined, concrete positions. The mass public picks up cues from such elite interests, allowing for a 'trickle down effect' in public opinion. Zaller (1992) agreed, finding that the mass public does "not usually carry around in their heads fixed attitudes on every issue; instead, they construct 'opinion statements' on the fly as they confront each new issue."[7] When elite opinion is clear on an issue, the mass public conforms, accepting the

[6] Baum, Lawrence and Devins, Neal, "Why the Supreme Court Cares About Elites, Not the American People" (2010). Faculty, *College of William and Mary Law School*. Publications Paper 1546.

[7] Zaller, John R. *The Nature and Origins of Mass Opinion.* Cambridge: Cambridge University Press, 1992. Pg. 67. Print.

perceived educated view of the elites, and make it their own. Like earlier studies on public opinion and the court, this thesis primarily will focus on mass opinions; although, narrower opinion[8] will be addressed with special attention to the relationship between business interests and the Supreme Court.

1.2 The Beginnings of the Roberts Court

The Roberts Court began in October 2005, with the summer confirmation of D.C. Circuit Judge John Roberts to the Chief Justice position, formerly held by longtime Chief William Rehnquist. He was the first new member on a Supreme Court that had remained remarkably consistent for fourteen years. He moved on to a court that was an enigma in many ways. On the one hand, the court Roberts was joining had the potential to be quite conservative in its many controversial cases. Observers of the court including Robert Barnes of *The Washington Post*, Adam Liptak of the *New York Times* and a variety of blogs and scholars generally agreed that the Rehnquist Court was more "conservative" in its rulings than the previous Burger Court, but not nearly what it could have been.[9]

With seven of the nine justices in the Rehnquist Court nominated by Republican presidents, the potential for a longtime conservative majority was ever-present.[10] More

---

[8] Narrow interests are not necessarily elite interests, nor are elite interests always narrow ones. For the purposes of this study, I use the term narrow interests to describe an agenda and viewpoint that the mass public may or may not be aware of, but that the narrow interest group will push wholeheartedly.

[9] In this discussion, two items are of particular importance. The first is that most justices do not self-identify as either conservative or liberal. They often bristle at characterizations where they are labeled in such a fashion. Second, when reflecting on a conservative or liberal justice, there are many rulings that are non-ideological, often technical rulings on arcane aspects of law that are not easily classified.

[10] Scalia, O'Connor and Kennedy were nominated by Ronald Reagan. George H.W. Bush nominated Souter and Thomas while Ford nominated Stevens. Rehnquist was nominated by Richard Nixon. Democrat Bill Clinton nominated Breyer and Ginsburg.

may have expected more from the Rehnquist Court had it not been for three members who turned out to not follow the "predicted" path. These three justices included John Paul Stevens, David Souter and Sandra Day O'Connor. In the first instance, John Paul Stevens was nominated by Gerald Ford in 1975 and served for 34 years on the court. While having issued his share of "conservative" rulings, he has largely been a solid "liberal" vote.[11] According to Marshall's analysis (2008), Stevens voted liberally 85% of the time during the fourteen years of the Rehnquist Court. David Souter, recently retired, was more surprising in that he more immediately voted more with the liberal block. He had a 71% liberal voting record, undoubtedly disappointing those who had counted on him voting with the conservatives. In addition to Souter and Stevens, the most maddening Justice for conservatives was Sandra Day O'Connor, who voted liberally only 41% of the time, but had a tendency to be a swing vote, voting with the conservatives on some issues and with the liberal bloc on the most contentious ones. As this report shows, these decisions were often done based on where the prevailing winds of public opinion were.

So in October 2005, the court was a mixed group, with four liberals, four conservatives (including O'Connor) and Roberts. Despite a 5-4 conservative advantage in the fall of 2005, the court was quite similar to the Rehnquist Court. Continuing with her tradition of being the swing vote, she was in the majority 100% of the time that fall. Notably, Roberts and O'Connor were both in the majority twenty-two out of twenty-four times. While most of these 22 decisions were made up of technical points and 9-0

[11] Despite his "leftward" drift, Justice Stevens has always claimed that he has not become more liberal but that the Court has been steadily moving away from him.

decisions, Roberts showed a willingness to go against public opinion early in his tenure. (Marshall, 2008)

In the fall of 2005, O'Connor and Roberts broke on two decisions. O'Connor joined the liberals in *Central Virginia Community College v. Katz* 546 U.S. 356 (2006) and *Gonzales v. Oregon* 546 U.S. 243 (2006). In both cases, O'Connor decisions reflected public opinion in her decision. The Central Virginia Community College case was about whether an individual could sue a state that was claiming immunity under the sovereign immunity statue. Public opinion polls consistently show that the public is in favor of the individual over the state when the individual is wronged. In the second case, O'Connor voted to uphold the right of the people of Oregon to have physician assisted suicide. The voters of Oregon passed the original ballot initiative with 51.3% of the vote in 1994 and then upheld this right in 1997 with 60% of the vote. These two examples highlight that even at the end of her term, she continued her pattern of consistency with public opinion. (Marshall, 2008) These examples also show that Roberts, even early in his term, was willing to buck public opinion.

1.3 Kennedy v. Louisiana

One example of how outside influence can make its way into Supreme Court is the rehearing petition in *Kennedy v. Louisiana* 554 U.S. 407 (2008). This case speaks volumes with regard to when justices use public opinion when necessary. Indeed, this case shows that justices can use the concept of public opinion when it fits their needs.

This was a case where the justices decided that the death penalty as a punishment for the rape of a child that did not end in the child's death violated the 8th Amendment. The ruling was based on the fact that only six states had such laws. In this case, the

majority (Kennedy writing for Souter, Ginsburg, Breyer and Stevens) supported their 5-4 decision by citing that the "national consensus" was moving away from the death penalty for the rape of a child that does not result in death. They bolstered their argument by noting that Congress had not passed a law which had the death penalty as a punishment for child rape. This was found to be a mistake when, three days after the decision, a military court blogger pointed out on SCOTUSblog that in 2006 Congress had, in fact, written into the Uniform Military Code of Justice a provision that allowed for the death penalty in the rape of a child, thus tearing a hole in the majority's argument of the Supreme Court decision. Despite the attention of this oversight via a *New York Times* article, and with 85 members of Congress, several governors and Department of Justice briefs requesting a rehearing, as well as the ensuing Louisiana petition that read "respondent first became aware of Section 552 (b) from a legal "blog" that attracted subsequent commentary.", the justices decided against re-hearing the case while acknowledging the factual error.

Justice Scalia, in his statement joined by Roberts, agreed that there should not have been a rehearing, and makes a mention of public opinion. Scalia contends:

> I am voting against the petition for rehearing because the views of the American people on the death penalty for child rape were, to tell the truth, irrelevant to the majority's decision in this case.

Scalia believes that he has a better pulse on American public opinion than does Kennedy. In fact, Scalia argues;

> While the new evidence of American opinion is ultimately irrelevant to the majority's decision, let there be no doubt that it utterly destroys the majority's claim to be discerning a national consensus and not just giving effect to the majority's own preference. As noted in the letter from Members of Congress, the bill providing the death penalty for child rape passed the Senate 95–0; it

> passed the House 374–41, with the votes of a majority of each State's delegation; and was signed by the President.

The letter from Congress is also an interesting tidbit because Scalia is making the point that national consensus for the death penalty for child rape, as represented by Congress and the President, was actually in favor of the law. As to the many state legislatures who do not have a law providing for the death penalty in these instances, Scalia believes that the actions of Congress and the President better reflect public sentiment or national consensus more than does state inaction.

The *Washington Post* posted an editorial which said:

> The Supreme Court's legitimacy depends not only on the substance of its rulings but also on the quality of its deliberations. That's why we think the Court needs to reopen this case — even though we supported its decision. The losing party, Louisiana, still has time to seek a rehearing, which the Court could grant with the approval of five justices, including at least one from the majority. The Court could limit re-argument to briefs on the significance of the UCMJ provision. We doubt the case will come out much differently; we certainly hope not. But this is an opportunity for the Court to show a little judicial humility. Before the Court declares its final view on national opinion about the death penalty, it should accurately assess the view of the national legislature.[12]

The rebuttal statements by Scalia help bolster one major argument of this paper. Justices will use the views of the American people when it helps reinforce their case and ignore it when it may not support it. Scalia deftly uses public opinion such a fashion. Indeed, he is outraged by the fact that the majority ignored the views of the American people. For someone who often expresses such distaste for public opinion, he certainly was able to use it in this case.

This example is designed to close out this first chapter, where the Supreme Court is introduced, including some of its major players, and the basic premise behind the paper

[12] "Supreme Slip-Up." *Washington Post*. The Washington Post, 05 July 2008. Web.

was discussed. This chapter examined the differences between the mass and narrow interest public opinion and explored some of Marshall's (2008) work on the subject. Finally, this chapter looked at one example at the dynamics in the relationship between the court and public opinion and how it can be used to bolster or undermine a case.

Chapter 2: Methodology

In this project, I propose to test the following hypotheses:

H1: The Roberts Court agrees with public opinion more than sixty percent of its cases in which a decision was rendered on its merits.

H2: Justices in the Roberts Court make indirect references to public opinion in their writings when there exists public opinion they believe bolsters their case.

H3: When narrow interests (in this case business interests) such as the Chamber of Commerce file amici briefs in cases or serve as a party in a case, the court is likely to rule on the side of these groups.

The methodology of this project has three components: 1) examining cases in which public opinion is indirectly referenced, 2) using a pairwise method created by Marshall (2008) which pairs court cases and polls and 3) examining the relationship between the court activity of the U.S. Chamber of Commerce, including when the Chamber is a party to a case, and Supreme Court votes. The goal is to determine whether there is enough evidence to support the hypotheses that the Supreme Court reflects public opinion both in its mass and narrow interest form.

While many newspapers and news organizations have their own polling division, Gallup is an independent organization that provides polling for a number of associations and is generally considered one of the most respected (Glynn, 1999 and Walden, 1996). It operates in over one hundred and forty countries and is referred to widely by the media. There was an attempt to use Gallup polls whenever possible. There are other polling

units that are useful, including the *ABC-Washington Post*, *NBC-Wall Street Journal*, *USA Today*, *and CBS-New York Times,* among others, all easily searchable in the Roper Archive and PollingReport.com, online databases. The Roper Archive is one of the premier poll repositories available to academics. The media often refer to these polls, and justices, along with their clerks, assuming that they read newspapers and watch the news, could thus get a sense what the country believes about high profile issues.

2.1 Indirect Mention Model

The methodology behind the indirect mention model is reasonably straightforward. Cases heard by the Roberts Court and decided between in the 2005 and 2010 terms were found via the Cornell University Law School Web Site. Majority, minority and concurring opinions are listed in an easily searchable .pdf format. The list of words that were searched was as follows: public, opinion, survey, poll, Americans, national consensus, community, citizen and society. If these words were found, then a more thorough review was made of the sentence and paragraph. It was often the case that words that referred to the public at large did not have the proper meaning when read as a part of a sentence or paragraph. I collected such phrases into a database and placed the expression in context of the larger opinion. Is the mention a prominent part of the court's reasoning or is it more of a secondary feature? A mention is logged and categorized if the phrase refers to public opinion either directly or indirectly and is used to support the author's opinion. Additionally, mining all Roberts cases for key words and phrases, I was able to assess distinctions in the types of opinions the court is using. A reference to a legal blog, for example, may indicate a more narrow interest opinion than a reference to a mass public opinion poll. Completing an advanced, substantive search of these words

within each of the majority, dissenting and concurring opinions provided evidence that the court is examining public opinion to one degree or another. At the very least, it should be recognition that the court understands where the public sits on a matter. One key word is “public”. If ‘public’ is used in the context "the public believes this or that" then it could be argued that the justices were speaking on behalf of the citizenry at large. However, in many situations the justices might be referring to a public entity that happens to be one of the principal parties in a case. As a result, cases that had the correct words but not the correct context were discarded.

I argue that the use of key words by the majority or minority indicate recognition of the importance of public opinion by the court. Words and phrases used in the past by earlier courts have included “the public views”, “the prevailing sentiment”, “an enraged community”, “Americans choose”, “residents believe”, “society expects”, “interests of the people” and similar phrases. These key words suggest that what ordinary people believe about a particular issue carries some weight amongst the justices.

Along this line, one of the more interesting phrases that has been used in Supreme Court decisions is “evolving standards of decency”. The first incarnation of this phrase was seen in *Trop v. Dulles*, 356 U.S. 86, 101 (1958), when Chief Justice Warren was writing about the 8th Amendment. In *Atkins v. Virginia* 536 U.S. 304 (2002), a death penalty case, Justice Stevens uses ‘evolving standards of decency’, essentially as a proxy for the “public opinion, in that the argument was that society had essentially decided that

the death penalty for the mentally retarded was cruel and unusual".[13] "Evolving standards" has become an allusion to the community view that is used by the court with great frequency in recent history. That has not always been the case. In the 1970's, when the court was deciding both *Furman v. Georgia* and *Gregg v. Georgia*, 428 U.S. 153 (1976), evolving standards was supposed to have an objective view based on "state legislation, sentencing decisions of juries and the views of entities with relative expertise."[14] It could be argued that all three "objective measures' are in fact opinion based. First, since state legislatures are elected by the mass electorate, states with pro-death penalty legislatures are presumably there because the electorate is also pro-death penalty. Second, juries are members of the general public and so their opinions may in fact reflect the views of the larger mass public and finally, entities with relative expertise may be anyone who has an interest in the subject, including the public at large.

There are only a few examples where the court uses the exact phrasing of 'public opinion'. Even rarer are the words 'poll' or 'survey' mentioned openly. However, the justices do speak in coded terms that suggest public desires do weigh on the justices. Justices, therefore, are more likely to indirectly cite public opinion in their decisions through either reference to societal sentiment on a specific ruling, or to the public as a whole. When Justice Scalia argued that 'most' of the citizens of The District of Columbia were in favor of lifting the gun ban in *D.C. v. Heller* 554 U.S. 570 (2008), he was arguing that the unreasonable restriction prohibited an entire class of guns that

[13] The laws of 30 states against the execution of the mentally retarded is "powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average citizen." *Atkins v. Virginia. Supreme Court.* 20 June 2002. Print.

[14] "Cruel and Unusual Punishment: The Juvenile Death Penalty Evolving Standards of Decency." *Juvenile Justice Center* (Jan. 2004): 1-3. Print.

Americans buy.[15] Indirect references allow justices, who otherwise might resist submitting to 'public opinion", a strategic way to circumvent contradiction their view on allowing public opinion a voice in court decisions.

Justice David Souter's opinion in *Brendlin v. California* 551 U.S. 249 (2007) is a good example of how the court is consistent with public opinion through indirect mentions. In this case, the code phrase is 'societal expectation'. In the *Brendlin* case, a passenger in a car was arrested on a parole violation. The passenger sued, arguing that the search was a violation of the 4th Amendment and that the seizure rule in such an automobile stop is intended for the driver. The court disagreed, 9-0, holding that all passengers in a car stopped are subject to search and seizure. On page eight of the opinion, Justice Souter explains that it is reasonable for passengers to expect that they are being seized when the car is stopped. Moreover, it is reasonable that police officers will not allow passengers to move around in or out of the car in ways that would endanger the police. Souter contends that there is a societal expectation that the police are unquestionably in charge when a car is pulled over. Reasonable people (the passenger and the driver) should reflect this societal expectation and know that both parties are subject to reasonable search and seizure once pulled over.

In this opinion, Souter is not pointing to any specific public opinion polls or surveys as the basis of his opinion. The public sway is much more nuanced, but nonetheless a suggestive look into the logic of the justices. Statements like 'societal expectation' are based on how society views the laws. In this case, members of society expect a certain behavior from the police and act accordingly. If societal expectation was

[15] The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. *DC vs. Heller. Supreme Court.* 26 June 2008. Print.

that the police are not allowed to seize passengers, then Souter's entire rationale might be different, the court might be disagreeing with public opinion, or the outcome might have been reversed. This opinion was 9-0, 'only' thirteen pages long and relatively non-controversial because the court was simply reinforcing a law that the public already expected from the police. And because the other eight members of the court agreed with Souter's rationale, it is reasonable to assume that they agree that societal expectation has a role in how the police should act.

Another example comes from a dissenting opinion in a 2007 case of *Morse et al v. Fredrick* (551 U.S. 393 (2007)), the "Bong Hits for Jesus" case, where the court ruled that the school principal did not violate the First Amendment in snatching a banner from a student and preventing it from being shown. Chief Justice Roberts wrote that since the banner advocated an illegal activity, it was not a violation of free speech to have it removed. In his dissent, Justice Stevens argued that marijuana is used by thousands of otherwise law abiding citizens and that public opinion is evolving on this issue much like it did on alcohol prohibition: "The ensuing change in public opinion occurred much more slowly than the relatively rapid shift in Americans' views on the Vietnam War, and progressed on a state-by-state basis over a period of many years."[16] Justice Stevens does not use public opinion as a direct rationale for his decision, but rather uses it in a supportive role, suggesting that as public opinion moves toward the legalization of marijuana, Roberts' rationale for the majority opinion loses legitimacy, especially if marijuana use becomes legal.

[16] *Morse Et Al v. Fredrick. Supreme Court*. 25 June 2007. Print. (Dissenting opinion.)

Common sense suggests that justices will use public opinion in their decision making if it supports their case and may go as far as to explicitly reference public opinion directly or through disguised intimations. In the *Morse* case, Chief Justice Roberts argued that polls on drug attitudes were showing more and more leniency among the young and the banner was promoting illegal activity that was on the rise. Even Justice Scalia, who lambasted O'Connor's use of public opinion in *Planned Parenthood v. Casey*, uses references to the public in his opinions *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *Kennedy v. Louisiana* 554 U.S. 407 (2008).[17]

2.2 Pairwise Method

To assess connections to public opinion, this study will also use the pairwise method, a poll-to-decision match, developed by Marshall in his two works on the Supreme Court (1989, 2008) including his book Public Opinion and the Rehnquist Court. The pairwise method determines the correlation between public surveys or polls and Supreme Court decisions by collecting 'matches' between a survey or poll taken on an issue before the Supreme Court and decisions made by the court. The resulting relationship is an indicator of whether a Supreme Court decision falls in line with public opinion. Marshall used this approach as many of the country's most pressing issues eventually find their way into the court system. As Alexis de Tocqueville once noted about the courts, "Scarcely any political question arises in the United States that is not

[17] In *District of Columbia v. Heller*, Justice Scalia said that "Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid. In *Kennedy v. Louisiana*, he argues, "Accordingly, the *Coker* dicta gave state legislators a strong incentive not to push for the enactment of new capital child-rape laws even though these legislators and their constituents may have believed that the laws would be appropriate and desirable." [*DC vs. Heller. Supreme Court.* 26 June 2008. Print.*][Kennedy v. Louisiana. Supreme Court*. 25 June 2008. Print.]

resolved, sooner or later, into a judicial question."[18] As the interest in cases before the court increases, the number of polls taken on those very issues also increases, allowing for a very direct comparison. Marshall has found that most of the Supreme Courts have been consistent with public opinion between sixty and sixty-six percent of the time and I argue that the Roberts Court will continue this trend.

This approach is one of two that has been used in comparing public opinion to the court. The other approach is the trend method, made popular by Weissberg (1976), Page and Shapiro (1983) and Devine (1970). In the 1990s, it became the norm in trend studies to use Stimson's (1991, 1999) public mood index. Trend studies (Flemming and Wood 1997, Mischler and Sheehan 1996, Norpoth and Segal 1994) deal with the broader public mood and have assisted in the debate on the extent to which public opinion is reflected in the court's decisions, while the pairwise method used by Marshall allows for greater specificity in cases and a more transparent assessment of whether specific issues are being reflected in court decisions. The trend method is effective in reflecting how the public mood impacts the makeup of the court but is limited in that public mood indices do not necessarily contain issues that come before the Supreme Court. When the country chooses a Democrat for president the trend might be that the country is moving slightly left. This trend results in court appointments being more liberal leaning. When the public mood is more liberal, the court can become more liberal as well. The 2008 election is a good example of this. After the Bush years, the country elected President

[18] Christopher L. Tomlins, Ed.. *The United States Supreme Court: The Pursuit of Justice*, New York, New York. Houghton Mifflin Company. 2005. Print. Page 72.

Obama, paving the way for both Sotomayor and Kagan confirmations to the court, roughly keeping the court in the same ideological place it had been during the Bush years. However, rather than the trend method, the methodology in this thesis will rely on the pairwise linkage model and apply it to the Roberts Court to best judge the parallel between specific decisions and specific polls.

This study will employ a compilation of cases in which there is public opinion polls associated with the issue debated by the court. Most of the more high-profile, media-saturated cases during the Roberts Court have polls associated with them. While the Internet provides myriad polling 'data', polls from the Gallup organization are used when possible. In the absence of a Gallup poll, I use *ABC News, USA Today, CNN, CBS News, New York Times, Harris,* and *Washington Post* polls. If a public opinion poll cannot be found on the issue being debated before the court, the case will not be used. Court decisions dealing with more than one issue with corresponding polls on each subject will be treated as two matches. Conversely, multiple court cases on the same issue with a corresponding poll will be treated as one case. The cases and polls will be cross-checked to determine their consistency with public opinion. The majority opinions will be coded 'consistent or 'inconsistent'. Polls on the same decision or issue that had opposing results will be assessed as 'unclear' and not used and polls that had a variety of responses such as 'very likely' and 'likely' will be collapsed accordingly. Additionally, cases that had more than one poll attached to them will be combined into one result. Dissenting and concurring opinions will also be mined for similar information. A consistency rate between cases and polls will be gathered and analyzed in order to assess the strength of the relationship.

The date the poll was taken is another important factor in this analysis. Since polling is influenced by the court's decision, this study will only use polls taken prior to a decision by the court. It avoids the complicated issue of whether the court was influencing public opinion.[19] If a poll's outcome is consistent with the court's majority opinion, it is coded as the court being consistent with public opinion. Since the Roberts Court is relatively new, it will be challenging to find exact matches as the number of high profile cases is small. In cases where there was no poll found on an exact case, then polls on the issue presented before the court will be used. For instance, in the 2009 case *Herring v. United States* 555 U.S. 135 (2009), there is no poll specifically on this case before the court. However, there were polls found on the issue discussed in the case, the exclusionary rule and exceptions to it, before the court ruled on its merits.

2.3 Narrow Interest Model

The third methodology will scrutinize the pairwise method to see if there is a consistency rate between what the Chamber favors for court outcomes and court decisions. This methodology will use both amicus briefs filed by the Chamber of Commerce as well as cases where the Chamber itself was a party. The Chamber of Commerce was founded in 1912 as an advocacy group for American businesses. They have three million members and support both large major companies such as Wal-Mart and smaller "Mom and Pop" stores. While business advocacy is a large umbrella, business interests as represented by the Chamber are still narrow because the Chamber

[19] In Marshall's 2008 study, he found that it made no difference statistically between when a poll was used either before the decision was announced or after. However, there is much literature on the theory that Supreme Court decisions do influence public opinion after they are released to the public. Because the Court has such high approval ratings, it stands to reason that the public will side with the Court's opinion.

represents and lobbies on behalf of their members (a small group compared to the general population) before the executive, legislative and judicial branches. When the Chamber files amicus briefs supporting their constituents, evidence exists that members of the court and their staffs do read, pay attention to and reflect on these briefs. There are several studies supporting this suggestion of the link between amicus briefs and justices' votes (Spriggs and Wahlbeck 1997, Segal 1988, Songer and Sheehan 1993, Johnson 2004, Caldeira and Wright 1988, Epstein 1993).

With the data suggesting that the Supreme Court sides with the Chamber of Commerce when they file an amicus brief or are a party to a case, the original question remains: Are the justices who side with the Chamber agreeing to something they already believe, or is the narrow interest view, in this case, the Chamber of Commerce, a roadmap for how they ought to rule in the case? Since public opinion is often opposed to Chamber positions, when the court agrees with Chamber positions, it can be doing so against mass public opinion. In this method, it can be identified whether the court decided in favor of the Chamber of Commerce and against public opinion, and by extension, whether the court was more consistent with narrow opinion than mass public opinion.

Amicus briefs do not represent the mass public. As a whole, they are largely representative of narrow interest group opinion. This is because amicus briefs are written for the benefit of a specific group rather than the mass public. As Stephen Shapiro of the Supreme Court Bar asserts, "Today, organizations such as the American Civil Liberties Union, the NAACP Legal Defense & Education Fund, and the AFL-CIO advocate their positions in nearly every Supreme Court case that impinges on their goals. To a lesser

extent, conservative public interest groups, such as the Mountain States Legal Foundation, also file amicus briefs in Supreme Court cases."[20] Authors of amicus briefs generally are interested in the outcome for their specific members. For example, while the mass public may be in favor of limited gun control and the National Rifle Association files brief on their behalf, they also do so in cases where the public may be against them. Their vested interest is their group and its membership first. The fact that the public at large may benefit (as is the case with the ACLU) is simply a byproduct. The mass public, generally unfamiliar with amicus briefs, would not be able to use this same communication method with the court.

Sometimes, narrow interest opinion makers take positions through amicus briefs opposed by the mass public. The United States Chamber of Commerce is one such group. It represents business interests, and while it has approval ratings hovering around 50%, it also takes positions that the mass public often disagrees with. In the two terms of 2009-2011, for example, the Chamber filed briefs in eight cases and was on the winning side in six of them. In those six cases, public opinion was in favor of the opposite position the Chamber took. The two most notable of these cases were *Lilly Ledbetter v Goodyear Tire Company* 550 U.S. 618 (2007) and *Wal-Mart v Dukes* 564 U.S. ___ (2011)[21] While the *Ledbetter* case, where the central issue concerned a women who sued her employer for back pay when she found out that as a manager, she was paid less than

[20] Shapiro, Stephen M. "Amicus Briefs in the Supreme Court." *Appellate.net*. Mayer, Brown & Platt, 1999. Web.

[21] The Ledbetter case was about a woman who sued her employer for back pay when she found out that as a manager, she was paid less than her counterparts. The majority ruled that the statute of limitations had passed and Ledbetter was unable to sue for damages. The Wal-Mart v. Dukes case was where Patty Dukes attempted to make her sex discrimination part of a class action of lawsuits against Walmart. The Court said that her case could not be made as such. Both cases were decided 5-4.

her counterparts, was decided largely on statutory issues rather than constitutional ones, the minority argued that the 180 day limit on filing claims was itself wrong because discrimination occurs over a long period of time. The Chamber of Commerce filed an amicus brief stating that Lilly Ledbetter ought not be able to sue, subsequently supported the Supreme Court decision, stating that the ruling "eliminates a potential wind-fall against employers by employees trying to dredge up stale pay claims," and opposed a bill passed by the House, Senate and signed into law by the President. Polling showed that sixty-six percent of Americans were in favor of the law, in stark contrast to the Chamber of Commerce.

A study by the Constitutional Accountability Center of the Chamber and reported on by Adam Liptak of *The New York Times* during the years 2005-2011 reveals that the Chamber of Commerce was successful either as a litigant or when it filed an amicus brief:

> The Roberts Court, which has completed five terms, ruled for business interests 61 percent of the time, compared with 46 percent in the last five years of the court led by Chief Justice William H. Rehnquist, who died in 2005, and 42 percent by all courts since 1953. Twenty percent of the cases had Chamber support through an amici filing and each one was a victory by the Chamber of Commerce. Of the twenty, fifteen were decided by a 5-4 vote.[22]

Collins (2007) suggests that amicus briefs make a "robust" difference. He argues that pressure groups are effective at shaping the court's policy outcomes and decision-makers such as the Supreme Court can be influenced by organized interests. Corely

[22] Liptak, Adam. "Justices Offer Receptive Ear to Business Interests." *The New York Times*. The New York Times, 18 Dec. 2010.

(2008) goes a step further in suggesting that there is a connection between the language found in amicus briefs and the language found in majority, concurring and dissenting decisions. This evidence hints at the possibility that amicus briefs are convincing enough to guide the court towards a decision in their favor. There is much discussion in the media that some members of the court are voting with the Chamber on most or all issues. The consistency scores between the Chamber and some members are quite striking. Justices Roberts, Alito, Scalia, Kennedy and Thomas collectively voted for the Chambers position 74% of the time. Justice Alito has voted consistently with the Chamber of Commerce 100% of the time.

2.4 Challenges

The three methodologies used in this thesis each have their own set of challenges. Marshall (2008) found 123 direct mentions to polls or other surveys for the Rehnquist years. There are only a few direct mentions thus far during the Roberts Court. Therefore, more coded indirect mentions need to be used. As a result, the reading of one indirect mention may mean something to one person, but something else to another. There would be more clarity with direct mentions, but that is not currently possible.

The pairwise method equally can be questioned for its ability to substantially reflect mass opinion in the decision making of Supreme Court members. One challenge is that cases are not always decided on the merits, and those cases had to be largely excluded. One notable example was the case *Arizona Christian School Tuition Organization v Winn*, 09-987 which was enticing to examine because of its First Amendment content. In this case, a group of Arizona taxpayers sued based on a law,

which allowed tax credits for people who donated money to tuition organizations.[23] These organizations then would provide tuition assistance to parents who had their children in private or religious schools. There was a poll done on this very case, which made it not only eligible for inclusion in this study, but it was exceptional in that most cases did not have polls that dealt with the case itself, rather they were polls that dealt with the issue being debated. Despite its seemingly ideal qualities, this case was omitted from the study's database as it was overturned 5-4 on a standing to sue issue rather than the merits of the case. This was one of several cases that were similarly excluded.

Finally, there are the justices themselves, who consistently argue that they are not subject to public opinion. When confronted with the idea that they are often subject to public opinion, they often respond negatively.

> Both O'Connor and Justice Stephen Breyer strongly resisted the suggestion by Larry Kramer, the dean of Stanford Law School, that the Court, self-consciously or not, follows popular opinion in particular cases. "We're aware of broad [public] views, but to say that we read the polls is unrealistic, so the answer is no," O'Connor said decisively. Kramer politely suggested that both justices were victims of false consciousness, noting that the empirical data about how closely the Court follows the public over time is too overwhelming to ignore. But, although O'Connor and Breyer were shocked, shocked, by the suggestion that they intentionally tried to mirror the views of the public, it's true that the Court would be a far more centrist institution today if O'Connor were still on it.[24]

Another challenge with measuring the relationship between the court and mass public opinion is the public's relative lack of knowledge. As Marshall (2008) pointed out, only half of Americans can name the country's most significant decisions and a

[23] There are organizations in Arizona which allow for parents to make donations to them in exchange for a dollar to dollar deduction in their state income tax. The tuition organization takes that money and donates it on behalf of children attending Christian schools.

[24] Rosen, Jeffrey. "Why I Miss Sandra Day O'Connor." *New Republic*. The New Republic, 1 July 2011. Web.

minority of Americans can name even one justice. Yet, the court's approval rarely falls below fifty percent. Moreover, over a third of Americans polled agreed that the Supreme Court's recent decisions were "about right."[25] Notably, the same poll in 2011 showed that thirty percent of Americans believed that the court was too liberal, in stark contrast to the assessment of most Supreme Court watchers. A recent poll from a 2011 Time Magazine showed that only 15% of respondents followed the major decisions of the Supreme Court very closely. While 54% of the respondents said that they followed the Supreme Court "somewhat closely", a full 30% admitted that they did not follow them closely or at all.[26] Further examination suggests that citizens are able to comment on the court at the institutional level but not able to do so at the individual level. From 2010 with the confirmation of Elana Kagan being a centerpiece of the daily news cycle, 58% of Americans indicated that they were either not following the confirmation very closely or not following it at all.[27] Sixty percent said they were either unsure or couldn't say whether she ought to be confirmed. An NBC/Wall Street Journal poll illustrated that forty-seven percent of respondents said they did not know enough about Kagan to make a decision whether she ought to become a Supreme Court Justice.[28] A National Constitution Center poll showed that 72% of respondents believed that the decisions of the court have an impact on their daily lives[29], yet Fox News survey from June 2010

---

[25] **Gallup Poll**. 9/8-11/2011=11. N=1,510 adults nationwide. Margin of error ± 4.

[26] **Time Poll** conducted by Abt SRBI. June 20-21, 2011. N=1,003 adults nationwide. Margin of error ± 3.

[27] **USA Today/Gallup Poll**. July 27-Aug. 1, 2010. N=1,208 adults nationwide. Margin of error ± 3.

[28] **NBC News/Wall Street Journal Poll** conducted by the polling organizations of Peter Hart (D) and Bill McInturff (R). June 17-21, 2010. N=1,000 adults nationwide. Margin of error ± 3.1.

[29] **AP-National Constitution Center Poll** conducted by GfK Roper Public Affairs & Media. Aug. 11-16, 2010. N=1,007 adults nationwide. Margin of error ± 4.5.

showed that forty percent of Americans had never heard of Kagan.[30] A Pew Research Poll responded that 72% of Americans thought that President Obama's choice of justices was either very important or somewhat important.[31] This demonstrates a clear disconnect between what Americans believe about the Supreme Court as a whole versus its individual parts. They will admit that decisions coming from the court are important, but do not follow day-to-day events surrounding the court.

Despite the fact it enjoys its traditionally high approval ratings, there has been a recent downturn in the court's approval ratings. Consider the chart taken from a Gallup Poll on approval ratings of the Supreme Court over the past several years:

Table 2.1: Gallup Poll of Supreme Court Approval Ratings

Gallup Poll. Sept. 8-11, 2011. N=1,017 adults nationwide. Margin of error ± 4.

"Do you approve or disapprove of the way the Supreme Court is handling its job?" Percent approving

	Approve	Disapprove	Unsure
9/8-11/11	46	40	14
9/13-16/10	51	39	10
8/31 - 9/2/09	61	28	11
6/14-17/09	59	30	11
9/8-11/08	50	39	11
6/9-12/08	48	38	14
9/14-16/07	51	39	10
5/10-13/07	51	36	13
9/7-10/06	60	32	8
9/12-15/05	56	36	8
6/24-26/05	42	48	10
9/13-15/04	51	39	10
9/8-10/03	52	38	10

[30] **FOX News/Opinion Dynamics Poll**. June 29-30, 2010. N=900 registered voters nationwide. Margin of error ± 3.

[31] **Pew Research Center Survey**. April 21-26, 2010. N=1,546 adults nationwide. Margin of error ± 3.

7/7-9/03	59	33	8
9/5-8/02	60	29	11
9/7-10/01	58	28	14
6/11-17/01	62	25	13
1/10-14/01	59	34	7
8/29 - 9/5/00	62	29	9

With the brief exception of June of 2005, the court currently has the lowest approval ratings it has had since polling was conducted. While the approval range has a median of 55%, the 15 point drop in approval ratings since September of 2009 is notable in that the court has made many of its more high profile decisions during this time period. Moreover, the increase in disapproval ratings has also been climbing steadily during the same time period, from a low of 28% in 2009 to its second highest disapproval rating in the past eleven years in 2011. Even in the months after the *Bush v. Gore* 531 U.S. 98 (2000) decision, the court had rebounded to a 59% approval rating and a 34% disapproval rating in the spring of 2001.

Chapter two is designed to explore the model that I will use to test the extent to which the Supreme Court reflects public opinion. I plan to examine the words of the justices themselves to see if they refer to public opinion, extend Marshall's pairwise method to the Roberts Court between the 2005 and 2010 terms and see if the Chamber of Commerce's support on an issue is consistent with Roberts Court decisions. These three models have challenges, most notably that cases need to be decided on the merits and that the court members themselves have publically claimed that they are subject to the whims of public opinion.

Chapter 3: How the Supreme Court Reflects the Popular Will

Traditionally, the relationship between public opinion and the Supreme Court has four streams of research. In this chapter, I will survey these four streams in depth, and note why the Supreme Court even cares about public opinion at all. Additionally, I will examine the role of ideology on the court within the context these four streams and see the extent to which the justices ever evolve in their thinking.[32] The first stream argues that justices are members of the community and largely are products of the political process. Assuming that they and their clerks read newspapers, listen to the news, visit the Internet and attend functions where opinion is meted, public opinion could have an impact. This is almost a process of osmosis, where the justices are surrounded by a particular point of view and it seeps into decision making. Glick (1993) has written in support of this view. He argues that even with lifetime appointments, there might be a creeping effect of public opinion into judicial decision making. These judges have children and families who are a part of the political and national conversation and undoubtedly share their opinions with the justices.

The second school of thought argues that because the court often relies on the executive and legislative branches at federal, state, and local levels to carry out its orders, the court will not flow too far away from mainstream public opinion. Dahl (1957), Mishler and Sheehan (1993; 1996) provide clarity on this issue. Because the court is a

[32] Judicial ideology in this paper refers to how the policy preferences of the justices impact their legal decisions. For example, a justice with a conservative ideology will choose a conservative legal outcome on a case and a justice with a liberal ideology will choose a liberal outcome. See Segal and Spaeth's attitudinal model of judicial decision making (2002).

majoritarian institution, they argue, it needs to operate within a "zone of acceptable outcomes" in its decision making.[33] If a decision is outside of this zone, public disapproval of the court increases. As the public disapproval increases, pressure for lawmaking bodies to react increases. As a result, reaction by the people to a Supreme Court decision is often reflected by pressure on Congress. For example, with the eminent domain case (*Kelo v. City of New London* 545 U.S. 469 (2005)), this decision arguably fell outside the 'zone.' Public opinion at that time showed strong majorities generally opposed to the government taking private land in order to give it to another private entity for economic development. As a result, Congress and several localities introduced legislation prohibiting localities from taking private property for economic development.[34] Justice Souter's house in New Hampshire, for example, was threatened by a group of advocates who disagreed with his majority vote. While the town eventually voted against confiscating Souter's residence, New Hampshire went on to pass a law which banned the practice of taking property for commercial development.[35] Another case with this same dynamic was *Citizens United v. Federal Election Commission*, 558 U.S. ___ (2010), where the court ruled against a prohibition on labor unions and corporations from making independent expenditures in elections. The outcry has been palpable, with President Obama addressing the court directly in his 2010 State of the Union Address. Some members of Congress, including Representative Chris Van Hollen

[33] The 'zone of acceptable outcomes' has been used repeatedly in discussing Congressional outcomes. Weaver (2000) uses it often in his book on welfare reform.

[34] H.R. 4288, 111 Cong. (2009) (enacted). Print.

[35]"Souter Won't Get Taste of His Own Medicine." *Msnbc.com*. Associated Press, 15 Mar. 2006. Web. 09 Mar. 2014.

(D-MD) and Senator Charles Schumer (D-NY), threatened to "rectify" this situation during the 2010 legislative year and every subsequent year until a new law is passed.

The court also reflects the public when it chooses cases. Since it self-selects, it often chooses ones that have both percolated up through the system and remain in the mainstream of public debate. Two examples support this theory. With eighty percent of people in a 1965 Gallup poll across the country approving the availability of contraceptives, the court overturned, in *Griswold v. Connecticut* 381 U.S. 479 (1965), a ban on the practice. While it could be argued that the Court simply brought Connecticut into line with the rest of the states, the eighty percent figure is significant in its robustness. The court also appeared to be reflecting public opinion in the case of *Reed v. Reed,* 404 U.S. 71 (1971) where the court overturned an Idaho law that preferred men to women in the administration of estates. Public opinion across the nation as measured by a Gallup Poll showed a vast majority of people in favor of expanding women's rights (Marshall, 2000, 32).

The third theory of public preferences and the court is found in the nomination process. Certainly the president has to take public opinion into account in his choices (Johnson and Roberts, 2004). If the nominee is outside the mainstream on policy views, then the potential for rejection is raised. Chief Justice Robert's confirmation vote was 78-22, for example, as his hearing was viewed as being relatively smooth and without controversy. The Senate Judiciary Committee vote was 13-5 in favor, easily clearing the way for him to be confirmed by the larger body. Three liberal members of the Senate Judiciary Committee, Russell Feingold and Herbert Kohl of Wisconsin and Patrick J. Leahy of Vermont all voted for Roberts. This indicated that Roberts, even though widely

recognized as conservative, was well within the mainstream (Hoch, 2006). A second example with the opposite outcome was Robert Bork, who was defeated by the Senate 58-42, after a contentious confirmation fight. The conventional wisdom is that Bork was defeated after Senate Democrats were successful in painting Judge Bork as being outside this mainstream (Ogundele and Keith, 1999). Senator Edward Kennedy took to the floor forty-five minutes after Bork was announced to denounce his nomination (Marshall, 2000, 120). Because it took the Reagan administration two months to organize and respond, the Democrats had the advantage going into the confirmation hearings. The nomination and confirmation process keeps the court within a certain parameter, in that more extreme nominees have a tougher time getting through the Senate Judiciary committee. Most nominees who are likely to be rejected pull out of the process before the Judiciary committee has a chance to act. Harriet Myers is a more recent example of this phenomenon. She was unable to pass congressional scrutiny in her early meetings with Senators.

A fourth line of research deals with references to the actions of state legislatures with regard to specific legislation. If the majority of states, for example, were to have laws on gun control or execution methods, the court can and does make reference to these laws in their rulings. This would reveal that justices are informed by amicus briefs, clerks and litigants about how the state legislatures dealt with similar issues (Peters, 2007). Notable examples include the juvenile death penalty, child rape laws and the execution of the mentally retarded. The court overturned both laws with the majority opinion noting that there were so few states that had the law that it made it cruel and unusual and was a violation of the Eighth Amendment. References to state legislatures

can arguably serve as a proxy for public opinion because if enough states have the same law, it is reasonable to assume that the majority of people of those states support that legislation. In many cases, the phrase 'evolving standards' is used as a surrogate term for a change in public opinion.

If state legislatures indeed act in a majoritarian fashion, does the same logic apply to Congress? If Congress passes a law, to what extent does the court defer to the legislative branch? The debate here is a bit clouded. Any student of the court system first learns that *Marbury v Madison* 5 U.S. (1 Cranch) 137 (1803) is where the court established the power of judicial review. Counter to popular notions, the court actually invalidates very few federal laws. It does make an effort to respect the laws passed by Congress (Peters, 2007). The court in these cases serves its purpose of being a check on the legislative branch. Take the case of the line item veto, a circumstance where the court ruled that Congress overreached by allowing the president to have this power. A 1995 Gallup poll showed that the majority of people who knew about the bill did support it. Regardless, the court rejected the law as being a violation of the separation of powers principle (Kline, 2000). This judicial 'respect' for Congress has ebbed and flowed through the years. The Warren Court was well known for the broad policies that came from its rulings while the Roberts Court appears to be making its opinions as narrow as possible in order to allow Congress to make new laws as necessary. Both the *National Law Journal* and *The Washington Post* have recently run articles articulating this point.[36] Anecdotal evidence of these rulings includes the Voting Rights Act reauthorization

[36]Lane, Charles. "Narrow Victories Move Roberts Court to Right." *Washington Post*. The Washington Post, 29 June 2007. Web..; Mauro, Tony. "Roberts Court Takes Narrow Road to Right." *National Law Journal* (2009) Print.

(*Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. ___ (2009),) and when the court upheld the partial birth abortion ban in Nebraska (*Gonzales v. Carhart*, 550 U.S. 124 (2007)). Many newspapers and legal blogs have referred to the Roberts Court as the minimalist Court (Sunstein, 2006), as the court moves incrementally by deferring decisions to the other branches.

Ultimately, public opinion is often fluid and justices try to "split the difference" as best they can. A case in point comes from the Rehnquist Court. The Rehnquist Court was a split-the-difference kind of court, where attempts were made at preventing the court from doing away with precedent while at the same time bowing to public opinion. Judge J. Harvie Wilkinson, in his piece "Rehnquist Court at Twilight" argues that in controversial cases, the court has a tendency to "thread the needle" between public opinion and in doing so, "splits the difference on contentious social issues". The court was in "sync with the views of most Americans" and "in the place that most Americans preferred." despite the fact that the Rehnquist Court has been called by Keck (2005), the most activist Supreme Court in history. A'twilight' Rehnquist case highlight this mentality. In *Gratz v. Bollinger* 539 U.S. 244 (2003) and *Grutter v Bollinger* 539 U.S. 306 (2003), the court cut the case in the middle as tightly as possible. On the one hand, they ended the affirmative action system at the University of Michigan, arguing that the point system in place was unconstitutional. On the other, the court ruled that race could be used as one factor in admissions. The outcome in the case pleased no one, and both sides claimed victory. Many conservative commentators, who believed that the time was right to end affirmative action, decried the decision because of its split nature. Notably, however, the court, with Justice O'Connor in the lead, did exactly what the American

people wanted them to do. Polls taken just days before the decision was announced showed two contradictory attitudes. In one, sixty percent of Americans were against affirmative action and in favor of merit with regard to getting into college. However, in the same poll, close to eighty percent made the contradictory argument that it was important that college campuses have some diversity. Neither side could claim full victory, but that is exactly what the people wanted.

The Roberts Court, especially in the last several years, is showing itself to not have the same "ear" towards public opinion as did the Rehnquist Court. Indeed, the cases that come from the Roberts Court appear to be less splitting-the-difference. The cases that the court has been deciding lately show perceptible movement especially when it comes to business and criminal cases. Whereas the Rehnquist Court saw the middle ground to be its foundation, the Roberts Court appears to be deciding cases in a way that chips away at many rulings from the 1960's. The most recent example of this is the Miranda warning case of *Berghuis v. Thompkins* 560 U.S. 370 (2010), where the court ruled 5-4 that the right to remain silent must be expressly stated rather than implied after the Miranda warnings were given. While it is a clarification of the Miranda warning, doing anything that changes Miranda is risky with regard to public opinion, as more than 80% regard it a good procedure. The Roberts Court's conservatives voted in favor of the change while the liberals voted against it. The ruling arguably restricts the rights of defendants in a way that the public would not necessarily approve of. Contrast this decision with the Rehnquist decision in 2000, where the Miranda warnings were upheld by a 7-2 decision. In *Dickerson v. United States* 530 U.S. 428 (2000), the court refused to overturn Miranda, arguing that the warnings were both constitutional and part of the

national culture. Both Kennedy and O'Connor were in a majority on Dickinson. It has been widely reported by authors such as John Yoo and Kathleen Parker that Rehnquist joined the majority when he realized that he was going to be in the minority and he wanted to craft the opinion as narrowly as possible.[37]

So what was the difference between the two decisions? Certainly, the cases were different, but more importantly, the makeup of the court was different. In *Berghuis v. Thompkins* 560 U.S. 560 (2010), Kennedy voted to restrict the protections in Miranda. So what accounts for the change in attitude towards Miranda? It is possible that he may not agree with the broad protections of Miranda, but was unwilling to do away with the law completely. That might explain how he voted to keep it intact in one case and then vote to restrict it seven years later. Or is it possible that Kennedy saw this as a middle ground, like O'Connor did, understanding that the public had no interest in doing away with Miranda?

3.1 Why the Court Cares About Public Opinion

I would argue that Roberts Court follows mass public on par with other Supreme Courts. The mass public is not directing what the justices ought to do from case to case, but the public's preferences are reflected in both cases the court accepts and its outcomes. Logic suggests that decisions mirror mass public opinion in part because the Court desires respectability and legitimacy. Barry Friedman writes in his book The Will of the People that the relationship consists on two levels. The first level is that the court is

[37] "HOLDING COURT: The Legacy of the Rehnquist Court." Interview by Peter Robinson. *Uncommon Knowledge*. Leland Stanford Junior University, 26 May 2005. Web.

directly responsive to the public, either through appointments or through public pressure. The second level of this relationship is more complicated in that the public expects the court to disagree with them from time to time. The public expects the court to make unpopular decisions from time to time. Therefore the popularity of the Supreme Court exists on two levels as well. On the one level the court's popularity ebbs and flows with popular decisions that emerge. The *Bush v. Gore* and *Citizens United* cases speak to this. Inevitably the court will continue to be subject to the political ups and downs. On the second level, the court has a deep level of credibility that allows it to make unpopular decisions from time to time. Much of that institutional credibility has been built up throughout history and often is combined with a lack of knowledge about the court. As several researchers (Caldeira and Gibson 1992) show, there exists a "reservoir of goodwill" towards the court. But despite the idea that the court can turn to this good will when they make unpopular decisions, does the court actively seek legitimacy? There is some evidence to support this assertion. Both Souter and O'Connor were concerned about what the politicization of the court in *Bush v. Gore* 531 US 98 (2000) was going to mean for the court's legitimacy, and in more recent times, Scalia and Breyer show their concern for legitimacy as they fight against cameras in the courtroom.

Another recent example of where the court appeared to be weighing legitimacy concerns was *Newdow v. United States Congress, Elk Grove Unified School District, et al.*, 542 U.S. 1 (2004). The case dealt with whether the phrase 'Under God' in the Pledge of Allegiance constituted a violation of church and state. A 2003 poll from the First Amendment Center indicated that "68% of adults believe that teachers who include '*one nation under God*' in the *Pledge of Allegiance* were not violating the principle of

separation of church and state."[38] The same poll found that "73% of respondents said that the pledge, including the '*under God*' phrase is "*primarily a statement related to the American political tradition*."[39] On a technicality, the court allowed "Under God" to continue in the pledge. Despite its dismissal on standing-to-sue grounds, Chief Justice William Rehnquist wrote a concurring opinion discussing the merits of the case.[40] In his opinion, he references the public's willingness to go along with the pledge, saying,

> To the millions of people who regularly recite the Pledge, and who have no access to, or concern with, such legislation or legislative history, "under God" might mean several different things: that God has guided the destiny of the United States, for example, or that the United States exists under God's authority. How much consideration anyone gives to the phrase probably varies, since the Pledge itself is a patriotic observance focused primarily on the flag and the Nation, and only secondarily on the description of the Nation.

By referencing the millions who take the pledge every day, Rehnquist implied that they are willing, thereby in favor of, the continuation of the pledge in its current form. The court would certainly be concerned about a loss of legitimacy if it overturned such a respected and valued American tradition. To date, this issue has yet to come up before the court again.

Despite the capital that the court has built up over the years, there is some evidence that the reservoir might be draining a little. For many years, the Supreme court's approval ratings have hovered between fifty and sixty percent, but recently, the approval

---

[38] Poll taken from the First Amendment Center ["Background Material." *Pledge of Allegiance and Its "Under God" Phrase*. Ontario Consultants on Religious Tolerance, 2002. Web. 25 Oct. 2008.]

[39] Poll taken from the First Amendment Center ["Background Material." *Pledge of Allegiance and Its "Under God" Phrase*. Ontario Consultants on Religious Tolerance, Web. 25 Oct. 2008.

[40] The Court's rejection of the plaintiffs case on the standing to sue issue prevented the Court from having to decide on the merits of the case, one that certainly would be fought over in both the courtroom, and in the public eye.

ratings have been slipping. From highs in 2006 of sixty percent and sixty one percent as recently as 2009, the court stood between fifty one percent in 2010 and at forty six percent in 2011. As Justice Roberts himself said in an interview with Jeffrey Rosen, "If the Court in [Chief Justice John] Marshall's era had issued decisions in important cases the way this Court has over the past thirty years, we would not have a Supreme Court today of the sort that we have." "That suggests that what the Court's been doing over the past thirty years has been eroding, to some extent, the capital that Marshall built up."[41]

As Justice Breyer noted in his book, the court's "infirmity" shows that its legitimacy in the public's eyes "cannot be taken for granted." His pragmatic means are intended "to help maintain the public's trust in the court, the public's confidence in the Constitution, and the public's commitment to the rule of law."[42] The court was being questioned in this manner before the Obamacare decision was handed down. Adam Liptak of *The New York Times* weighed in with this: "Should a bare majority of justices composed solely of the court's Republican-appointed members strike down a Democratic president's signature legislative achievement, the public perception of the court may be altered." Moreover, "… some scholars are already wondering how much damage, if any, a party-line ruling striking down the law would do to the court's prestige, authority and legitimacy."[43]

---

[41] Wittes, Benjamin. "The Supreme Court's Looming Legitimacy Crisis." *Brookings*. The Brookings Institution, 25 June 2007. Web.

[42] Caplan, Lincoln. "A Judge's Warning About the Legitimacy of the Supreme Court." *The New York Times*. The New York Times, 26 Sept. 2010. Web.

[43] Liptak, Adam. "Do the Judicial Math on Health Care." *The New York Times*. The New York Times, 05 Feb. 2011. Web.

3.2 *Role of Ideology*

One aspect of the relationship between public opinion and the Supreme Court can be explored through an examination of the court members and their ideological leanings. While both liberal and conservative justices might be individually consistent with public opinion, their collective leaning can either reflect mass opinions or ignore them. The Roberts Court is a good place to begin the discussion. Chief Justice Roberts was the first new member on a Court that had been remarkably stable for the previous fourteen years. One major concern at the time was the direction that Roberts planned to take the Court. The just-completed Rehnquist Court was more conservative than previous ones, but it was not as conservative as the nominating presidents may have wanted. In the Rehnquist Court, seven of the nine justices were nominated by Republican presidents, yet many decisions that were in conservative crosshairs ended up being protected.[44] Members of conservative groups had been expecting more from the Rehnquist Court but for two members who voted more liberally than anticipated. One, John Paul Stevens, has always claimed that he has not become more liberal but that the court has been moving to the right.[45] According to Marshall's analysis (2008), Stevens voted liberally 85% (Marshall 2008, 79) of the time during the fourteen years of the Rehnquist Court. David Souter, recently retired, was more of a surprise in that he almost instantly turned out to vote more with the liberal block. He had a 71% liberal voting record, undoubtedly disappointing

[44] Scalia, O'Connor and Kennedy were nominated by Reagan. George H.W. Bush nominated Souter and Thomas while Ford nominated Stevens. Rehnquist was nominated by Nixon. Democratic President Clinton nominated Breyer and Ginsburg.

[45] In a *New York Times* article from September 2009, Jeffrey Rosen in "The Dissenter" explains that Stevens himself makes this argument. [Rosen, Jeffrey. "The Dissenter." *The New York Times*. The New York Times, 22 Sept. 2007. Web. Jan. 2010.]

those who wished to see the court move right. In addition to Souter and Stevens, the most maddening justice for conservatives was Sandra Day O'Connor, who voted liberally only 41% of the time, but had a tendency to be a swing vote, voting with the conservatives on some issues and with the liberal bloc on others. According to Marshall (2008), this was often done based on where the prevailing winds of public opinion were. O'Connor was astutely aware of where the country stood on many issues and voted accordingly.

With John Roberts taking over for William Rehnquist and Samuel Alito taking over for O'Connor, the court has begun another ever-so-slight move to the right, in spite of the recent election of Democrats to all levels of the federal government. With the retirement of Justice O'Connor, Anthony Kennedy has moved to the center of the court. But where O'Connor voted 59% of the time with conservatives, Kennedy has voted 68% of the time conservatively (Marshall, 2008). Moreover, when public opinion was liberal on a pending decision, O'Connor voted with that group 59% of time. In the same circumstances, Kennedy voted with that group only 42% of the time (Marshall 2008, 78). This means that if Kennedy is now considered the median point, the court has moved 9% to the right. In the 2008-2009 term, this rightward movement has become even more pronounced. One third of the cases were decided 5-4, with Kennedy being in the majority in 75% in these cases. This move to the right was reflected in the Ledbetter case on sex discrimination (*Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)), the New Haven, Connecticut firefighter case (*Ricci v. DeStefano*, 557 U.S. ___ (2009), the Voting Rights Act case (*Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. ___ (2009),) along with several others. It is possible that if Justice O'Connor

was still on the court, each case might have turned out differently. But with O'Conner being replaced by the more consistently conservative Alito and with Kennedy voting more conservative than O'Connor, the court undoubtedly yet steadily moved to the right. Yet, the court is also moving incrementally on purpose, students-of-the-court, such as Jeffrey Toobin (2007) have argued, so as to not upset public opinion. As Iiya Shaprio of the Cato Institute points out in a *Washington Post* article, "One thing I think is going on is that the chief justice has a devotion to the institution of the Supreme Court, and not wanting to get it out on a limb in front of public opinion."[46] If Shapiro is correct, then the Roberts Court will continue to respect public opinion as did the Rehnquist Court.

One of the most fascinating relationships between a justice and public opinion is with Justice Anthony Kennedy. He has used public opinion in his writings several times, most commonly in dealing with the death penalty. As many court watchers can attest, Kennedy often spends his off time in Europe, and according to Toobin (2007), his legal views have evolved from these visits. In particular, his references to international law in dealing with the death penalty have drawn both praise and scorn.

An indication of how the court views themselves was seen in a recent interview of Roberts, who was discussing the most monumental case in Supreme Court history. In explaining that the *Dred Scott v Sanford* (60 U.S. 393 (1856).) case was the most reviled, he argued that Roger Taney's mistake was that he decided that since the other branches did not want to deal with the slavery issue, he was going to take care of it. In attempting to do so, he made the situation much worse. He should have decided the case on "much

[46] Barnes, Robert. "Term Saw High Court Move to The Right", *The Washington Post*. Accessed December 2, 2009 from Barnes, Robert. ["Decisions Indicate Supreme Court Moved Rightward This Term."*Washington Post*. The Washington Post, 01 July 2009. Web. 2 Dec. 2009]

narrower grounds, which would have preserved the court above the fray."[47] The "fray" to which Roberts refers is the political one, where public opinion has a significant and lasting role. Most justices prefer to stay above politics and Justice Roberts appears to agree that this is how he views the court.

3.3 Do Justices Evolve Their Thinking?

One of the more lasting questions regarding justices is whether they have the ability to change with their years on the court. In other words, is there a chance that justices become less ideological over the years? Some justices have been remarkably consistent over the years, with recent examples being Justice Thomas, Scalia and Rehnquist. Others have moved politically left over the years, including Justices Warren and Blackmun, who were both appointed by conservative presidents.[48] Sandra Day O'Connor, John Paul Stevens and Anthony Kennedy are three contemporary examples of justices who have drifted more liberally in some of their rulings. More historical examples include Justices Blackmun and Powell, who were both appointed by Richard Nixon. On certain issues, there is evidence of these justices' conservative values, but often, on the most contentious of issues, there is also little doubt of the leftward leanings. This is not to say that every shift is to the left. Those who drifted rightward over the years have included Byron White, Hugo Black Robert Jackson and Antonin Scalia. Epstein, Martin, Segal and Quinn (2007) have written about this concept of ideological

[47] Mauro, Tony. "Roberts Court takes Narrow Road to Right". [Mauro, Tony. "Roberts Court Takes Narrow Road to Right." *National Law Journal* (2009). Web. 03 Dec. 2009.]

[48] Richard Brust in a July 2007 ABA Journal article remarked that most justices seem to shift left and there are far more leftward drifts than rightward shifts. These rightward shifts include Byron White and Felix Frankfurter but not too many others. [Brust, Richard. "New Theories of Evolution." *New Theories of Evolution*. American Bar Association, 1 July 2007. Web.]

drift, where all justices since 1937 have either grown more conservative or liberal over the years.

What accounts for this left and right shift? Might public opinion play a role in shifting a justice's position through the years? One theory is that justices who were former politicians are better in assessing where the public's opinion is on an issue and whether a particular ruling is going too far. In addition to O'Connor, another well known example of this phenomenon is Earl Warren, who deftly engineered court opinions while recognizing where the country stood. This theory has contemporary followers in Senator Harry Reid, who has pined for justices who are non-judges. "I think what we need are people on that bench who have been legislators, people who are lawyers, people who are academics. You look at our Supreme Court and all these people, all they know is working with people in black robes. We have got to change that."[49] Reid and others have used this argument in the most recent Supreme Court nominee, Elana Kagan, who was not a judge.

One challenge with the politician-as-justice theory is that it tends not to explain drifting of justices from one end of the spectrum to another. Rather, it only explains a back and forth fluxuation that a justice may have. Several justices, however, have shifted from right to left. David Souter, who had reasonably conservative track record at the beginning of his tenure, became more liberal over the years. According to Epstein (2006), justices have a tendency to vote with the political philosophies of the presidents who appointed them for five to ten years. After that, the association becomes much weaker, meaning that justices have a tendency to be more independent. This

[49] Stein, Sam. "Harry Reid Slams Supreme Court Justices John Roberts, Anthony Kennedy For Campaign Finance Decision." *The Huffington Post*. TheHuffingtonPost.com, 10 Mar. 2010. Web.

independence could mean more of a willingness to include other factors in their decision making that may not have been as important in earlier years on the court.

Robert Bork, who famously was rejected by the Senate in 1986, argued that justices "tend to drift to the left in response to elite opinion." According to his theory, judges come to associate with and respond to "the intellectual class . . . dominant in, for example, the universities, the media, church bureaucracies, and foundation staffs." According to this theory, a justice's attitudes become "the intelligentsia's attitude, which is to the cultural left of the American people." With regard to presidential appointments, "it's hard to pick the right people in the sense of those who won't change, because there aren't that many of them. … So you tend to get people who are wishy-washy, or who are unknown, and those people tend to drift to the left in response to elite opinion.[50]"

Journalist Dahlia Lithwick pointed out that author Max Boot tried to explain this by arguing that Anthony Kennedy "is no Warren or Brennan, to be sure, but whenever he has a chance to show the cognoscenti that he's a sensitive guy—not like that meany Scalia—Justice Kennedy will grab at it."[51] Justice Silberman of the DC Court of Appeals called this the Greenhouse Effect, named after the *New York Times* reporter who Silberman believed some justices were trying to impress. This theory brought out a rebuke from Justice Kennedy, who lashed out at the media by saying that they often misinterpret the "reasoning" of the court. This theory is fundamentally based on the idea

[50] Lithwick, Dahlia. "The Souter Factor." *Slate Magazine*. The Slate Group, 3 Aug. 2005. Web.

[51] Taranto, James. "The Ineffective Greenhouse." *The Wall Street Journal*. Dow Jones & Company, 22 Mar. 2012. Web.

that the justices like to be liked and, as Dahlia Lithwick argues, have one eye on history.[52]

A second theory espoused by Mark Tushnet of Georgetown University has to do with Justice Scalia, who argues that Justice Scalia's rebukes and sometimes bitter opinions may drive colleagues into the liberal camp, especially Justices O'Connor and Kennedy. The assumption with this theory is that the opinions of Scalia are influential enough on a professional and personal level that the other justices are unable to come to their own opinions.

The third theory on why justices generally move more left is called the compassionate theory by Geoffrey Stone.[53] The justices, as they get older, become more compassionate and understanding of the world around them. As a result, their views change accordingly. Stone theorizes that "[j]ustices are continually exposed to the injustices that exist in American society and to the effects of those injustices on real people. As they come more fully to understand these realities, and as they come to an ever-deeper appreciation of the unique role of the Supreme Court in our constitutional system, they become better, more compassionate justices."[54]

The final theory that is used to explain a leftward drift has to do with the confirmation process. Scholars have pointed to this theory as explaining the swing of Justice Souter to the left in his years on the bench. While most have argued that Souter

[52] Lithwick, Dahlia. "The Souter Factor." *Slate Magazine*. The Slate Group, 3 Aug. 2005. Web.

[53] Lithwick, Dahlia. "The Souter Factor." *Slate Magazine*. The Slate Group, 3 Aug. 2005. Web.

[54] Lithwick, Dahlia. "The Souter Factor." *Slate Magazine*. The Slate Group, 3 Aug. 2005. Web.

was a closet liberal or a stealth candidate who hid his real views before coming to the court, the evidence shows this to not be the case. Indeed, in his early years on the court, he was a relatively reliable conservative. His attitude started to change however, not because his real views were coming to the front, but because he was essentially learning on the job. He did not have the judicial background that many judges had and therefore had less of a paper trail by which the Democrats could knock down. In contrast, justices Alito, Roberts, and Sotomayor have had Congress controlled by the same party as the president, inevitably making their confirmation process easier. Without the lengthy experience that many judges bring to the confirmation process, some have to develop their views while in the job.

This discussion of ideology is critical in two ways. First, there is anecdotal and journalistic evidence that the justices do care about what others think about their views. It may be being part of the elite of society, being at the best parties, or a self-awareness about their role in society, but views are arguably shaped by outside forces. Second, many justices have moved leftward and rightward along the continuum, and their votes change as a result. Indeed, the evidence suggests that at least some Justices (Kennedy and formerly O'Connor and Souter) have changed in profound ways with their years on the bench.

In conclusion, chapter three looked at the various ways in which the Supreme Court reflects the popular will, including reflecting the times in which they live and operate, how and why the court cares about public opinion and the relationship between justice's ideology and public opinion. Ideology on the court is not stagnant, however, sometimes drifting left and right depending on the justice.

Chapter 4: Literature on Public Opinion and the Supreme Court

The idea that the Supreme Court follows public opinion is largely counter-intuitive. In *Federalist 78,* Alexander Hamilton argues that the Supreme Court is designed to be the weakest of the three branches. It has neither the power of the purse nor power of the sword. Hamilton saw the court as an important part of the government, but unelected and life-term judges were necessary to prevent the other branches from overly influencing their decisions. Moreover, unelected judges were an "excellent barrier against the ill humors or dangerous innovations of public opinion" (Marshall1989, 192). There is much written that argues that the court is insulated from political pressure (Bishin, 1977, Choper, 1980). It is not a legislative body, nor does it have enforcement powers. It counts on other branches to carry out its rulings. The lifetime appointments of the justices, arguably, works counter to basic democratic concepts of representative democracy. This counter-majoritarian quality of the Supreme Court often troubles political theorists. When it invalidates federal law, the court is obstructing the public will. Who are these nine individuals who are able to sit in judgment on behalf of the entire nation? "The root difficulty" according to famed political thinker Alexander Bickel, "is that judicial review is a counter-majoritarian force in our system.... [W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it" (Bickel, 16-17). The assumption that Bickel makes, of course, is that the legislatures are static and do not change. One year a legislature may not be reflecting the popular will, but in subsequent years it might. In this chapter, I will investigate literature on the relationship

between public opinion and the Supreme Court, exploring scholarship that explains how and why the court might be influenced or even interested by mass public opinion. This chapter will also look at the scholarship on the role of amicus briefs on the Court members.

Serving as a bulwark against the 'tyranny of the majority', however, is one of the major roles of the court. Lifetime appointments are designed to insulate justices from the whims of public opinion. Justices are rarely impeached (none has ever been removed) and are careful to remain above the political fray. Public opinion polls of the court show it to be the most trusted and least political of the three branches. As Justice Scalia has pointed out several times, the court does not need public opinion to do its constitutional duty.[55] Justice Stevens, agreed, saying that sometimes the Supreme Court must ignore public opinion for the good of the country. Moreover, while there is evidence that individual members respond to public preferences, the empirical record is mixed. Both supporting and contradictory evidence exists (Stimson, MacKuen, and Erikson 1995, Erikson, MacKuen, and Stimson 2002). Some scholars have examined the indirect evidence of mass influence (McGuire and Stimson 2004, Murphy 1964, Dahl 1957, Gates 1987, Marshall 2008) and concluded that public opinion is not divorced from the court but that the influence is indirect at best. The court needs the public's support (through their elected officials) in order to keep legitimacy and enforce rulings. If the public is unsupportive of the court, decisions are unenforced. Many decisions during the Civil Rights movement confronted this problem. The ruling in *Brown v. Board of*

[55] "Justice Scalia on the Record." Interview by Lesley Stahl. *60 Minutes*. CBS. New York City, New York, 27 Apr. 2008. Television.

Education 347 U.S. 483 (1954), decreeing that African-American children could go to school with white children was unenforced for years in the South. The Court's rulings were ignored by localities. Notably, the court recognized this problem in Brown II, decreeing that desegregation ought to occur with 'all deliberate speed' rather than a set timetable that many were hoping. It took up to ten years or more for some rulings to be enforced (Kluger, 1976, Bell, 1978). While Gallup polling right after the decision showed that the vast majority (80%) of non-Southerners and (58%) of a whole were in support of the ruling, that support dropped to 54% support at the end of 1954. The decline of support suggests that the public may have been influenced by more narrow and elite opinion makers. Governors from several states including Virginia, North Carolina and Mississippi made passionate statements about how they would do their best to fight any attempt to desegregate the schools. Senators and representatives from all around the South argued against desegregation. One possibility may be that the public took cues from its elected officials that it was acceptable to oppose the law.

This historical example lends credence to the argument that the Supreme Court is often not the most effective agent for immediate social change especially if there is a lack of public support for the ruling. While the common perception is that the court is the arena of last resort for unpopular decisions, Rosenberg (1991) argues that the court can only enact social change when barriers such as a lack of enforcement are minimized. In other words, *Brown v. Board* highlights an issue that will repeat itself throughout this project. The Supreme Court needs support in other branches and amongst the people in order for its rulings to be effectively carried out, and thus, its legitimacy is closely tied to public opinion. It was not until the integration of Central High School in Little Rock

Arkansas in 1957, when it became clear that federal institutions were siding with the Supreme Court that public opinion began once again to move in favor of desegregation.

Segal and Spaeth (2002) contend that the court is unresponsive to public opinion. They point to research by Stimson, MacKuen and Erikson (1995) and posit there is little evidence to support a direct association between public opinion and the court's decisions. Segal and Spaeth use their well-regarded public mood index to study its longitudinal effects on the court. They found over the time period 1956 to 1989, the public mood was irrelevant to court decisions, but that the effect was indirect and dependent on presidential changes to the court. Flemming and Wood's model (1997) finds that a 29% change in public opinion influences the court in the same direction by only 1%. They declare, "by any reasonable interpretation, this is substantively meaningless" (Segal and Spaeth, 233). They declare that the relationship between public opinion and the court is spurious at worst and an "association" at best.

The challenge for arguing the position that public opinion has a direct effect on the court is that it fails to account for societal movement or changes in the public mood. In other words, is the court out front of public opinion, guiding it, or did society's opinion change and the court followed along? Indeed, the court may move with public opinion, but not because of it. Judges can be affected by "real-world" events but then move because of what *they* see, rather than what the public sees. The court and the public were both moved by the events of 9-11, for example, and subsequent rulings may reflect new attitudes toward terrorism or terrorists on either side of the debate. Which had the more lasting effect? Current modeling does not provide an answer.

An important consideration of any discussion of the effect of public opinion on the court is the fact that it does decide cases contrary to public opinion. Most of the civil rights cases were decided contrary to the majority of Southern sentiment, including *Brown v. Board of Education,* 347 U.S. 483 (1954) and *Loving v. Virginia* 388 U.S. 1 (1967). In both cases, the court reversed legal, majority-passed statutes and southern opinion.[56] Other high profile cases where the court acted counter to majority opinion dealt with abortion rights and school prayer. In *Roe v. Wade* 410 U.S. 113 (1973), support for abortion (as measured by Gallup polls in 1973) was under fifty percent, but the court ruled to outlaw restrictive bans.[57] And while support for prayer in public schools has stayed steadily above seventy percent since *Engle v. Vitale* 370 U.S. 421 (1962) was decided in 1962 and reaffirmed in 2005, the court has steadfastly blocked attempts by schools to circumvent the ban.[58] Prayer has been denied at graduation (*Lee v. Weisman*, 505 U.S. 577 (1992)) and at football games in *Santa Fe Independent School District* v. *Jane Doe* 530 U.S. 290 (2000). In both cases, the court upheld the principles of *Engle* even in the face of overwhelming public sentiment[59]. A more recent example of this was the Westboro Baptist Church ruling, where the Supreme Court decided to allow the members of the aggressively anti-gay church to continue to protest the funerals of

[56] As Dahl (2007) mentions, however, the Court may have acted in a majoritarian manner among elites, who were generally in favor of overturning these bans.

[57] One notable item in this case was the fact that while not yet at fifty percent, the Court had seen a dramatic rise in support for the legalization of abortion in the years prior to the case (Krason, 1984).

[58] Gallup Polls from the 1960's through the 2000's all show support over seventy percent. Gallup/CNN/USA Today Poll, Sep, 2003.

[59] Cases of Lee v. Weisman 505 U.S. 577 (1992) and Santa Fe Independent School District v. Jane Doe 530 U.S. 290 (2000). [*Lee v. Weisman. Supreme Court. 24 June 1992. Print.][* Santa Fe Independent School District v. Jane Doe. Supreme Court. 19 June 2000. Print.]

slain servicemen. As with Brown II, however, the court recognized that there exists the potential public outrage to rulings. As almost a nod to the localities that had to deal with the church, Roberts' opinion also listed several options towns had in dealing with the Phelps'.

There are myriad problems in determining the relationship between public opinion and the Supreme Court. The primary problem is direction; which is the influencing body, the public or the court? It is probable that the relationship is reciprocal. In the case of *Roe v. Wade* 410 U.S. 113 (1973), for example, public support for first trimester abortions rose after the ruling. A second challenge is measurement. Public opinion polls can be skewed by several factors, including how the question is worded, how quickly opinion changes and the public's knowledge about the issue in general. When the Supreme Court's name is mentioned in a poll, the percent of respondents who agree with the court often goes up compared to a generic question on the same topic. Polls are reflective of public opinion on higher profile issues. This creates a particular challenge when trying to make generalizations about the public impact on decisions. It is difficult to differentiate whether public opinion is informed and since many issues before the court primarily deal with complicated legal matters, they do not measure well, if at all, in polls. When more people can identify Judge Judy from television than can name one member of the court, expecting the public to be knowledgeable or even aware of highly specialized cases that come before the court is unreasonable. It becomes complicated to argue that public opinion has a major impact on the overall direction of the court when the public may only be pay attention to one or two cases per term. Polls show that much of the public is unable to name more than one or two historical cases and

cannot name members of the court at all. In a 1989 survey only nine percent could identify William Rehnquist as the Chief Justice and less than one percent could correctly name John Paul Stevens as a member of the Court (Marshall, 2008, 108).

4.1 Majoritarian Court

Robert Dahl (1957) is the main architect of the argument that the Court is majoritarian. He posits that the court is a political institution in addition to being a judicial one. He claims that because the President nominates justices, he will nominate only those who are generally in step with his ruling coalition. These coalitions are generally center-right to center-left, but within the political mainstream. Since the Senate confirms justices, the justices should not be too far out of sync with the public. Dahl believes the Supreme Court is "inevitably a part of the dominant political coalition [in American government] and inevitably supports the major policies of the alliance" (Dahl, 293). Because the court is part of the mainstream political system, they are invariably affected (albeit indirectly) by public opinion. Dahl's position finds support from Barnum (1985), Marshall (2008), and Page and Shapiro (1983), who all make the argument that, as a result of this mainstream approach, most of the court's decisions are reflective of public opinion.

Dahl's stance finds additional support in Sheehan and Mishler (1993, 1996) who examine the prospect that the court "can and does" respond to public opinion even without a change in its makeup. Their model, known as the "political adjustment hypothesis," operates on the concept that the court operates effectively only when it has a high legitimacy factor. They argue that shifts in public opinion do show up in the Court's

decisions, although often there is a lag time, sometimes upwards of five years. Mishler and Sheehan (1993) refer to this as the Dahl-Funston hypothesis (1957, 1975). It takes time for shifts in public opinion to reach the presidential level, for the president to make changes on the court for legal challenges to legislation to make it to the Supreme Court and for the court to subsequently recognize a shift in public mood. The court has a lasting representation of past ruling coalitions but cannot shift quickly to the impulses of public opinion.

The debate over the extent to which the court acts in a majoritarian manner is framed by Dahl (1957), Casper (1976) and Funston (1975), the court's role in the overturning of laws at the national, state and local level. All three attest that when the court overturns laws, they are indirectly opposing public opinion. The logic is that since the legislature directly is impacted by public opinion and represents the public's wishes through elections, by overturning laws, they are in fact preventing the will of the majority.

One example where it appears the court was moved by mass opinion was in *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992). David Souter, joined by Sandra Day O'Connor and Anthony Kennedy, claimed that to overturn the precedent of *Roe v. Wade* 410 U.S. 113 (1973) would make the court seem "political" and therefore "lose legitimacy." Being concerned with legitimacy suggests that the court is paying attention to the public perception. In fact, Justice O'Connor not only made that statement, but also said that the court ought to be attentive to the public when faced with a decision to overturn precedent. She points out that the segregation laws that were reversed in both *Brown v. Board of Education* (1954*)* and *West Coast Hotel v. Parrish*

300 U.S. 379 (1937) were overturned, in part because public opinion on race relations had changed dramatically during that time in other parts of the country other than the South. With abortion, O'Connor commented, "The Court's power lies…. …in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's laws mean and to declare what it demands."[60] Justice Scalia took O'Connor to task for making this argument: "I cannot agree with, indeed I am appalled by the Court's suggestion that the decision whether to stand by an erroneous constitutional decision must be strongly influenced- against overruling, no less- by the substantial and continuing public opposition the decision has generated."[61] For Scalia, using public opinion as a barometer for maintaining a decision is a violation of court norms. Notably, just eight years later, the Court decided to accept *Bush v. Gore* 531 U.S. 98 (2000), bringing up the very legitimacy questions that Souter et al. brought up. Notably, in the continued face of public outcry over the politicalization brought about by the case, Scalia has continually made the comment that the country ought to "get over it."[62]

Another model for studying public opinion and the court is the granting of writs of certiorari. On the one hand, the court is not afraid to grant certiorari on cases in which there are contradictory laws or rulings at the lower level. Perry (1995) is a proponent of this view. The Roberts Court recently took on contradictory legislation when it agreed to

[60] *Planned Parenthood of Southeastern Pennsylvania v. Casey*. Public Opinion and the Rehnquist Court 958-959. Supreme Court. 29 June 1992. Print.

[61] *Planned Parenthood of Southeastern Pennsylvania v. Casey*. Public Opinion and the Rehnquist Court 958-959. Supreme Court. 29 June 1992. Print.

[62] "Justice Scalia on the Record." Interview by Lesley Stahl. *60 Minutes*. CBS. New York City, New York, 27 Apr. 2008. Television.

accept, and subsequently ruled on, the D.C. handgun ban. The District of Columbia and Chicago had outlawed the ownership of handguns, yet other states such as Virginia allow ownership including carrying concealed weapons. Despite the court's willingness to take on some issues, it has also shied away from, made contradictory rulings, or have sidestepped altogether cases that are highly controversial. Examples of cases like these include gay marriage and "under God" in the pledge of allegiance.[63]

4.2 How the Court Comes to Decisions

One challenge with the relationship between public opinion and the Supreme Court is its difficult-to-quantify nature. Decisions are tricky to measure and case studies are complex enough that projection is impossible. But occasionally series of events transpire in sequence that suggests that outside forces are having an influence on the court. The court in 2003 and 2004, for example, granted certiorari on several cases dealing with the "Global War on Terror". The most significant of these were *Hamdi v. Rumsfeld* 542 U.S. 507 (2004) and *Padilla v. Rumsfeld* 542 U.S. 426 (2004) both argued on April 28, 2004. In the Hamdi case, a series of unusual events occurred between oral arguments and the decision. The very evening of the oral arguments, the news program *60 Minutes II* televised the now famous photos showing the abuse of the prisoners at the Abu Ghraib faculty in Iraq. The subsequent media coverage was quite intense and negative towards the interrogators in the Army. Only adding to the confusion was the previous release of June 2004 torture memo, where two Justice Department lawyers argued that the bar for what constituted torture was higher than what was being done at

[63] This ruling was that the plaintiff Michael Newdow had no standing to sue in the case. Another case is making its way through the Court system and ought to reach the Supreme Court by next year or so.

Guantanamo and around the world. Moreover, the argument went, because the war on terror was such a non-traditional and asymmetrical war that the executive had inherent powers to fight it any way he saw fit, including authorizing enhanced interrogation techniques.

Both the revelations of abuse and the torture memo were revealed after oral arguments, when the cases were relatively unknown, and before majority and dissenting decisions were released. In a largely unpredicted move, the court ruled 6-3 that the Bush administration had erred in the Hamdi case. Justice O'Connor noted that despite the 6-3 vote, "eight of the nine justices of the Court agreed that the Executive Branch does not have the power to hold indefinitely a U.S. citizen without basic due process protections enforceable through judicial review." Scalia and Stevens, on opposite sides of issues more than 90% of the time, joined a dissenting opinions that went further than O'Connor's plurality. The dissent argued that the Bush administration really had only two choices when it came to the ability to hold someone indefinitely; Congress should either suspend the writ of habeas corpus as they have the power to do in times of invasion or rebellion or two, try him under normal criminal law.

In this case, it is certainly possible that the court would have decided against Rumsfeld and the Bush Administration without the negative publicity that the case provided. Yet, if it is to be accepted that the court often acts within the attitudes of the time they are operating, it is possible that the court might have recognized the brewing backlash and partially ruled against the Bush Administration as a result. Certainly this theory is pure speculation, but it is one feasible explanation for a surprising result.

4.3 Amicus Briefs, Narrow Interest Opinion and the Court

If the media (and cameras) potentially have an impact on the court, are there other such influences? One theory worth exploring is through the submission of amicus briefs written by narrow and elite opinion makers on behalf of positions they endorse. Link (1995) showed that elite public opinion has an effect on decisions, especially in areas of criminal law. As political scientist James Q. Wilson argues, "though not elected, judges read the same newspapers as members of Congress and thus they too are aware of public opinion, especially elite opinion" (2006, 314). Public opinion is woven into legislation passed by Congress, actions of state legislatures or juries, and editorial pages. Songer and Sheehan (1993) claim that the Supreme Court actively seeks outside opinion on the "preferences of other actors" through the solicitation of amicus briefs from the Solicitor General. Research by O'Connor and Epstein (1981), Songer and Sheehan (1993), Bailey, Kamoie and Maltzman (2005) and Kearney and Merrill (2000) all argue that briefs can have measurable impact on the court's decisions.

The research on the influence of amici briefs on the court is extensive. Among the scholarship includes O'Connor and Epstein (1982, 1983), Ivers and O'Connor (1987), Kearney and Merrill (2000), Epstein (1993), Heberlig and Spill (2000), Collins (2004), Songer and Sheehan (1993), Spriggs and Wahlbeck (1997). Despite the broad consensus that amici briefs guide the court, there is general disagreement on the form of that guidance, especially with regards to the merits of any particular case. The measurement of this influence is difficult to quantify effectively. According to Collins, the most common method of measuring influence has been to "calculate the proportion of winning

litigants with amicus briefs supporting their position."(2008, 56). "Typically speaking, this is simply the number of times the litigant with amicus support prevailed divided by the total number of times that litigant participated in the Court." This method has been used by Morris (1987), O'Connor and Epstein (1982), Kearney and Merrill (2000), Rushin and O'Connor (1987), McLauchlan (2005), and Songer and Sheehan (1993). Collins identifies that the problematic nature of this relationship is the current model fails to control for ideological factors (Songer and Sheehan, 1993 and Marshall, 2008). As a result, it is still unclear the extent to which the amici briefs made a difference. Nevertheless, this model does at least identify positions narrow interests often take.

These measurement challenges notwithstanding, the larger issue is the extent to which amici briefs represent mass opinions. On most every level, the answer to this is no. Marshall (2008) argues that there are many considerations other than mass public opinion to determine whether an interest group is going to pursue a brief. These include the importance of the case to their particular needs, the amount of money available and whether or not the case has significant policy implications on the interests represented. Interest groups will certainly use public opinion as part of their brief if it helps support their position, but by and large, interest groups operate in a vacuum outside of the public view.

While interest groups often have little interest in the particular case, they may have a significant investment in the precedent set by the case. Take the case of *Citizens United v. Federal Election Commission*, 558 U.S. 08-205 (2010). Of the hundreds of amicus briefs filed on either side of the case, the push was not for the right of Citizens United to show the Hillary Clinton campaign documentary, but rather the long term

implications of ruling that the law banning corporate donations was unconstitutional. Certainly the issue in the case was narrowly-orientated and the amici briefs reflected that fact. But while interest groups are not representing public opinion, the side they represent may, in fact, be supported by the mass public. As Marshall points out (2008), the interest groups whose position is supported by public opinion are significantly more likely to win cases but only because the amici briefs and mass opinion are on the same side.

On the aggregate level, there is evidence that supports the arguments that the court is influenced by amicus briefs. On the individual level, is there similar evidence that amicus briefs make a difference? Scholars (Epstein and Knight 1999, Collins; 2004) have pointed out both that justices used amicus briefs to find out information that they otherwise may not research. In addition, amicus briefs serve a similar function as lobbyists. Much like lobbyists attempt to influence lawmakers' policy choices, amicus briefs try to persuade a justice to their side of the law. The challenge for amicus briefs, as is for lobbyists, is the extent to which they effectively sway targeted justices to deviate from their normal policy preferences. In the halls of Congress, for example, the NRA would have a difficult time lobbying against gun control laws to liberal members of Congress from a city district. In fact, the member would be unlikely to waste their time meeting with the NRA. Likewise, the NRA would not invest effort lobbying against a lost cause. In the same way, it is logical to argue that members of the court, while having the option of reading any of the briefs, are more likely to read ones that reflect their policy positions.

Several justices have argued that amici briefs serve an important function. During a speech in 2006 at the Henry Clay Foundation award ceremony, Justice O'Connor remarked that "the 'friends' who appear today usually file briefs calling our attention to points of law, policy considerations, or other points of view that the parties themselves have not discussed. These amicus briefs invaluably aid our decision-making process and often influence either the result or the reasoning of our opinions."[64] Justice Breyer shared a similar sentiment in a speech in Philadelphia in 1998, "[amicus] briefs play an important role in educating the judges on potentially relevant technical matters, helping make us not experts, but moderately educated lay persons, and that education helps to improve the quality of our decisions"[65]. One expectation here is that the court members are willing to view both conservative and liberal amici in order to find out which case has more credibility. In fact, there is evidence that a better argument both in amicus briefs and oral argument does have some weight with the members. Spriggs and Wahlbeck (1997) found that briefs from the Solicitor General had more influence than other such briefs. Lindquist and Klein (2006) argue that "if" members are interested in "legal" decisions (ones that are determined on points of law rather than policy preferences), then amicus briefs have the most influence. The challenge with amicus briefs and the legal model is that the justices often use ideology more than legalism in order to come to decisions.

[64] Collins, Paul M. *Friends of the Supreme Court: Interest Groups and Judicial Decision Making*. New York: Oxford UP, 2008. Print.

[65] "Justice Breyer Calls for Experts To Aid Courts in Complex Cases." *The New York Times*. The New York Times, 16 Feb. 1998. Web.

To highlight the apparent influence of amici briefs on members of the Supreme Court, one needs to look no further than the University of Michigan law school affirmative action case of *Grutter v. Bollinger* 539 U.S. 306 (2003). Twenty-nine former leaders of the United States military filed an amicus brief arguing that affirmative action as a policy was beneficial to the advancement of individuals in all branches of the armed forces. Among the two hundred plus briefs filed, clearly this one stood out amongst the others. It is apparent by all sides that the brief, filed in 2003, made an impact on the justices. By the time oral arguments started in April of 2003, it was clear that the justices had read the brief. Justice Ginsburg demonstrated her knowledge when she asked Solicitor General Ted Olson whether he was aware that all of the service academies had racial preferences in their admission policies. When the decision came out upholding affirmative action as a general policy, Justice O'Connor noted that "High-ranking retired officers and civilian leaders of the United States military assert that ... a 'highly qualified, racially diverse officer corps is essential to the military's ability to fulfill its principal mission to provide national security.'"[66] The fact that O'Connor directly referred to the brief speaks volumes of their potential effect. Moreover, the sheer number of amicus briefs filed showed its potential power. In the Michigan cases, a record 107 amicus briefs were filed. However, Corely (2008) noted that O'Connor often was an outlier when it came to using amicus briefs in opinions. She was, by far, the most willing to do so.

As with most cases before the Supreme Court, there is generally no obvious evidence that the court is using amicus briefs as a guide to decision making. However, there exist tantalizing anecdotes such as the aforementioned case that suggests the court

[66] *Grutter v. Bollinger*. Supreme Court. 23 June 2003. Print.

is looking at them. As many scholars have found, however, it was an area of confusion as to whether it was an effective way of getting a message across. As a result, the amicus argument is one that deserves further examination, especially as watchers of the court notice the increase of briefs. As R. Reeves Anderson and Anthony Franze (2011) point out in their commentary on the Court, in *Turner v. Rogers*, 131 S. Ct. 2507 (2011), the court "based its decision on an argument raised exclusively in an amicus brief." Justice Thomas rejected this notion, noting in his dissenting opinion that departing from the "wise and settled general practice of this Court not to consider an issue in the first instance, much less one only by an amicus."[67] In Anderson and Franze's examination of the 2010-2011 court, they conclude there has been, indeed an increasing number of briefs filed by friends of the court. "The upward trend continued last term, with 93% of the cases with signed opinions including at least one amicus brief at the merits stage" [68]

The Supreme Court finds itself consistently being criticized for deciding cases on behalf of the business community. This critique is not without merit, especially when the Chamber of Commerce files an amicus brief on behalf of one political party. A *New York Times* editorial identifies the Supreme Court as "reflexively pro-business". One such study shows that when the Chamber of Commerce filed an amicus brief, sixty-four percent of the time there was at least a five justice majority voting in their favor. While the makeup of four of the justices is hardly surprising--Alito, Roberts, Scalia and Thomas, it is more unusual to find Kennedy being in the majority sixty-seven percent of the time on Commerce-amicus-filed cases. While it is not clear that the justices are

---

[67] *Turner v. Rogers*, 131 Supreme Court, 2507 (2011). Print.

[68] Reeves, Anderson and Franze, Anthony. "Commentary: The Court's increasing reliance on amicus curiae in the past term", *The National Law Journal,* (2011). Web.

swayed by the brief per se, it suggests that when the Chamber files an amicus brief, they can be confident that they have a better than average chance of winning.

Jeffrey Rosen, law professor at George Washington University, noted in his piece about the relationship between the justices and the Chamber of Commerce that in 2007-2008, when the Chamber filed amici briefs, they "won" 13 out of 15 cases, a winning percentage of 87%. Rosen hints at the growing relationship between the court and the business community,

> What should we make of the Supreme Court's transformation? Throughout its history, the court has tended to issue opinions, in areas from free speech to gender equality, that reflect or consolidate a social consensus. With their pro-business jurisprudence, the justices may be capturing an emerging spirit of agreement among liberal and conservative elites about the value of free markets.[69]

In a similar study, between 2006 and 2009, when the Chamber of Commerce filed a brief, they were successful 65.2% of the time. And while remarkably consistent over the years, it palls in comparison to the success rates that the United States government has when it files an amicus brief in a business related case. In that situation, the Supreme Court sides with the Solicitor General over 91% of the time. The significance of this rate over a three year period hints that not only do the justices find favor when the Chamber of Commerce files an amicus brief, but they overwhelmingly side with business community when the United States also files a brief. Notably, when the government and the Chamber had competing briefs supporting different sides, the government's side won over 92% of the time.

[69] Rosen, Jeffrey. "Supreme Court Inc." *New York Times*, The New York Times, 16 March 2008. Web.

The fact that all the justices mention amici briefs in their opinions at one point or another further illustrates the point that they have some influence on the members. In the 2010-2011 term, Anderson and Franze found that the justices had between a 12% mention-rate (Scalia) to a 70% mention-rate (Roberts). Certainly it is possible that court members are citing those briefs that support their position rather than being influenced by them, but it is also possible that the argument laid out in the brief may have been an understanding of a point of law that the Justice had not thought of themselves. Then the argument becomes one of influence.

There is a good deal of scholarship about the relationship between the Supreme Court and the narrow opinions found in amicus briefs, most arguing that these briefs are effective in position-taking and pointing out issues that the court may not have been aware of. Moreover, the evidence suggests that the Roberts Court is passively inviting more such briefs to be filed. When Roberts mentions amici in 70% of his opinions, he is certainly inviting more participation in these discussions, including business interests[70]. Moreover the government's involvement in a case as an amicus participant almost guarantees a victory. This points to the role of the Solicitor General in the relationship

[70] "The chamber's success rate is but one indication of the Roberts court's leanings on business issues. A new study, prepared for The New York Times by scholars at Northwestern University and the University of Chicago, analyzed some 1,450 decisions since 1953. It showed that the percentage of business cases on the Supreme Court docket has grown in the Roberts years, as has the percentage of cases won by business interests. The Roberts court, which has completed five terms, ruled for business interests 61 percent of the time, compared with 46 percent in the last five years of the court led by Chief Justice William H. Rehnquist, who died in 2005, and 42 percent by all courts since 1953." [Liptak, Adam. "Justices Offer Receptive Ear to Business Interests." *The New York Times*. The New York Times, 18 Dec. 2010. Web.]

with the court and prompts the question whether this "tenth justice"- as they are often known, represents mass public or narrow opinion in some fashion.[71]

Is there any support under the Roberts Court for the argument that the number of briefs filed may not be as important as who files them? In the case of the Michigan Affirmative Action cases, it could be argued that the former General's briefs were influential to the point where Justice O'Connor was willing to put them in her opinion. Indeed, noted legal scholar Jeffery Toobin has argued that this particular brief was the most important in Supreme Court history.[72] Examining *Graham v Florida*, 560 U. S. ____ (2010)[73] there were high profile groups filing briefs on both sides of the debate. For the petitioner wishing to reduce the sentence, there was the American Psychological Association and the American Bar Association in addition to various churches as well as the NAACP. For the state of Florida, there were sixteen members of the House of Representatives as the most prominent groups.

[71] Many scholars have posited that the Solicitor General serves as a tenth justice. See Black and Owens (2009), Caplan (1987) and Chandler (2012) among others.

[72] "Justice O'Connor's opinion quoted Mr. Phillips's brief at length and then, in an extraordinarily rare tribute, adopted its words as part of the court's opinion: 'To fulfill its mission, the military 'must be selective in admissions for training and education for the officer corps, and it must train and educate a highly qualified, racially diverse officer corps in a racially diverse setting.' In all, considering the statements at the oral argument and Justice O'Connor's opinion, the submission from the retired officers, as set in motion by Mr. Ford, may have been the most influential amicus brief in the history of the Supreme Court." [Toobin, Jeffrey. "Gerald Ford's Affirmative Action." *The New York Times*. The New York Times, 29 Dec. 2006. Web.]

[73] *Graham* was about whether a juvenile under 18 could be given life imprisonment for a non-homicidal crime. The Court ruled 5-4 that Florida could not have this punishment.

In *Citizens United v. Federal Election Commission*, 558 U.S. ___ (2010)[74], there were also prominent groups lined up on both sides of the issue. Senate Minority Leader Mitch McConnell, the U.S. Chamber of Commerce, and the American Federation of Labor all lined up for the appellant while Senators McCain, Feingold with Former Representatives Shays and Meehan filed briefs on behalf of the appellee.

In *District of Columbia v. Heller*, 554 U.S. 570 (2008)[75], the petitioner briefs included the NAACP, the Brady Center to Prevent Gun Violence, the City of Chicago, the American Bar Association, the American Academy of Pediatrics and the U.S. Conference of Mayors, all supporting the District of Columbia. Filing against the District were briefs from the National Rifle Association, fifty five members of the Senate including the President, and two hundred fifty of the House of Representatives and thirty one states. Notably, there was also a filing from eleven generals from the military branches.

From these three examples, it becomes clear that it is possible that the justices looking at the briefs might be indirectly influenced by who files them. It might be easy, for example, for the Court members to minimize filings from members of Congress, but arguably less so with organizations such as the American Bar Association or the American Psychological Association[76]. That being said, when fifty-five members of the

[74] The *Citizens United* case was whether the First Amendment allowed the government to restrict political speech (in the form of independent financial expenditures) by corporations, labor unions or other associations. It was a challenge to the 2002 McCain-Feingold Campaign Finance Law. The Court ruled 5-4 that parts of McCain-Feingold violated the First Amendment.

[75] *DC v. Heller* concerned the private ownership of firearms in the District of Columbia. It was ruled that the 2nd Amendment did not allow for the DC ban.

[76] See Kearney and Merrill (2000).

Senate and two hundred fifty members of the House of Representatives file a brief to overturn a law, that is a reasonably strong motivator as to the mindset behind Congress if they had the opportunity to vote on DC's ban. Furthermore, if members of Congress are willing to go on record for such an issue, it also provides strength that they are serving as a proxy for the American public.

Of course, it is logical to conclude that ideological beliefs and the law both will be greater factors than amicus briefs when it comes to influence on Supreme Court members. However, I suspect that the number of amicus briefs and the filers will reinforce what the justices believe about an issue. To the conservative justice, seeing most conservative leaning organizations line up on one side of an issue will reinforce what that member already believes about how to decide. In conclusion, while the Supreme Court is insulated from public pressure, there is scholarship that argues that the court is responsive to both the mass public in some cases and more narrow opinions in others. There are vehicles, notably amici briefs, through which organizations try and reach the court. The impact of amici briefs on the court's decision making is a particularly robust area of study.

In chapter four, the heart of the relationship between the court and public opinion is placed in historical context, exploring the varied and abundant literature on the subject, some arguing that the court is responsive to public opinion, while other literature shows no such link. This chapter reveals how scholarship of this kind is difficult to quantify and yet numerous attempts are made to link these two seemingly contradictory concepts. Finally in this chapter I explored the role of the amicus brief and examined the scholarship behind the most direct communication between the court and outside groups.

There is conflicting evidence here as well, where some members of the court have admitted that they are informative and thought provoking without being overly influential, yet other studies show that narrow, including elite opinions, like the kind found in amicus briefs, do sway members.

Chapter 5: How the Public Learns About the Court

Chapter five examines the relationship between the Supreme Court and the media, and introduces the readers to the debate over cameras in the court. The media have a dwindling number of exclusive court reporters, and information that comes from the court is sometimes misinterpreted in the desire to get the story out first.[77] Despite the fact that members of the court are wary of the media, many court watches, including prominent members of Congress, are eager to have cameras to shed some (alleged) transparency on its interworkings, to the consternation of the court members. As a whole, this chapter will explore the relationship between the media and the Supreme Court to the extent that it impacts how substantively the public understands both the court dynamics and the decisions that come from it.

5.1 Role of the Media

Beyond examining the relationship between the court and public and narrow opinion, it is important to scrutinize the quality and quantity of media coverage of the court to determine how informed public opinion may be regarding court decisions, and its subsequent influence over those decisions. Decreasing coverage may be reducing public awareness of court decisions, making it less likely to have an informed public opinion. Additionally, by self-admission, at least some justices conduct research using popular media websites. Justice Kennedy has admitted that he has used the Internet on occasion for such research. According to one Stanford Law Review article (Lee, 2009),

[77] CNN and Fox News both erroneously reported in June of 2012 that the Supreme Court had struck down the individual mandate as a part of the Obamacare ruling before correcting themselves.

SCOTUSblog is apparently being read inside the Court, as IP addresses from the court have been seen logging on to the popular blog. Is this a clue that public opinions (either narrow or mass) are directly making their way into the court? Is modern technology reaching inside justices' chambers? The evidence does not always lend itself to empirical analysis, but enough may be there to propose that the public and the court are growing closer, thereby adding support to the contention the court generally follows the public.

A careful examination of how the court deliberations and its subsequent decisions reach the public is a critical element in assessing whether public opinion might have an influence on the Supreme Court. The on-going debate over cameras in the courtroom plays a central role in the court's continued concern over its legitimacy and the extent to which the media itself introduces bias into the coverage of decisions of the court.

Since court proceedings are not carried live and television coverage is not allowed in the Supreme Court, accounts filtered through media is the only avenue through which the public learns about the Court. While *The Washington Post*, *The New York Times, Los Angeles Times* and NPR have dedicated Supreme Court reporters, the number of outlets which rely on pool reports and part time reporters is increasing. The Supreme Court is covered the least of any of the branches, (Franklin and Kosaki 1995), and the coverage is incomplete and many cases are not covered at all (Ericson, 1977). As a result, the relationship between the public and the court is generally limited as is the literature on this set of issues. The most prominent studies (Graber 1989, Davis 1987, 1994, Slotnick and Segal 1998) show that the coverage is sporadic at best and not a prominent feature of newspapers or television programs. Studies by Hibbing and Theiss-Morse (2002, 1995) and Spill & Oxley, (2003), show that the coverage of the court is largely apolitical in

nature. The findings are a mixed bag however. Baird and Gangl (2006) argue that when the press portrays the court as acting politically, then public confidence of the institution goes down. They additionally suggest that if the media consistently portrayed the court as being political in nature, there would be long term negative effects. As Baird and Gangl (2006) themselves point out, however, there are other scholars who actually find the opposite results. Hibbing and Theiss-Morse (2002) argue that the public's disgust of the political side of Congress is the fact that they are so often debating in their own best interest. Even if somewhat political, the court appears insulated from such charges as members of the court do not seek re-election or overtly act with material goals in mind.

With newspaper and local television stations losing money, the coverage of the Supreme Court is generally thin. Usually only a small fraction of its decisions is covered and then only superficially. This only adds to the convoluted nature of the relationship between media coverage and public opinion. In the other branches of government, for example, framing policy that comes from Congress or the Presidency is a time consuming effort often used to promote or demonize the other branches, especially if they are held by a rival party. Unlike these institutions, which rely on elections and thus, public opinion, the court allows others to frame their decisions. As a result, the media play an oversized role in telling the story coming from the court (Franklin & Kosaki, 1995). Some of the most covered topics on the news often deal with crime and criminal matters (McManus 1994, and O'Callaghan & Dukes, 1992). And, as Slotnick and Segal argue, content in the coverage is often factually wrong (Slotnick & Segal, 1998). Finally, as Clawson, Strine and Waltenburg (2003) argue, "mainstream media coverage of the Court tends to emphasize the legal basis of its decisions, and because public knowledge about

the Court is largely determined by the press, it stands to reason that those most knowledgeable are influenced by the apolitical frame."[78] So if the court is defined by the media, and the media often get the court wrong, is there any basis for concern as it relates to public opinion reflecting back on the court? It is striking that the members of the court, interested in public legitimacy and dependent on the public for ultimately abiding by its rulings, (although implementation is often done by elites in other parts of the government and society) are so unconcerned about their portrayal in the media. After all, how can the court's decisions reflect public opinion if the relationship is so indirect? While it is clear, according to Lee (2008), SCOTUSblog is being read by someone inside the court, it is uncertain what information justices or their clerks glean from blogs. Ultimately, this demonstrates the narrow, and almost insular, influence of the court by small slice of the public.

Returning to the *Kennedy v. Louisiana* case once more, according to Lee (2008), the most notable aspect of this case was not the factual error made in the case, but the speed and intensity at which the error traveled, underscoring the marriage between technology and the media and its potential impact. The fact that there are those bloggers or erstwhile reporters eager to fact check court decisions can only make the process more transparent and open. Yet, there is a suspicion that bloggers might have a broader role than being relegated to fact checker. In the age of instant communication, where the emphasis is on getting the story out first, bloggers are at risk for errors themselves. Supreme Court decisions are complicated and the ramifications not easily digested, thus

[78] Clawson, Rosalee, Harry Strine and Eric Waltenburg. *Framing Supreme Court Decisions The Mainstream Versus the Black Press*. Journal of Black Studies, 33:784-800 (2003).

the potential for misreading decisions and long term implications during the rush of the "break the story first" mentality creates the possibility of influence based on inaccuracies. Bloggers and readers alike need to be aware of the potential harm that wrong information may bring.

Despite concerns about the inaccuracy of information, instant blogging could potentially serve as a proxy for public pressure. Ex parte communication could be used as a means to influence decisions in an incipient manner, given the indication there might be active reading of blogs inside of chambers. It is not too farfetched for a clerk of the court to use a blog as a measuring stick for the general mood of the public and subsequently convey that sentiment to a justice. The only justice to publically admit using the Internet thus far is Justice Kennedy, who said on April 12, 2005 during a House Appropriations Committee Hearing that he sometimes did legal research this way. On some level, justices surfing the Internet for information may be a function of the age in which we live, the byproducts of which are not yet fully explored.

Legal blogs are easily accessible. Many attorneys follow SCOTUSblog, for example, because of its access to its "inside-baseball" coverage and observations about the court. As shown by Lee (2008), the SCOTUSblog has indisputably breached the court with readers inside the Court and justices themselves using information from blogs in their opinions. One such example is the 2005 decision of *United States v. Booker* 543 U.S. 220 (2005) where Justice Stevens referred to a document that was found on a blog. While the dissent was not based on the blog per se, the fact that information is so readily available via blogs and referenced by a justice speaks to its potential power.

Understanding that blogs are potentially being read has titillated members of the SCOTUSblog community because they could use this medium to try and influence things from case outcomes to cert acceptance. And while many blogs include entries by simple observers of the court, there are occasions where blogs are used as a communication method with the court after oral arguments as seen in the *Kennedy* case. Court rules, for example, forbid the introduction of amici briefs after oral argument but the rules are silent with regard to ex parte blogging by parties involved in the case. Several lawyers have blogged about their experience before the court and discussed the merits of the arguments only hours after they were presented.

While there may be no sinister motive in blogging about the experience, Lee points out, "Nonetheless, the power to potentially reach the justices with one more presentation of the best arguments for a side—particularly a version crafted after the insight that oral argument offers into the justices' concerns—could be invaluable to litigants."[79] Communication with the court after oral arguments irrefutably violates norms and rules, yet a blog post falls into a gray legal area because while attorneys are not overtly reaching out to communicate with the court, they could use this medium often read by legal insiders, potentially to include court members and their staffs. It is a reasonable assumption to argue that ex parte messages and other Internet-based chatter could find their way into chambers in the judicial purgatory between oral arguments and a decision, creating new court customs and allowing for an evolution in Court-public communication. As members of the court become more astute with technology, blogging

[79] Lee, Rachel. *Ex Parte Blogging: The Legal Ethics of Supreme Court Advocacy in the Internet Era*, 61 Stanford Law Review 1339 (2009).

after oral arguments and before conference could have an impact upon decision-making, allowing an element of the public opinion a voice in the outcome.

Studies have clearly shown the weight of amici briefs in influencing justices, and while there is currently no hard evidence suggesting blogs hold the same power, the circumstantial evidence indicates the possibility that the blogs eventually may have serve as a guiding role in future justice evaluations of cases. The court is increasingly populated with tech savvy law clerks, forcing the court to recognize the technology reality of our modern world. Some justices have demonstratively acquiesced as both justices Souter and Kennedy have quoted Internet sources in their opinions. Justice Thomas was a major force behind the launching of a Supreme Court website. With four new justices named to the court in the last several years (Roberts, Alito, Sotomayor and Kagan), the court is becoming younger and has a greater awareness of the tools that the Internet can bring. In fact, at her hearings, Justice Sotomayor claimed, "The Internet is "revolutionary" and affects all areas of the economy and society." As a result, the Internet and the corresponding legal blog world may ultimately force the court to reflect on the different ways in which it gathers information upon which it makes decisions.

5.2 Cameras in the Courtroom

One stumbling block in the relationship between the public and the court is that so few decisions are publically known. One controversial measure, which is gaining momentum in the court community to address this concern, is to allow cameras in the courtroom. Each member of the court has weighed in on the issue. A sampling of their views shows they generally are against it:

Anthony Kennedy:

"Our dynamic works. The discussions that the justices have with the attorneys during oral arguments is a splendid dynamic. If you introduce cameras, it is human nature for me to suspect that one of my colleagues is saying something for a sound bite. Please don't introduce that insidious dynamic into what is now a collegial court. Our court works…We teach, by having no cameras, that we are different. We are judged by what we write. We are judged over a much longer term. We're not judged by what we say. But, all in all, I think it would destroy a dynamic that is now really quite a splendid one and I don't think we should take that chance.[80]

John Roberts:

There's a concern (among justices) about the impact of television on the functioning of the institution. We're going to be very careful before we do anything that might have an adverse impact.[81]

Steven Breyer

I think there are good reasons for it and good reasons against it. The best reason against it is the problem that we could become a symbol since we are the Supreme Court, and if it was in our court, it would be in every court in the country, criminal cases included…When you have television in some, not all, criminal cases, there are risks. The risks are that the witness is hesitant to say exactly what he or she thinks because he knows the neighbors are watching. The risk might be with some jurors that they are afraid that they will be identified on television and thus could become the victims of a crime. There are risks involving what the lawyer might or might not be thinking…Is he influenced by that television when he decides what evidence to present? So what you have in me and the other judges, is a conservative reaction, with a small "c." We didn't create the Supreme Court…But we are trustees for that reputation, a reputation of great importance so that government will work fairly in America…And not one of us wants to take a step that could undermine the courts as an institution."[82]

Antonin Scalia:

---

[80] "Cameras in the Court." *C-SPAN*. National Cable Satellite Corporation. Web.

[81] Kessler, Robert. "Why Aren't Cameras Allowed at the Supreme Court Again? - The Wire."*The Wire*. The Atlantic Monthly Group, 28 Mar. 2013. Web. 7 Mar. 2014.

[82] S. Rep. No. 110-110-448 (2008). Print.

> "Not a chance, because we don't want to become entertainment. I think there's something sick about making entertainment out of other people's legal problems. I don't like it in the lower courts, and I don't particularly like it in the Supreme Court."[83]

David Souter:

> If the cameras are unobtrusive and are not making sound that is distracting, that's one thing. There is still a risk…Cameras which are obtrusive to oral argument so that they really do distract your attention. That is something that has to be avoided…There's no question there's value there.[84]

Some of these arguments are coded because justices simply do not want to be on television. The justices are concerned about grandstanding by members of the court, members of the community playing to the camera and most significantly, reducing their statements from the bench to sound bite that may make the member look poor on the evening news. It could also be surmised that the court is also concerned about the impact of public pressure that may come as a result of cameras in the courtroom. It is notable that the court members, so insulated in much of their legal world, are concerned about the public's view.

Some in the Congress are clearly for cameras in the courtroom, arguing that the Supreme Court should be open to more transparency. Former Senator Arlen Spector, then Chairman of the Judiciary Committee, said in 2006 that if the court was going to act like a 'super-legislature' in its rulings, then it ought to open itself up to the public. "The public has a right to know what the Supreme Court is doing", he argued. The Judiciary

---

[83] "Interview with Supreme Court Justice Antonin Scalia." Interview by Maria Bartiromo. *NBC Today Show*. CNBC. New York City, New York, 10 Oct. 2005. Television.

[84] Confirmation Hearing on the Nomination of David H. Souter to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 101st Cong., (1990) (statement of David H. Souter) [United States. Cong. Senate. Committee on Judiciary. *Hearings on the Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States*. *Hearing*. 19 September. 1990. 101st Cong., 2nd sess. Washington.]

Committee passed along a bill 12-6 which would allow cameras in the courtroom for all proceedings unless due process was at stake. The bill never got to a full vote in the Senate[85].

The issue of camera in the courtroom has been seen at the Supreme Court level before. In 1965, the Court ruled in *Estes v Texas* 381 U.S. 532 (1965) that cameras in the courtroom had distracted jurors, judges, defendants and the witnesses and ordered a new trial as a result. Yet in 1981, the Court ruled 8-0 in *Chandler v Florida* 449 U.S. 560 (1981) that the media in the form of radio, TV and still photography could be used in a criminal trial even if the defendant objected. They also said that the court in *Estes* had not indicated that it was unconstitutional for the media to be in courtrooms. Moreover, the right of defendants to due process was not jeopardized by cameras in the courtroom.

While many state courts used cameras in the courtroom, the Judicial Conference of the United States, which oversees the federal court system, has repeatedly denied requests for cameras in the courtroom, arguing that they still serve as a distraction, diminish the dignity of the court and even risks the fairness of the trials. Justice Thomas has argued that televising the oral arguments might create a security situation because judges may lose some anonymity and therefore be potential targets.[86] In the wake of recent shootings of judges, this notion may constitute a real fear for judges.

Justice Breyer went as far as to argue that any bill that allows cameras in the courtroom is a violation of separation of powers. He stated that because the court does

[85] Mathewson, Joe. *The Supreme Court and the Press: The Indispensable Conflict*. Evanston, IL: Northwestern UP, 2011. Print

[86] "Cameras in the Court." *C-SPAN*. National Cable Satellite Corporation. Web. (Under "Justice Clarence Thomas")

not tell Congress how to do its job, they ought to not tell the court how to do theirs.[87] Ironically, this issue may become confrontational in that if Congress were to pass a law that forced cameras in the courtroom, the court could declare such law unconstitutional.

Following David Souter's retirement announcement, there has been a reawakening of this issue from both lawmakers and court watchers. After a successful fight to have cameras in the House of Representatives and the Senate, Brian Lamb, the founder and CEO of C-Span, asserted the Supreme Court will inevitably submit to the presence of cameras in the courtroom: "The Supreme Court and the Congress will have about as much luck keeping public scrutiny out of our deliberations as we would trying to control the wind," he said. "It's a public setting where the public is invited to attend. There is no logical distinction between opening up a public oral argument to 100 members of the public versus 300 million."[88]

There are several studies pertinent to this debate that highlights the education-versus-entertainment argument. One such prominent article deals with public perception of the branches of government and media reporting. While the Supreme Court has consistently had higher approval ratings than the other branches, much of that perception comes from the relatively positive media attention that the court gets (Hibbing and Theiss-Morse 1995:32). Indeed, its general non-political rulings are by and large well perceived by the public. As Vinson and Ertter (2002) point out, the Supreme Court

---

[87] "Cameras in the Court." *C-SPAN*. National Cable Satellite Corporation. Web.

[88] Mark, David. "New Push to Bring Cameras in Supreme Court." *Politico*. Capitol News Company, 11 May 2009. Web.

needs public support. In the absence of public support, the other branches may be less inclined to carry out enforcement of its decisions.

In the Supreme Court case *Chandler v. Florida* 449 U.S. 560 (1981) the Court argued "at present no one has been able to present empirical data sufficient to establish that the mere presence of the broadcast media inherently has an adverse effect" on due process. Moreover Vinson and Ertter (2002) found that media coverage, despite pressure for ratings, was not presented primarily as entertainment, but rather, was presented as news more often than not. C-SPAN-esque coverage is what many pro-camera members are arguing for, with the ability for the viewers themselves to judge what is happening in the courtroom without much editorializing.

The fact that the court is currently so vehemently against cameras in the courtroom has raised suspicions from the other branches and the public at large, and elicits questions about the influence a more informed public might have over a more accessible and transparent Supreme Court. The argument is that the court hides behind a veil, shielded from broad public scrutiny, and the resulting ratings, due to the absence of live coverage, a luxury not afforded to any other branch of government. A court preoccupied with its legitimacy as measured by public approval would fight to maintain the mystery. They are unwilling to allow themselves individually or collectively to be delegitimized by cameras in the courtroom. Keeping cameras out inevitably raises the stature of the court, where the Court remains a mystery to most people, albeit a legitimate and serious one.

What of the justices themselves? While much of this argument has dealt with the public's impact on justices, have the justices made attempts to communicate their

thinking to the public beyond their opinions? Was the 2010 State of the Union exchange between Justice Alito and President Obama a sign of things to come or just an once-in-a-lifetime occurrence? "This court is probably more active in speaking outside the courtroom than any other court has been," said former solicitor general Gregory G. Garre. "The court is becoming more public."[89] As the court becomes more open to technology and its capabilities, the court members themselves have also become more comfortable in the public arena, as the digital age has demanded more transparency.

In concluding chapter five, it is important to be reminded that the Supreme Court does not have to follow public opinion in any way. In fact, as chapter four will highlight, to do so goes against the idea that the court members are, on-purpose, insulated from public opinion pressure with lifetime appointments. Media reports on decisions are often thinly covered or not at all. However, the combination of the traditional media with the Internet age has placed pressure on the court to be more media friendly. Moreover there are areas where the media catches errors by the court and the court has responded.[90] The court can and does ignore the cry for cameras in the courtroom, but most agree that as a new generation of members takes their place, cameras is a question of when rather than how.

---

[89] Barnes, Robert. "High Court: Justices Increasingly Speaking Outside the Courtroom."*Washington Post*. The Washington Post, 05 Apr. 2010. Web.

[90] In addition to the SCOTUSblog revelation, in April of 2014, another blog, *Legal Planet*, noted (on the day that the decision was released) that Scalia referenced in his dissent an earlier opinion (which he wrote) in which he got the plaintiff and defendant's positions backwards. Shortly after the blog noted that this was "a hugely embarrassing mistake", Scalia's dissent was taken down from the Court's website and revised.

Chapter 6: Results

This section deals with the results of all three models; the indirect model, the pairwise model and the Chamber of Commerce model. Each model is designed to see if the court is reflecting public opinion in some way. One of the models examines the words of the members themselves, one compares opinions to polls, while the last one explores business cases and their impact on the court. The models are inconclusive but suggest that members of the Roberts Court may reflect public opinion when it helps their argument.

6.1 Methodology 1: Indirect Reference Model

Completing a query search of these words in each of the majority, dissenting and concurrent opinions provided evidence that the court mentions public preferences from time to time. When the court does this it is recognizing that the court understands where the public is on a matter. The indirect model has some tantalizing results for hypothesis one. There were occasions where the justices made comments that assumed that they were speaking on behalf of a majority of Americans. Table 1 shows the cases where these references exist.

Table 6.1 Indirect Mentions by Justice 2005-2010

Case	Opinion	Mention	Author
Morse v. Frederick	Dissenting	Indirect	Stevens
Uttecht v. Brown	Dissenting	Indirect	Stevens
Citizens United v. Federal Election Commission	Dissenting	Indirect	Stevens
District of Columbia v. Heller	Majority	Indirect	Scalia
	Dissenting	Indirect	Stevens
Kentucky v. King	Majority	Indirect	Alito
McDonald et al. v. City of Chicago, Illinois et al.	Majority	Indirect	Alito
	Concurring	Indirect	Scalia
	Dissenting	Indirect	Stevens
Nasa v. Nelson	Concurring	Indirect	Scalia
Pleasant Grove City v. Summum	Majority	Indirect	Alito

Caperton et. Al. v. A. T. Massey Coal Co., Inc.,	Majority	Indirect	Kennedy
	Dissenting	Indirect	Roberts
Graham v. Florida	Dissenting	Indirect	Thomas
Sorrell, Att. Gen. Vermont v. IMS Health Inc.	Majority	Indirect	Kennedy
	Dissenting	Indirect	Kagan
Kennedy v. Louisiana	Majority	Indirect	Kennedy

Several specific examples from the chart are seen below:

In the *Citizens United* case, Justice Stevens wrote in dissent:

- Our "undue influence" cases *have allowed the American people to cast* a wider net through legislative experiments designed to ensure, to some minimal extent, "that officeholders will decide issues . . . on the merits or the desires of their constituencies," and not "according to the wishes of those who have made large financial contributions"—or expenditures—"valued by the officeholder." McConnell, 540 U. S., at 153.63
- *Most American households that own stock do so through intermediaries* such as mutual funds and pension plans, see Evans, A Requiem for the Retail Investor? 95 Va. L. Rev. 1105 (2009), which makes it more difficult both to monitor and to alter particular holdings.
- At bottom, the Court's opinion is thus a rejection of the common sense of the *American people, who have recognized a need to prevent corporations from undermining self government since the founding,* and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt.
- A democracy cannot function effectively when its *constituent members believe* laws are being bought and sold.
- When *citizens turn on their televisions and radios before an election and hear only corporate electioneering, they may lose faith in their capacity,* as citizens, to influence public policy.
- The majority declares by fiat that the appearance of undue influence by high-spending corporations "will not cause the electorate to lose faith in our democracy." *Ante,* at 44. *The electorate itself has consistently indicated otherwise, both in opinion polls, see McConnell v. FEC, 251 F. Supp. 2d 176, 557–558, 623–624 (DC 2003) (opinion of Kollar-Kotelly, J.), and in the laws its representatives have passed,* and our colleagues have no basis for elevating their own optimism into a tenet of constitutional law.

What can be concluded by his statements? First, it shows that Justice Stevens, while not expressly admitting that he is being influenced by mass public opinion, he is at least

reflecting *on* public opinion and how decisions made by the court will impact Americans. For example, in these statements, Stevens is playing the populist role, arguing that with the ruling, Americans cannot get a fair shake in the system created by Citizens United and lose faith in it as a result. He is writing about the American people and their influence, contrasting his opinion with that of the decision. Stevens is arguing that the majority was ruling in a way that was against public opinion or at least the desires of average citizens. In this sense, he is indirectly using public opinion, but using it nonetheless. In the last point, found in a footnote, Stevens makes his most compelling argument saying that the electorate is against such high spending corporations as the ones who would be unburdened by the majority ruling.

In *Graham v. Florida* 560 U.S. ___ (2010), a case where life sentences for juveniles was declared unconstitutional, Justice Thomas had a good deal to say in his minority opinion regarding the decision:

- ...the Framers did not provide for the constitutionality of a particular type of punishment to turn on a "*snapshot of American public opinion*" taken at the moment a case is decided.
- Although the text of the Constitution is silent regarding the permissibility of this sentencing practice, and although it would not have offended the standards that prevailed at the founding, the *Court insists that the standards of American society have evolved* such that the Constitution now requires its prohibition.
- The fact that the laws of a jurisdiction permit this sentencing practice demonstrates, at a minimum, *that the citizens of that jurisdiction find tolerable the possibility that a jury of their peers could impose a life-without parole sentence* on a juvenile whose non homicide crime is sufficiently depraved
- The integrity of our criminal justice system depends on the *ability of citizens to stand between the defendant and an outraged public* and dispassionately determine his guilt and the proper amount of punishment based on the evidence presented.

Justice Thomas goes on to say:

> The Court has nonetheless adopted categorical rules that shield entire classes of offenses and offenders from the death penalty on the theory that "evolving standards of decency" require this result. *Ante*, at 7 (internal quotation marks omitted). The Court has offered assurances that these standards can be reliably measured by " 'objective indicia' " of "national consensus," such as state and federal legislation, jury behavior, and (surprisingly, given that we are talking about "national" consensus) international opinion. *Ante*, at 10 (quoting *Roper*, *supra*, at 563);see also *ante*, at 8–15, 29–31. Yet even assuming that is true, the Framers did not provide for the constitutionality of a particular type of punishment to turn on a "snapshot of American public opinion" taken at the moment a case is decided. *Roper*, *supra*, at 629 (SCALIA, J., dissenting). By holding otherwise, the Court pretermits in all but one direction the evolution of the standards it describes, thus" calling a constitutional halt to what may well be a pendulum swing in social attitudes,"

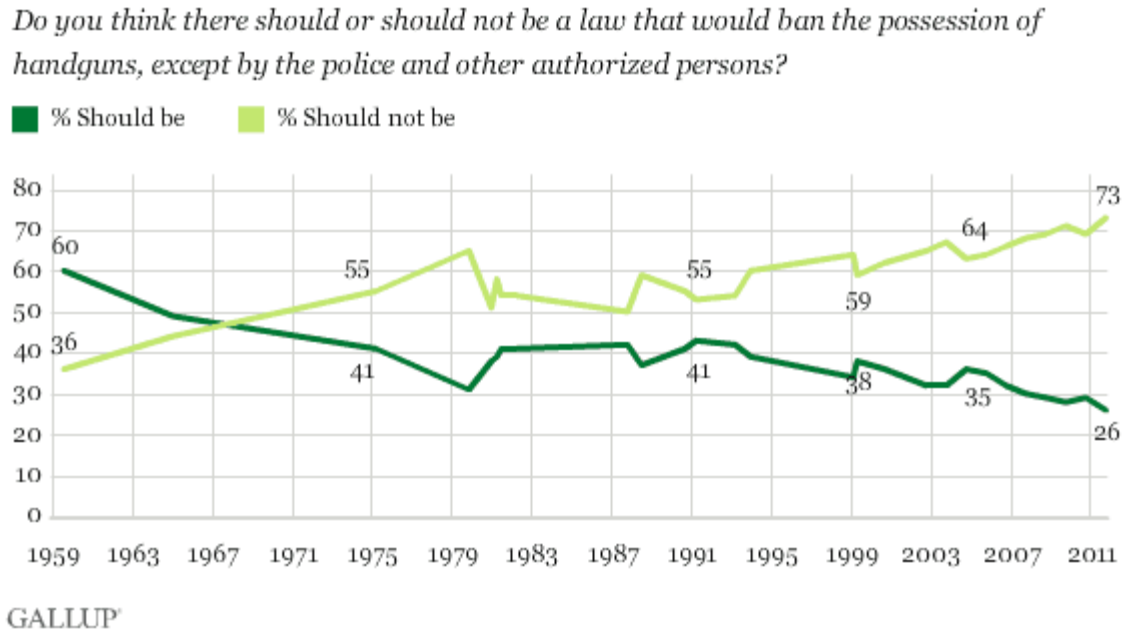
In his opinion, Justice Thomas both uses public opinion and derides his colleagues for using it at the same time. At times he makes the case that the founders would have not had a problem with life sentences for juveniles despite the snapshot of public opinion which he argues is the basis of this decision. Several paragraphs later, Thomas makes the case that the reason that the practice remained because citizens are tolerant of juries who give these sorts of punishments.

The *Graham v. Florida* 560 U.S. ___ (2010) case highlights a common thread in the indirect mention model. Most justices will use such justification when it fits their argument. In *Citizens United*, Thomas voted with the majority who, according to Stevens, were thwarting the will of the majority. Thomas appears to be interested in the majority (of people) in Graham yet disagrees with them in Citizens United.

Probably the most prominent example of where public opinion has been used to justify decisions of the court appeared in the gun cases. Gun cases are among the most

well-known that the Supreme Court has dealt with through the years and polls quite well. A recent example of such polling includes the following:

Figure 6.1: Gallup Poll on Handgun Ban[91]



Seventy-three percent of respondents agreed that handguns should not be banned. As far as public opinion goes, this position is relatively strong. Indeed, the Supreme Court refers to public opinion in gun cases more than any other and the gun cases specifically bring out the vitriol in majority and dissenting opinions.

Majority Opinion by Justice Alito in *McDonald v. Chicago* (561 U.S._(2010),

- (noted that handguns are "overwhelmingly *chosen by American society* for [the] lawful purpose" of self-defense)

[91] Jones, Jeffrey M. "Record-Low 26% in U.S. Favor Handgun Ban." *Record-Low 26% in U.S. Favor Handgun Ban*. Gallup, Inc., 26 Oct. 2011. Web.

- *("[T]he American people have considered* the handgun to be the quintessential self-defense weapon"). Thus, we concluded, citizens must be permitted "to use [handguns] for the core lawful purpose of self-defense."
- *Municipal respondents point out*—quite correctly—that conditions and problems differ from locality to locality and that citizens in different jurisdictions have divergent views on the issue of gun control. Municipal respondents therefore urge us to allow state and local governments to enact any gun control law that they deem to be reasonable, including a complete ban on the possession of handguns in the home for self-defense.
- If, as petitioners believe, their safety and the safety of other *law-abiding members of the community* would be enhanced by the possession of handguns in the home for self-defense, then the Second Amendment right protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials.

Concurring Opinion by Justice Scalia –

- Even though he does "not doubt for a moment *that many Americans . . . see [firearms] as critical to their way of life as well as to their security*,"

From the dissenting opinion:

Justice Stevens:

- Indeed, there is a good deal of evidence to suggest that, if anything, American lawmakers tend to under regulate guns, *relative to the policy views expressed by majorities in opinion polls*.

- The Court hinges its entire decision on one mode of intellectual history, culling selected pronouncements and enactments from the 18th and 19th centuries to ascertain what Americans thought about firearms.

- In considering whether to keep a handgun, *heads of households must ask themselves* whether the desired safety benefits outweigh the risks of deliberate or accidental misuse that may result in death or serious injury, not only to residents of the home but to others as well. *Millions of Americans* have answered this question in the affirmative, not infrequently because they believe they have an inalienable right to do so—because they consider it an aspect of "the supreme human dignity of being master of one's fate rather than a ward of the State

Dissenting Opinion by Justice Breyer –

- Moreover, every State regulates firearms extensively, and *public opinion is sharply divided* on the appropriate level of regulation.
- A citizens committee spent months gathering information about handguns. Id., at 21. *It secured 6,000 signatures from community residents in support of a ban*. Id., at 21–22. And the village board enacted a ban into law. Id., at 22.

In both *DC v. Heller* and *McDonald v. Chicago*, the justices tugged back and forth on what Americans believed about guns and gun control. Writing that Americans (or citizens) were in favor or against gun control was used prominently and liberally throughout the decisions. The only conclusion that can be drawn is that the justices saw it as important to put what Americans 'considered', 'expressed', 'ask-themselves' or 'chose' into their opinion to bolster their case. Clearly the majority (and those agreeing with the majority) are using the sixty-one percent as leverage for their argument. I find it notable that Justice Scalia is particularly vehement in his defense of guns, especially as he has said time and time again that public opinion has little value in Supreme Court decisions. The justices rarely use the term 'public opinion' or 'survey' in their opinions. I would suggest that the reason is that the members of the Court do not wish to appear political or overtly following public opinion, yet when it is convenient, justices do manage, as seen above, to get it into their opinions.

Starting in Chief Roberts first term of 2005-2006, there were seventeen majority, concurring or dissenting opinions where the Court was inferring public opinion (often in more than one place). In Marshall's 2008 analysis, such indirect mentions are not used, but with the smaller sample size, combined with the fact that indirect mentions have value, leads me to include them in the analysis. The scope of these "mentions", are wide ranging and the justices of all ideological stripes use them. A typical example beyond

what was earlier presented comes from a dissenting opinion in a 2007 case of *Morse et al v. Fredrick*, the "Bong Hits for Jesus" cases, where the court ruled that the school principal did not violate the First Amendment in snatching the banner from the student and preventing it from being shown. Chief Roberts wrote that since the banner argued for the use of an illegal activity, it was not a violation of free speech to remove it. Justice Stevens countered that the use of marijuana is being done by thousands of otherwise law abiding citizens and that public opinion is evolving on this issue much like it did on alcohol prohibition: "The ensuing change in public opinion occurred much more slowly than the relatively rapid shift in Americans views on the Vietnam War, and progressed on a state-by-state basis over a period of many years." In this case, Justice Stevens does not use public opinion as a direct rationale for his decision, but rather uses it in a supportive role, suggesting that as public opinion moves toward the legalization of marijuana, the majority decision would no longer be valid because it would not be advocating an illegal activity. Mentions such as this are critical in exploring the relationship between the court and public opinion. I found that Justice Stevens had the most direct mentions with six, while each of the others had lesser amounts. The chart below highlights the number of instances:

Table 6.2 Number of Opinions where Indirect Mentions Were Made by Justice, 2005-2010

Justice	Number of Opinions
Stevens	5
Alito	3
Scalia	3
Kennedy	3
Roberts	1
Kagan	1
Thomas	1

What might account for Justice Stevens' use of public opinion, when he had many fewer mentions in the years prior to the Roberts Court?[92] In five separate opinions Stevens felt comfortable speaking on behalf of Americans, especially in his dissenting opinions. The forcefulness of his dissenting opinions often claimed that the majority was wrong. An example of the forcefulness of Stevens' positions in seen in *Uttecht v. Brown* 551 U.S. 1 (2007), where in his first sentence, he states "*Millions of Americans are against the death penalty*." He goes on to say in the next sentence, "*A cross section of virtually every community in the country includes citizens who firmly believe the death penalty is unjust but who nevertheless are qualified to serve as jurors in capital cases*." The references are indirect, yet helpful in Stevens' attempt to show that public opinion is on his side. Taken as a whole, the indirect mention model is one that lends itself to the argument that the court members, who themselves may reject that public opinion plays a role in their deliberations, do look at how Americans feel about certain issues. And while they are not mentioning polls or surveys per se, they do speak on behalf of all citizens at times and show repeatedly they are reflecting on public opinion.

In examining the data, it becomes clear that the types of cases and the potential robustness of the public opinion may make a difference whether it is going to be used in an opinion. It is likely that the cases which have indirect public opinion mentions are high profile, where the public has weighed in strongly on one side or the other. It is reasonable to assume that issues which these cases discuss need to be prominent ones,

[92] Especially when we consider that Stevens retired in 2009.

otherwise mentioning public opinion will have little bearing. In order to test this theory, the following table highlights the issues the cases discussed.

Table 6.3 Number of Indirect Mentions by Issue

Issue	Number of Mentions
Gun Control Cases	5
First Amendment	5
Death Penalty	3

Not surprisingly, the most media-covered cases are the ones that received the most mentions. It is certainly possible that the data cannot be extended to the court as a whole because of the particular times in which cases appear. The type of case can determine whether the members will use public opinion. The predictability of this model, therefore, is limited by the cases. It is possible that in any given year that the court members will not mention public opinion either directly or indirectly.

6.2 Methodology 2: The Pairwise Method

The second methodology employed involved a poll to decision match. Using this method, I discovered that the Supreme Court reflected public opinion more than sixty-three percent of the time. In other words, the Supreme Court's decisions were consistent with mass public opinion (when decisions were granted on the merits of the case), over sixty-three percent of the time. Finding polls that matched decisions of the court proved tricky, and many potential polls were not used because they were found to be unscientific. Moreover, the small sample size proved problematic with regard to any overarching conclusions. As is stands, between the 2005 and 2010 terms, there were sixty-three matches made. Some matches were easy to make and had several polls

attached to them. In those cases, I usually looked at several to ensure that they were consistent. The most vexing problem was when the wording of the question led to contradictory answers. One such example was finding polls dealing with the *Citizens United* case. When the question asked "s*hould corporations be allowed to donate to political campaigns*", the number of negative responses was usually well over fifty percent. But when the question asked, "*Should corporations have the right to free speech as it relates to political campaigns*", the positive respondents were also well over fifty percent. In these cases, I usually tried to see if the majority of polls indicated support one way or another or I coded the case as undetermined and left out the match altogether. In the *Citizens United* example, most polls were inconsistent with the ruling when the poll asked about the case itself.

In the cases that were matched, it appears that the court is continuing the Rehnquist tradition of reflecting public opinion. The most reasonable explanation is that the Chief Justice was helping keep the court within the mainstream of public opinion. While he is only one vote, when he is in the majority, his ability to influence opinions through the assigning of opinions allows him to keep some control over what the majority or minority is saying. The fact that Roberts has been in the majority over ninety percent of the time during this five year span speaks to this power. A second explanation is with Anthony Kennedy being the court's center; he is finding his way as the median and swing jurist. Perhaps, like O'Connor before him, he is showing the ability and desire to read the "tea leaves" of public opinion.

A note of caution is warranted comparing these findings to those of Marshall. First, with sixty three matches, it is almost half of the number examined by Marshall in

only five years. I would suspect this is due to the proliferation of polls, but since it is only half the number Marshall compared; perhaps the Roberts Court will be less reflective of public opinion in the next nine years. Second, a more accurate comparison between the fourteen years of each court might yield similar or very different results.

In examining the Roberts Court in its early years, one pattern has emerged; the court has ruled on behalf of business interests. In thirteen cases, the justices ruled the same way that the Chamber of Commerce ruled the case a success on their litigation website. Decisions that fell this way include *Citizens United*, the Lilly Ledbetter case and the *Dukes* case.[93] These three cases were high profile and polling was found to be inconsistent with the majority decision. This is not to say that every business case was found to be inconsistent with public opinion, but several high profile ones were. Both the *Citizens United* case and *Wal-Mart vs. Dukes* were 5-4 decisions that had many in the media proclaiming that the court was currying favor with the business community. And despite that accusation, the court has continued that trend of favoring business interests over those of the mass public.

The area where the court continues to be most in line with the public is with criminal cases, specifically with the Fourth Amendment. There were 18 cases dealing with one or more aspects of privacy and the court agreed with public opinion more than 85% of the time. I would suspect that the court is extremely reticent in restricting these rights, knowing that the outcry would be palpable and potentially de-legitimizing. Recent

[93] Each of these three cases was inconsistent with public opinion on the matter at hand.

examples of cases like this include Miranda warning laws that have stood since the 1960's.[94]

In the pairwise method, I discovered that the Supreme Court has decreased its consistency rate with the public since the time of the Rehnquist Court. In its first five years, the court has an overall rate of 63.49% consistency with public opinion, slightly lower than the 66% of the Rehnquist Court. In the 63 cases where the outcome was decided on the merits, and with cases in which polls could be identified, there were 40 determined to be consistent and 23 deemed inconsistent. The macro breakdown is seen in the following chart:

Table 6.4 Supreme Court Percentage Consistent with Public Opinion

Year	Percentage Consistent with Public Opinion	N	Percent of Total Cases
2005-2006	73.33%	15	17.6%
2006-2007	66.67%	9	12.0%
2007-2008	60.00%	10	13.7%
2008-2009	80.00%	10	12.0%
2009-2010	66.67%	6	6.5%
2010-2011	38.46%	13	15.29%
Overall Percentage:	***63.49%***	***63***	***12.85%***[95]

[94] *Berghuis v. Thompkins* is a case where a defendant did not expressly indicate he wanted to remain silent in response to being read his Miranda rights. After hours of questioning from police about a shooting, Mr. Thompkins was asked "Do you pray to God to forgive you for shooting that boy down?" When he answered yes, he was arrested and this response was used against him by prosecutors. Most Court observers seemed to think that the Court was narrowing Miranda without outright eliminating it because Miranda is such a part of the national culture. Liptak, Adam. "You Have the Right to Remain Silent. But Don't, If You Want to Use It." *The New York Times*. The New York Times, 01 June 2010. Web.

[95] One question that this data bring up is whether the number of cases compared to the number or percentage of total cases decided in that term is large enough. The Percent of Total Cases column is a list of all cases decided by the Court, including per curiam decisions. The number of cases is small as a

The cases examined that were matched up with polls are listed below with the split by case:

Table 6.5 Cases with Decisions and Consistency Rates

Case	Decision	Consistent/ Inconsistent	Term
Hamden v Rumsfeld	5 3	Inconsistent	2005
Garcetti v. Ceballos	5 4	Inconsistent	2005
Jones v. Flowers	5 3	Consistent	2005
Day v. McDonough	5 4	Consistent	2005
Holmes v South Carolina	9 0	Consistent	2005
Brigham City v. Stuart	9 0	Consistent	2005
Hudson v Michigan	5 4	Inconsistent	2005
Oregon v. Guzek	9 0	Consistent	2005
United States v Grubbs	8 0	Consistent	2005
Zedner v. United States	9 0	Consistent	2005
Davis v. Washington	9 0	Consistent	2005
Burlington Northern v. White	9 0	Consistent	2005
Kansas v. Marsh	5 4	Consistent	2005
Gonzales v Ocentro	8 0	Consistent	2005
House v Bell	5 4	Inconsistent	2005
Gonzales v. Carhart	5 4	Consistent	2006
Brendlin v. California	9 0	Consistent	2006
FEC v. Wisconsin Right to Life	5 4	Inconsistent	2006
Scott v Harris	8 1	Consistent	2006
Morse v. Frederick	5 4	Consistent	2006
Philip Morris v. Williams	5 4	Inconsistent	2006
Parents Involved in Community Schools v. Seattle School District No. 1	5 4	Consistent	2006
Panetti v. Quarterman	5 4	Consistent	2006
Ledbetter v Goodyear	5 4	Inconsistent	2006

percentage of the whole yet, not small when compared to the number of cases that are either in the media or attached to a poll.

Kimbrough v United States	7 2	Consistent	2007
DC v. Heller	5 4	Consistent	2007
Kennedy v. Louisiana	5 4	Inconsistent	2007
US v Williams	7 2	Consistent	2007
Munaf v. Green	9 0	Inconsistent	2007
Snyder v. Louisiana	8 1	Consistent	2007
Baze v. Rees	7 2	Consistent	2007
Crawford v. Marion County	6 3	Consistent	2007
Boumediene v. Bush	5 4	Inconsistent	2007
Exxon Shipping v. Baker	5 3	Inconsistent	2007
District Attorney's Office v. Osborne	5 4	Inconsistent	2008
Pleasant Grove City v. Summum	9 0	Consistent	2008
Ricci v. DeStefano	5 4	Consistent	2008
Northwest Austin Municipal Utility District No. 1 v. Holder	8 1	Consistent	2008
Federal Communications Commission v. Fox Television Stations	5 4	Consistent	2008
Harbison v Bell	7 2	Consistent	2008
Melendez-Diaz v. Massachusetts	5 4	Consistent	2008
Herring v. United States	5 4	Inconsistent	2008
Safford Unified School District v. Redding	8 1	Consistent	2008
Ashcroft v. Iqbal	5 4	Consistent	2008
Sullivan v Florida, Graham v Florida	6 3	Consistent	2009
Citizens United v. FEC	5 4	Inconsistent	2009
McDonald v. Chicago	5 4	Consistent	2009
Salazar v Buono	5 4	Consistent	2009
Padilla v Kentucky	7 2	Consistent	2009
US v Stevens	8 1	Inconsistent	2009
Abbott v. United States	8 0	Consistent	2010
Bruesewitz v. Wyeth	6 2	Inconsistent	2010
Michigan v. Bryant	6 2	Consistent	2010
Snyder v. Phelps	8 1	Consistent	2010
Connick v. Thompson	5 4	Inconsistent	2010
Brown v. Plata	5 4	Inconsistent	2010
Brown v. Entertainment Merchants Association	7 2	Inconsistent	2010
McComish v. Bennett	5 4	Inconsistent	2010

Pliva v. Mensing	5 4	Inconsistent	2010
Walmart v. Dukes	5 4	Inconsistent	2010
ATT v. Conception	5 4	Inconsistent	2010
Chamber of Commerce v. Whiting	5 3	Consistent	2010
Williamson v Mazda	9 0	Consistent	2010

Note: Of the twelve cases that were highlighted in the indirect mention model, seven were also included in the pairwise model.

The highest rate of consistency with public opinion was 80% seen in the 2008 term, where eight out of ten cases were decided consistently with public opinion. Cases that were argued and decided in that term included two cases on the first amendment (*Pleasant Grove City v. Summun* and *FCC v. Fox*), three cases concerning criminal issues (*Melendez-Diaz v. Massachusetts, Herring v. United States and Safford Unified School District v. Redding*), one death penalty case (*Harbison v Bell*), one Affirmative Action case (*Ricci v. DeStefano*) and one terror case (*Ashcroft v. Iqbal*). Several of these cases registered quite strongly in public opinion polls, notably *Pleasant Grove City v. Summum*, where over 80% of people polled before the case was argued agreed with the court's eventual reasoning that not every religious group has a right to put their creeds in the town square.[96] The second case which registered quite robustly was the *Ricci v. DeStefano* case, a high profile decision about the rights of white firefighters who believed

[96] This case was one where a religious group known as the Summum argued that if a town was allowed to have a inscription of the Ten Commandments in the town square then they ought to have a similar right to place their Ten Amorphisms in the square as well. Otherwise, they argued, the town was essentially choosing one religion over another, a violation of the Establishment Clause.

that they had been denied a promotion because the city of New Haven Connecticut believed that the test was racist.[97]

Was there anything particular about the justices that year that might give a clue as to the high consistency rate? If anything, 2008 was the fourth straight year of high consistency rates for the Roberts Court so it is unlikely that any pattern could be found there. Most likely, the small number of cases makes the comparison tricky. Interestingly, there was not a great deal of agreement on the court during that term in the paired cases, with six 5-4 splits, one 7-2, two 8-1 and one 9-0 cases amongst those studied.

The other year that clearly jumps out over the others is the 2010-2011 term, where the justices only had a 38.46% consistency rate with public opinion. This means that the Supreme Court was inconsistent with public opinion over sixty-one percent of the time. One question to consider is whether this latest year was simply an outlier or something more tangible. Taking the 2010 term out of the aggregate calculations yields a 71% consistency rate with public opinion, higher than the average during the Rehnquist years. This relative drop between the years 2005 and 2010 indicates, I would presuppose, that the Roberts Court is now comfortable with taking the court in a direction that may be more independent of public opinion. Consider this data from SCOTUSblog, noting the direction that the court is heading.

[97] The Ricci case is essentially an Affirmative Action case, where the white firefighters argued that their advancement test was not biased and that their rights were being denied in favor of minority applicants. The poll was completed Quinnipiac University, saying that over 70% of respondents agreed that the firefighters who scored high on the test ought to be promoted.

Table 6.6 SCOTUSblog Conservative Direction of Court Compared to Consistency Rate[98]

Year	Conservative Direction	Consistency Rate
2005	45%	73.33%
2006	54%	66.67%
2007	33%	60.00%
2008	48%	80.00%
2009	50%	66.67%
2010	63%	38.46%

The percent of decisions that went in a conservative direction hovered roughly around 50% between 2005 and 2009 (2007 notwithstanding) while the percent of conservative decisions jumped 13% in one year and 30% since 2007.

The trend suggests that when the court is consistent with public opinion, the court is relatively moderate, that is, deciding cases in roughly an equal number of liberal and conservative decisions. However, it also becomes clear that in 2007, when the court decided cases more liberally, they were being relatively inconsistent with public opinion compared to other years (although still at 60%). Likewise, in 2010, the court moved more dramatically in the conservative direction and the consistency rate changed as well. These results suggest that the public is showing that it is ideologically moderate in most situations.[99]

It is possible that this model is showing the consistency rate with public opinion decreasing as the Roberts Court gets older. The term that finished in 2011 shows the lowest consistency rate in the six years examined, even though it is currently an outlier.

[98] SCOTUSblog. STAT PACK. October Term 2002. 5-4 Decisions. 22 June 2013.

[99] The correlation coefficient was -.29613 with a 3.25E-07 2 two tailed test

It can be argued, in the words of the *New York Times*, that "after four new members in five years, the court has entered a period of stability.[100]" Is it possible that Roberts has now found its comfort zone, far more willing to go against public opinion than in previous years? Perhaps the Roberts Court and John Roberts as Chief Justice in particular, is becoming increasingly comfortable with making decisions that may be inconsistent and potentially unpopular with the public. Perhaps the consistency rate has been impacted by several new appointments. What might new justices bring to the court? Consider the following table with the court membership listed:

Table 6.7. Rates of Consistency Compared to Court Makeup

Year	Members	Percent Consistent
2005-2006	Stevens, Scalia, Roberts, Souter	73.33%
	O'Connor, Kennedy, Thomas, Ginsburg, Breyer	
2006-2007	Stevens, Alito, Roberts, Souter	66.67%
	Scalia, Kennedy, Thomas, Ginsburg, Breyer	
2007-2008	Stevens, Alito, Roberts, Souter	60.00%
	Scalia, Kennedy, Thomas, Ginsburg, Breyer	
2008-2009	Stevens, Alito, Roberts, Souter	80.00%
	Scalia, Kennedy, Thomas, Ginsburg, Breyer	
2009-2010	Stevens, Alito, Roberts, Sotomayor	66.67%
	Scalia, Kennedy, Thomas, Ginsburg, Breyer	
2010-2011	Kagan, Alito, Roberts, Sotomayor	38.46%
	Scalia, Kennedy, Thomas, Ginsburg, Breyer	

[100] Liptak, Adam. "A Significant Term, With Bigger Cases Ahead." *The New York Times*. The New York Times, 28 June 2011. Web.

Further study might reveal if the new members of the court are moving the court either away from or closer to public opinion. The current data hint at the new members pushing the court away from public opinion rather than towards it, but it is still too early to determine that conclusively. Of course, the nature of the cases has an important impact on this piece of the puzzle as well.

Table 6.8 Each Justice Consistency Rates Between Terms 2005-2010.

Consistency rate with public opinion:

	Justice	Roberts	Kennedy	Ginsburg	Stevens	Breyer	Scalia	Alito	Thomas	Souter	
Term											
2005		80	66.67	80	73.3	73.3	66.67	72.7	66.67	80	
2006		55.5	66.67	66.67	55.55	66.67	66.67	55.55	66.67	55.55	
2007		80	60	30	60	50	70	77.78	60	20	
2008		70	70	60	60	60	70	60	60	70	
2009		50	66.67	50	50	50	33.33	66.67	33.33	**SS**50	
2010		46.15	38.46	78.60	EK 76.9	75.00	38.46	38.46	53.85	**SS**76.92	
	Average	63.61	61.41	60.88	59.77	62.49	57.52	61.86	54.18	56.39	
					EK76.9					SS 63.46	

Notes: Kagan began her first term in the 2010 term, and Sonia Sotomayor began hers in 2009. EK in the above chart refers to Elana Kagan and SS refers to Sonia Sotomayor.

Ranking the justices by agreement rate reveals the following:

Table 6.9 Percentage Agreement with Public Opinion by Justice.

Justice	Percent Agreement	N
Kagan	76.9%	8
Sotomayor	63.46%	19
Roberts	63.61%	62
Breyer	62.49%	63
Alito	61.86%	58
Kennedy	61.41%	63
Ginsburg	60.88%	63
Stevens	59.77%	51
Scalia	57.52%	63
Souter	56.39%	44
Thomas	54.18%	63

Kagan's percentage is the highest, but is only based on eight cases. Her percentage will undoubtedly go down as she rules on more cases. Chances are Sotomayor's rates will be reduced to around the sixty percent mark similar to justices with longer terms on the court. Of the top four justices consistent with the court, three of them (Roberts, Kagan and Sotomayor) are all new to the court and four of the top six consistent justices have been on the court six years or less (as of 2011). While only six years of data have rendered these conclusions inconclusive, it still remains probable that the Supreme Court will remain consistent with public opinion even as more cases get added to the list.

6.3 Year by Year Analysis of the Court Members

Justice Roberts

Justice Roberts year by year analysis reveals that the Chief Justice had one of the more inconsistent years on the court, starting with an 80% consistency rate, dropping to a

55.5% consistency rate in year two, then moving to an 80% rate in year three and a 70% rate in year four, then dropping to 50% again before becoming 46.15% rate in his sixth year. Is there anything to be gathered by the up and down nature of his consistency rate? More importantly, is the fact that he had an average 48% consistency rate in the 2009 and 2010 terms an indicator of anything? It is reasonable to argue that Roberts 80% approval rating and the 71.37% average in his first four years is a function of his newness to the court, perhaps combined with the selection of non-controversial cases. And while Roberts likely did not take public opinion into account directly when he decided or took cases, it is possible that he was aware, that as new Chief Justice, public legitimacy was important and getting too in front of public opinion too early in his term might hurt his legitimacy. The more recent incarnation of Justice Roberts perhaps shows a justice more willing to buck public opinion or at least take on more controversial cases that might force him to be less in line with public opinion. Finally, John Roberts is a conservative and is showing a willingness to go along with conservatives on issues, even if the decisions are against public opinion. Perhaps his ideology is showing now that he is more comfortable in his shoes.

Roberts' Martin Quinn scores have borne this out about Roberts, consistently showing that Roberts is conservative, although less so than Rehnquist was in his first term as Chief Justice.[101] Since 2005, he has consistently become more conservative, despite several high profile defections from the conservative side of the political spectrum. Consider his Martin-Quinn scores from the 2005 to 2010 terms.

[101]Martin-Quinn scores are a measurement of Supreme Court Justices along an ideological continuum, where a increasing positive score means a Justice is voting more conservatively and a decreasing negative score indicates a Justice voting more liberally.

Table 6.10 Justice Roberts Martin-Quinn Scores, 2005-2010[102]

2005	1.815
2006	1.899
2007	1.99
2008	2.165
2009	2.287
2010	2.497

With the exception of the 2009 to 2010 term, the Martin-Quinn scores show Roberts becoming more conservative since his confirmation. Comparing the Martin-Quinn scores with the public opinion agreement scores gives this result:

Table 6.11 Comparison Between Chief Robert's Martin-Quinn Scores and Public Opinion Agreement

Year	MQ Score	Agreement Percent
2005	1.815	80
2006	1.899	55.5
2007	1.99	80
2008	2.165	70
2009	2.287	50
2010	2.497	46.15

While there are some subtle differences between the two sets of scores, most notably between 2006 and 2008, where Roberts went up in 2007 and down in 2008 but continued to be conservative in the MQ scores, the overall trend is that as Roberts becomes more conservative, the less agreement there is between his votes and agreement with public

[102] Martin, Andrew D. and Quinn, Kevin M. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999." *Political Analysis*. 10:134-153. 2002. Web.

opinion. This relationship is statistically significant at the <.05 level and shows a correlation of -.69, meaning that as he votes more conservatively, he has been less in agreement with public opinion. This data reveals that as time has gone on, Roberts has voted more conservatively and that his votes have moved him away from public opinion, at least for the votes examined in this method.

As commented on by Nate Silver of *The New York Times*, "although Chief Justice Roberts is not especially more conservative than Chief Justice Rehnquist under their (the Martin Quinn score) system, chief justices can sometimes exert an overall pull on the court based on the way they manage it, and this may be one of those cases."[103] In 2009 and 2010, Roberts dissented only twice in the pairwise model, siding with the conservatives in *Brown v. Plata* and *Sullivan v. Graham*. These two years provided a large swath of business cases where Roberts sided with business interests over the individual (*Pliva v. Mensing, Bruesewitz v. Wyeth, Wal-Mart v. Dukes and ATT v. Conception*), the state over the criminal (*Connick v. Thompson*) and protecting free speech (*Brown v. Entertainment Merchants Association, United States v. Stevens and Citizens United v. FCC*). Those are generally the votes of a conservative and perhaps Justice Roberts is just more comfortable with his role. Overall, and in spite of the last two terms studied, Chief Justice Roberts has one of the highest consistency rates amongst all the justices.

[103] Silver, Nate. "Supreme Court May Be Most Conservative in Modern History." *Supreme Court May Be Most Conservative in Modern History Comments*. The New York Times Company, 29 Mar. 2012. Web.

Justice Kennedy

Anthony Kennedy had a very consistent six year span during the years studied. He had a 66.67% consistency rate for three of the six years, a 50% and 70% rate, and most recently, a 38.46% rate during the 2010 term. The average rate of 66% without the 2010 term included is higher than his Rehnquist-years rate of 60%. His consistency rate during the 2010 term was identical to that of Roberts with the exception of his vote in *Brown v. Plata*, in which Kennedy joined his liberal colleagues in voting to forcibly reduce the prison population of California. In all the other cases in 2010, Kennedy voted with his more conservative colleagues, but largely against public opinion. It was the only criminal case in that term in which Kennedy voted against public opinion. Kennedy voted with business interest in each of the five business cases that term, three of which were against public opinion. Similar to many other members, Justice Kennedy's consistency rate is well within established norms.

After examining Justice Kennedy's voting records and comparing it to public opinion, two things are clear. First, he is in majority much of the time, more than 96% of the time in this model (61 out of 63 cases). Second, with a public opinion consistency rate of 61%, he is less inclined to go with public opinion on cases than Sandra Day O'Connor was during her tenure. Despite his relative high consistency rate, he is only middle-of-the-pack with regard to the Roberts Court. In other words, when it comes to being the swing voter in the Roberts Court, Justice Kennedy may indeed play that role that O'Connor once did, but Kennedy is no O'Connor when it comes to public opinion. In fact, the 30% gap between Kennedy's majority vote rate and his 61% consistency rate indicates that he may be in the majority much of the time, but possibly lacks the political

acumen that O'Connor had throughout her career. Comparing his MQ Scores with percent of agreement shows the following:

Table 6.12. Comparison Between Justice Kennedy's Martin-Quinn Scores and Public Opinion Agreement

Year	MQ Score	Agreement Percent
2005	.55	66.67
2006	.605	66.67
2007	.609	60.00
2008	.988	70.00
2009	1.236	66.67
2012	1.521	38.46

There is no overall statistical correlation between the two scores, but as Justice Kennedy has voted more conservatively between the 2008 and 2010 terms, his consistency rate has also decreased. Being the court's swing voter has not prevented him from a corresponding slide in a consistency rate. It is possible that Justice Kennedy's increasing conservatism has moved him away from the political center. Further study will reveal the extent to which this slide is an anomaly or a new pattern.

Justice Ginsburg

On the aggregate level, the years of 2005-2010 were a typical one for Justice Ginsburg. She is a reliable liberal vote and her votes were consistent with that direction. With a 60.88% consistency rate, her ranking was right in the middle. She remained consistent with her earlier terms under Rehnquist and was a leader of the liberal wing of the court.

On closer inspection, she had an 80% rate in 2005, but also had three years in a row where she was at 60% or under. In 2007, she had a 30% consistency rate. Her consistency rate fell and rose as the court moved liberal and conservatively. In 2010, the year which had very low consistency rates amongst conservatives, she scored the highest rate of 78.60%. She dissented eight times in the term, and was mostly positively reflecting public opinion at the time. One pattern that emerges with Justice Ginsburg is one that seems to be a pattern. When the court lurches either in a conservative or liberal direction, the justices consistency rate drops or rises depending on their ideology.

Justice Stevens

If there is any justice who had motivation to vote according to his own preferences it was Justice Stevens. He retired after the 2009 term and left a significant legacy for others to follow. He had a rate of 59.77% in his last five years on the court. During his years on the Rehnquist Court, he had a consistency rate of 50 percent. Twice, Stevens had below 60%, 55.55% in 2006 and once a rate of 50% in 2009. Justice Stevens was appointed by Gerald Ford in 1975 as an Associate Justice and confirmed by the Senate 98-0. During his years on the Seventh Circuit of Appeals, Stevens was generally a reliable conservative and he continued that record in his early years on the court. He voted both to reinstate the death penalty in 1976 in *Gregg v. Georgia* and voted against affirmative action in *Regents v. Bakke* in 1978. In the ensuing years, Justice Stevens' positions changed on several issues, to the point where he was considered one of the more liberal members of the court. He always maintained that it was not he who was moving away from the conservatives but the conservatives were moving away from him. And while his MQ

scores do show him becoming more liberal over the years, he continues to argue that the court's median continues to move in a conservative direction.[104]

One aspect of Justice Stevens' tenure on the court is the fact that he understood the political nature of the Court and the role it plays in society. Time and time again, Stevens understood the impact of decisions on the credibility of the court. He was concerned that certain cases, like *Bush v. Gore*, had the chance to destroy this relationship:

> I think that it had an adverse impact on the public's regard for the independence of the court. Over the years, the court has survived that unfortunate mistake and still has a high standing. But I do think that it suffered a rather serious temporary setback as a result of that case.[105]

In his dissent in that very case he commented:

> What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit. The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is

[104] Justice Stevens, MQ scores, 1975 .029 to -0.531 in 2009. Martin, Andrew D. and Quinn, Kevin M. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999." *Political Analysis*. 10:134-153. 2002. Web.

[105] Zalan, Kira. "Justice John Paul Stevens on How the Supreme Court Works." *US News and World Report*. 23 Jan. 2012. Web.

> perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.[106]

Justice Stevens was concerned about how the public might view judges, understanding that much of their power is derived from the people themselves.

Justice Thomas

All eleven justices examined in this study had consistency rates within ten percentage points of each other (Justice Kagan being the exception). This relative consistency between justices is testament to the fact that the public was relatively unpredictable in where it weighed in on cases. There were cases where the public sided with conservatives and ones in which it sided with liberals. As the data are examined, a pattern of agreement emerged where the liberals on the court were consistent with public opinion on business cases and the conservatives on the court were consistent with the public on criminal and gun cases. As a result, both groups had cases in which they could be consistent with public opinion with similar rates. It is also true that these rates were consistent with rates found during the Rehnquist era. Justice Thomas had the lowest public opinion agreement rate of any of the justices studied. He had two 66.67% agreement years (2005, 2006) but then tied the lowest agreement score in 2009 with 33.33%. Having the agreement lowest scores amongst all the justices gels with the reputation that Thomas (and Scalia) have gained on the court, that they are consistent in their beliefs, regardless of where the mass public might be at on an issue. It is argued as

[106] *Bush v. Gore*, Supreme Court. December 2000. Print

evidence, for example, by Adam Liptak of *The New York Times* and Dahlia Lithwick of *Slate*, that Thomas' silence during oral argument (he has said one line in several years and recently made news when he made a joke during oral arguments) could be seen as a snub to the American people, as oral arguments are the only setting where the American public gets to see the justices in action. As Lithwick recently stated, "If you believe it shapes judicial opinions, or telegraphs important areas of concern to counsel, or allows the justices a forum in which to bridge the differences among themselves, then Thomas' decision not to participate feels like an insult. If you believe it's the sole opportunity for the court to interact formally before the American public, it can seem like a deliberate snub."[107] And yet, it is not as if Thomas is a recluse. He is often seen speaking to various organizations and his presence is often seen at conservative events. As Lithwick implies, Justice Thomas' selective silence is troublesome (he is rarely in attendance at the State of the Union) in that he chooses not to engage the mass public. In this light, it is not unusual that Justice Thomas' has a low public opinion consistency rating.

Justice Scalia

Similar to Justice Thomas, Scalia had a consistency rate of 57%. This rate was slightly higher than Thomas, but the second lowest of any justice. The data on Scalia in the early years of the Roberts Court suggests that he was largely in sync with public opinion (66.67, 66.67, 70 and 70 respectively between 2005 and 2009). His votes largely mirror those of Kennedy and Thomas during that time period. His consistency rate, however, drops dramatically in the 2009 and 2010 terms along with Thomas, Roberts and

[107] Lithwick, Dahlia. "Clarence Thomas' Supreme Court Silences Are Far Less Worrisome than His Private Speeches." *Slate Magazine*. The Slate Group, 15 Feb. 2011. Web.

Alito (33.33 and 38.46%). Such low rates imply that Scalia is willing to make voting decisions that are against public opinion. While this pattern may self-correct in the next few years, it is worth noting that Scalia often likes to vote independently of public opinion and likely sees it as his job to do so. Voting consistently with public opinion might be simply a coincidence. That being said, Justice Scalia understands that some cases can go beyond what is acceptable to public opinion. Consider his comments to a gathering at a law school in Chicago in 2011:

> My court has, by my lights, made many mistakes of law during its distinguished two centuries of existence. But it has made very few mistakes of political judgment, of estimating how far … it could stretch beyond the text of the constitution without provoking overwhelming public criticism and resistance. Dred Scott was one mistake of that sort. Roe v Wade was another … And Kelo, I think, was a third.[108]

Even Justice Scalia, who seemingly has no relationship with public opinion, understands the potential backlash of cases that go too far in the public's eye.

Justice Alito

Justice Alito, like Justice Roberts, had a high consistency rate with public opinion during his first term (72.7%). He recused himself on several cases but was largely the Justice that the media and scholars thought he would be. His rates mirror that of Roberts more than they do Scalia and Thomas, but by every account, he is a reliable conservative when it comes to his votes.[109] He is a bit hard to pin down, however, when it came to

[108] Crimmins, Jerry. "Scalia Criticizes Kelo Ruling on Private Property. *Chicago Daily Law Bulletin*. 19 October 2011. Web.

[109] Justice Alito's Martin-Quinn scores are as follows: 1.812 in 2005 and increasing to 2.832 in 2010, a similar trajectory to that of fellow Bush appointee Roberts, who went from 1.815 to 2.497 during the same period. This MQ score comparison hints that both appointees are becoming more conservative, it also

being consistently for or against public opinion. In 2009, where the other 'reliable' conservative justices had low consistency rates (Roberts, 50%, Thomas 33.33%, Scalia 33.33%), Alito scored a 66.67%, tied for highest with Kennedy. His overall rate was much closer to Kennedy (61.67 to Kennedy's 61.79) than it is to either Scalia or Thomas. This implies that Alito was more in tune with public opinion (like Kennedy is "supposed" to be as the swing justice) than Scalia and Thomas, at least in the early part of his tenure. One notable "criticism" of Alito is that he has never voted against the Chamber of Commerce in a case in which the Chamber was either a party or filed an amicus brief and this study bolsters that argument. Alito's consistency rate would be much higher were it not for business cases, in which he voted for the business interests 100% of the time between 2005 and 2011. Future years will certainly reveal more about any relationship between public opinion and Alito's decisions.

Justice Breyer

Justice Breyer's consistency rate is similar to that of Justices Roberts and Stevens, scoring a 62.49%, which is the fourth highest score in the six year span and the highest amongst justices who have been on the court more than two years. What jumps out in comparing Breyer to Roberts is that, unlike Thomas and Scalia, they do not vote together that often, yet they have almost identical rates. This can be explained by the fact that when Roberts' rates are lower, meaning he was voting in cases that went against public opinion, Breyer was voting consistently with public opinion. Likewise, when Breyer's

---

seems as though Alito is becoming more conservative more quickly. Martin, Andrew and Quinn, Kevin M. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999." *Political Analysis*. 10:134-153. 2002. Web.

scores were lower, Roberts' were higher. This dichotomy allows for two "almost opposite" justices to have scores quite similar. This means that Justice Breyer and Justice Roberts have two high consistency scores but on opposing cases.

David Souter

Of all the justices who may have felt unencumbered during the last few years, David Souter is probably the most prominent. He had within a four year period an 80% consistency rate in 2005 and then a 20% rate just two years later. In his last year on the court, he had a 70% rate. Is there anything about Souter retiring that had something to do with his lowest-among-justices 56.39% agreement rate? Perhaps he was willing to go it alone in the final years, free with the knowledge that his days on the Court were numbered. For example, in 2007, in which the conservatives had an above 60% agreement rate and the liberals had a below 60% agreement rate, Souter's 20% stands out. The cases that Souter disagreed with public opinion that year were *District of Columbia v. Heller, Kennedy v. Louisiana, United States v. Williams, Baze v Rees, Crawford v. Marion County, Boumediene v. Bush, and Exxon Shipping v. Baker.* These cases spanned the gamut of topics, including general criminal, business, gun, child rape, child porn and death penalty cases. The only cases he agreed with public opinion were *Kimbrough v. United States* and *Snyder v. Louisiana*. Souter's agreement rate in 2007 reveals a justice who is as willing to go against public opinion as he was willing to go with it in 2005 when he had an 80% consistency rate. As there was consistency between Thomas and Scalia, there was similar consistency between Souter and Ginsburg across the entire 2005 to 2011 time period studied. As the two more liberal justices, this is not all that surprising.

6.4 Newness-To-The-Court

One pattern that is surprising is what is called the Newness-to-the-Court model. Regardless of the ideology, during the 2005 to 2011 terms, the longest serving members of the court had lower consistency rates than did the newest members. Of the top six, only Breyer and Kennedy were veterans of the court, while the other four were the newest justices to the Court (Kagan, Sotomayor, Roberts, Alito). The other five made up the lowest consistency rates (Ginsburg, Souter, Stevens, Scalia and Thomas). While these results rest on a the small sample size, the data hints at the possibility that members might be more in tune with public opinion in their first years rather than their subsequent ones.

Table 6.13 shows that three of the four new justices since 2005 had higher public opinion agreement in their first term than their overall agreement rate.

Table 6.13 First Term Agreement Compared with Overall Agreement with Public Opinion

Justice	**Overall**	**First Term**
Roberts	63.61%	80%
Kagan	76.9%	76.9%
Sotomayor	63.49%	50%
Alito	61.86%	72.7%

In three of the four cases, the justices had an equal or higher rate in their first term than their overall consistency rate. Might this suggest that justices are more centrist in

their decisions so as to establish themselves on the court? Is it possible that new members of the court are staying in the middle of the court with regard to public opinion?

In this pairwise model, the 2010-2011 term had the lowest consistency rate across the six terms studied. There are three possibilities that may explain such a low consistency rate. The first is that the Roberts Court was purposefully carving out a new path, independent of public opinion. The second is that the court took up two types of cases that year, ones that were low profile and others that were media blockbusters, with a few types of cases in between. Perhaps the court was in much higher agreement with public opinion, but the cases which may have concurred did not register with a matching poll. The third possibility is that this term is an outlier. While the court does self select cases it will hear, it only can do so once the cases have percolated up through the system. It is possible that the court had a number of high profile, unpopular cases that, if presented in a different year, might have produced a more varied result. It is not as if the court has been time and again declining in its consistency rates. In several years, the percent of agreement went up, then back down, most probably based on the idea that the court only can act on those cases brought before it.

Assuming for a moment that one reason for the drop in public opinion agreement is that Roberts is more comfortable in his role as Chief Justice, it still does not explain the up and down nature of the court as compared to public opinion. Perhaps, as some have opined, there simply is no relationship.

Might there be something different with the willingness of Roberts, as say compared to Rehnquist, to go against public opinion? From the many assessments of the

Rehnquist Court, it is clear that Rehnquist may have wanted to push the court in directions that happened to be against public opinion, but there were other factors that kept the court from doing so. Rehnquist rarely had the fifth vote to overturn popular rulings and Roberts potentially does have that vote. As a result, Roberts could be achieving what Rehnquist could have only dreamed about.

6.5 Outliers

Examining the consistency rates for each justice reveals that they are, on average, generally between 55% and 78%. There were several outliers. The most notable of these was the 2010 term, in which three justices (Scalia, Kennedy and Altio) had agreement rates of 38.46% and one (Roberts) with a rate of 46.15%.

A second group of outliers is the 30% and 20% agreement rate seen by both Ginsburg and Souter in the 2007 term. Both justices were *against* public opinion on average 75% of the time. Contrast those numbers with the Marshall analysis of the justice with the lowest consistency rate during the Rehnquist Court being William Brennan, who had an average consistency rate of 35%. During the Rehnquist Court, Ginsburg and Souter were remarkably similar, having an agreement rate of 50 and 51% respectively. During the Roberts Court through 2011, Ginsburg had a 61% consistency rate and Souter a 56% consistency rate (although his last term was 2008-2009), but neither ever had anything close to a 20% rate at any time during their time on the Rehnquist Court. It is challenging to explain such a low rate during the 2007 term, other than to suggest that the cases that were before the court were ones they disagreed with. The ones she and Souter both disagreed with (and had perfect agreement amongst

themselves) were *DC v. Heller* (handgun possession in DC), *Kennedy v. Louisiana* (death penalty for child rape), *US v. Williams* (First Amendment and child pornography), *Virginia v. Moore* and *Crawford v. Marion County* (photo ID to vote). The only case that Ginsburg and Souter voted with public opinion was *Snyder v. Louisiana* (race, juries and the death penalty). The case they disagreed with was *Exxon Shipping Co. v. Baker* (business case). All of these cases were high profile, controversial cases that had high profile polls associated with them. And while the Rehnquist Court rarely topped a 67% consistency rate, there were two instances where the Roberts Court was topping 70% (2005 term with 73.33% and 2008 term with 80%). Is there an explanation of this variance or is it by chance? Notably, whereas the Rehnquist Court never fell below 50% approval rating, the Roberts Court has fallen from time to time below a 41% approval rating.

Such a low consistency rate by two of the court's reliable liberals indicated that the sharp polarization that the court managed avoid in the early years of the Roberts Court came out strong in 2007. Contrast Ginsburg and Souter's rates in 2007 term with those of Alito and Roberts, who had scores of 66.67% each during the same term. The disparity is striking, especially when the ideology is considered. The four liberals (Breyer, Soyter, Ginsburg, Stevens) on the Court had a 40% consistency rate while the five conservatives (Alito, Kennedy, Scalia, Thomas and Roberts) had an average rate of 69.6% agreement with public opinion, a difference of 29.6 percentage points. At least where public opinion was concerned, the 2007 term had the most disparity between liberals and conservatives.

6.6 What-Difference-Can-One-Justice-Make?

Is it possible that decisions of the court can be turned by one justice? Would the Roberts Court have made different collective decisions if President Obama had not won election in 2008? This idea can be explored using Mishler and Sheehan's political adjustment hypothesis which states that the indirect movement of the court is seen through new justices on the court.[110] Conversely, the court moves in response to losing justices as well. For example, when Justice O'Connor left the Court, Justice Kennedy became the swing or median justice. And because Kennedy is more conservative than O'Connor was, the court is more conservative as a whole. "She was the swing vote on what SCOTUSblog.com publisher Tom Goldstein calls the "highest profile, most consequential social questions" that touch every person's life.'"[111]

One way to explore this further is by asking what would O'Connor have done if she was on the court instead of Justice Alito. In one such example, after *Citizens United*, Justice O'Connor gave a speech in which she said she was troubled by the court's action, specifically the section of the ruling that dealt with donating corporate money to judicial campaigns. Since retiring from the court, she has been an advocate for the elimination of judicial elections, arguing that when judges are beholden to special interests, they cannot be impartial. In an interview to Jeffrey Rosen, she indicated, "*Citizens United* concerned me because what it did was to recognize corporations as being fully protected by the First Amendment," she said. "I sort of thought the framers of the Constitution were talking

[110] See Mishler and Sheehan (1996).

[111] Lawrence, Jill. "Sandra O'Connor's Choice: What Her Missing Supreme Court Vote Means to Women and America." *Politics Daily*. AOL, Inc., 2010. Web.

about the rights of individuals, not corporate entities. So I've been pretty concerned about the whole approach."[112]

Citizens United is not the only case that may have been different if she was on the court. In other decisions, according to Jill Lawrence of *Politics Daily*, she would have likely ruled the following ways[113]:

- For the defendants in *Arizona Free Enterprise Club v. Bennett*, No. 10-238, and *McComish v. Bennett*, No. 10-239. Her fifth vote would have upheld the law restricting outside money to campaigns.

- *Gonzales v. Carhart*. Partial birth abortion where she would have voted to eliminate the ban.

- Affirmative action in Seattle would have been upheld, as opposed to it being dropped 5-4. *Parents Involved in Community Schools v. Seattle School District No. 1*.

- *Ledbetter v. Goodyear Tire* would have been allowed to go forward.

- Upheld the State of California in the *Brown v. Entertainment* case.[114]

The analysis done by Lawrence and others is often framed as what-would-O'Connor-done-versus-Alito, but the other question is an O'Connor vs. Kennedy debate. When compared to O'Connor, Kennedy is less in line with public opinion than was O'Connor.

[112] Rosen, Jeffrey. "The New Republic." *New Republic*. The New Republic, 1 July 2011. Web.

[113] Rosen, Jeffrey. "The New Republic." *New Republic*. The New Republic, 1 July 2011. Web.

[114] Rosen, Jeffrey. "The New Republic." *New Republic*. The New Republic, 1 July 2011. Web.

The practical implication of this theory suggests that Kennedy is less willing on some issues than O'Connor was to be the public barometer. In other words, whereas O'Connor was well known for 'knowing the temperature' of the country, Kennedy may not either be as interested or knowledgeable. In either event, a swing jurist like O'Connor can make a sizable difference in the percent of decisions that agree with public opinion. By several accounts, Kennedy plays that role, but in fewer cases than did O'Connor.

6.7 Types of Cases and Public Opinion

Is there any evidence that the types of court cases have an impact on the consistency rate with public opinion? Are liberals more likely than conservatives, for example, to be consistent with public opinion when it comes to criminal cases? The argument might go something like this: The mass public has become used to the rights that were provided by the Warren and other courts, from rights like Miranda to the 4th Amendment Exclusionary Rule. Mass public opinion have high degrees of approval for rights that conservatives are against. Therefore, when the conservatives "win" a case that restricts such rights, to what extent are they acting contrary to public opinion? To test this question, just criminal cases were queried and compared to decisions. The death penalty was not included in these results because conservatives generally line up with the mass public on this issue. The results are seen in table 14.

Table 6.14 Non-Death Penalty Criminal Cases Compared with Public Opinion Consistency

Court Case	Decision	Consistent/Inconsistent
Holmes v South Carolina	9-0	consistent
Brigham City v. Stuart	9-0	consistent
Hudson v Michigan	5-4	inconsistent
United States v Grubbs	8-0	consistent
Zedner v. United States	9-0	consistent
Davis v. Washington	9-0	consistent
House v. Bell	5-4	inconsistent
Brendlin v. California	9-0	consistent
Scott v Harris	8-1	consistent
Kimbrough v United States	7-2	consistent
Virginia v Moore	9-0	inconsistent
District Attorney's Office v. Osborne	5-4	inconsistent
Melendez-Diaz v. Massachusetts	5-4	consistent
Herring v. United States	5-4	inconsistent
Safford Unified School District v. Redding	8-1	consistent
Sullivan v Florida	6-3	consistent
Padilla v Kentucky	7-2	consistent
Abott v. United States	8-0	consistent
Michigan v. Bryant	6-2	consistent
Brown v. Plata	5-4	inconsistent

Of the twenty criminal cases decided from 2005-2011, eight of them were unanimous (9-0 or 8-0) and consistent with public opinion. This is a full forty percent of the criminal cases. Second, there were many more decisions that were consistent with public opinion than might have been thought otherwise. Fourteen out of twenty (70%) were consistent with public opinion. However, there were six decisions (30%) that were decided by a 5-4 count and five of these (25%) were both inconsistent with public opinion and where the majority was made up of the five conservatives. The sixth was 5-4 case consistent with

public opinion where the majority included the four "liberals" and Clarence Thomas. Going back to the original question, the conservatives were inconsistent 30% of the time in criminal matters (there was a 9-0 inconsistent case) while the liberals were inconsistent with public opinion 10% of the time. This finding implies that when it comes to non-death penalty criminal cases, conservatives are less likely to be consistent with public opinion than liberals. The data supports this conclusion. As the Roberts Court continues, it will be interesting to see if this pattern continues.

This chapter has presented data which supports the idea that the Roberts Court is generally in line with public opinion on a variety of issues. Both the indirect mention model and the pairwise model imply a connection, at least when the members believe that they have public opinion on their side. There will be much more discussion of this data later in the paper, but despite the small number of cases overall, the data suggests the court is continuing the pattern established in earlier courts.

Chapter 7: The Narrow Interest Model As Represented by the Chamber of Commerce

Here in chapter seven, the scope of the project narrows to discuss narrower interests. The Chamber of Commerce was chosen as a body that best represents business interests, sometimes in agreement with the mass public, but often not. The argument for their narrow status comes from two main sources. First, the Chamber of Commerce's own statements often portray themselves as narrow, specialized interests arguing against larger populist movements. In response to the anti-corporate populism that enveloped the 2008 presidential election season, for example, Chamber President Tom Donohue indicated, "I'm concerned about anti-corporate and populist rhetoric from candidates for the presidency, members of Congress and the media. It suggests to us that we have to demonstrate who it is in this society that creates jobs, wealth and benefits -- and who it is that eats them."[115] The Chamber also has an anti-populist stigma attached to it. As liberal columnist Dana Milbank points out, "Listed as members of the chamber's board are representatives from Pfizer, ConocoPhillips, Lockheed Martin, JPMorgan Chase, Dow Chemical, Ken Starr's old law and lobbying firm, and Rolls-Royce North America. Nothing says grass-roots insurgency quite like Rolls-Royce -- and nothing says populist revolt quite like the U.S. Chamber of Commerce."[116]. Second, the Chamber of Commerce often represents positions that are against mass public opinion. Among the thirteen cases relating to the Chamber of Commerce examined in the pairwise study,

[115] 08, January. "Chamber Vows to Spend Big on Campaign." *Los Angeles Times*. Los Angeles Times, 08 Jan. 2008. Web.

[116] Milbank, Dana. "A Tea Party of Populist Posers." *Washington Post*. The Washington Post, 20 Oct. 2010. Web.

every position taken by the Chamber was opposed by mass public opinion. The Chamber of Commerce often represents large business interests, ones that have unfavorability ratings among the masses. Notably, in the Occupy movements held across the country in 2011 and 2012, much of their ire was directed against the Chamber of Commerce, accusing them of being representatives of the 1% the movement has been fighting. Occupy DC members, for example, disrupted a Chamber of Commerce luncheon in November 2011 and did the same to the Chamber's holiday party in December 2011. Other such disruptions of Chamber of Commerce events took place in far flung places as Little Rock, Arkansas. Not only has the Chamber been active at the Supreme Court level, but they have lobbied against many laws that came out of the financial collapse in 2008. These laws included the Banking and Accountability Act of 2008, a law that was quite popular when polled.

There are many anecdotal examples in which the Supreme Court has appeared to side with narrow interests over the masses. Certainly the *Citizens United* case qualifies as one which had the potential for this accusation. Other such cases include the death penalty, where 60% of the country supports the death penalty, yet the court has moved toward restricting the ultimate penalty for minors, child rape and for the intellectually disabled. In two of these cases, the court has rejected public opinion outright, siding instead with the body of evidence presented by child and developmental experts rather than by what the public desires. The other area where the court has a tendency to side with narrower interests over the masses is with church and state issues. The public is largely in favor of closing the gap between church and state, but the court had often sided with the academic and cultural interests on this issue.

The case for the argument that the Supreme Court cares about narrow elite interests is made by Lawrence Baum and Neal Devins in their article from 2010, "*Why the Supreme Court Cares About Elites, Not the American People*". They call attention to several factors that lead to the court being concerned with elites, including the idea that justices are interested in winning favor from audiences they care about as well as self preservation.[117] There are both policy and social reasons for why members decide cases the way they do. Most significant of these, the Supreme Court concerns itself with making legal policy and needs the elite public's approval in order to legitimate and carry out that policy. If the elite public does not accept the outcomes of a decision, the policy and the court itself become potentially less effective. And while mass public opinion may be ignored from time to time, elite opinion is needed by the justices in order to move decisions from opinion to policy. They need the other branches, bureaucracy, academics, think tanks and the like to interpret, disseminate, and to follow their decisions in order for them to have the desired impact.

As a result the justices need their peers. Indeed, when justices say they are not influenced by public opinion, they may be referring to only mass public opinion. But to phrase the question differently: "To what extent are the justices influenced by their peers?" brings up a series of other issues. In other words, are the justices influenced by groups of which they are members? Or at least, are they influenced by their intellectual peer group. Baum and Devins (2010) posit that there exists enough evidence that suggests that the Court is moved in various directions by elites. Obviously, not every

[117] Baum, Lawrence and Devins, Neal, "Why the Supreme Court Cares About Elites, Not the American People" (2010). Faculty. Publications Paper 1546.

justice responds to elites consistently and it is possible that justices who are the most consistent with elite opinion are the swing justices because they want to be considered the most "right" by their peers. Justice Kennedy, by that logic, could be the most likely to follow elite opinion.

This concept of elite leadership is not a one way street. With the confirmation of Elana Kagan in 2010, there was some discussion in the media about the elitism of the court relating to the colleges the justices attended. With the addition of Kagan, every member of the court attended either Harvard or Yale Law School, sparking a rash of articles pointing to the dearth of other law school being represented. As Jonathan Turley from George Washington University laments in journalist Tim Padgett's article about the current pattern: "It's deleterious to the court," he argues, "because it artificially limits the pool of candidates and inevitably removes better qualified candidates. The U.S. has the world's best legal education system, yet we turn to an absurdly minute corner of it for our Supreme Court justices. The high court is a cloistered enough institution as it is — so why risk making it even more detached from the rest of us by turning it into a Harvard-Yale Law Review reunion? A court that draws from outside those two institutions would be part of a less insular conversation in its deliberations." [118]

Does having members of the court exclusively from Harvard and Yale restrict their views on issues? Yes, says other scholars. Justices from the eastern part of the country, for example, may not necessarily have the breadth of knowledge about water rights, an issue which is paramount in the central and western part of the United States.

[118] Padgett, Tim. "Is the Supreme Court Too Packed With Ivy Leaguers?" *Time*. Time, 12 May 2010. Web.

In essence, limiting the court to Harvard and Yale restricts the views of the membership and adds to the belief that the justices are out of touch with the masses.

One avenue where narrow interests communicate their beliefs directly to the justices is through the filing and examination of amicus briefs. As addressed in the beginning, amicus briefs serve as a main conduit between narrow views and the court members. So it follows that if the Chamber of Commerce uses the method of amicus briefs to communicate to an attentively business-orientated Supreme Court, then the court should be responsive to the their concerns. This is exactly what the amicus brief model is based upon.

While in the model there were a small number of cases, there was enough to draw some implications for further research. Out of sixty three cases studied, there were thirteen matches where the Chamber of Commerce's National Litigation Center filed an amicus brief or supported the business side of a case. These cases are listed as follows;

Table 7.1 Cases in Pairwise Model Where Chamber of Commerce was Party or Filed Amicus Brief

2005	Burlington Northern v. White
2006	FEC v. Wisconsin Right to Life
2006	Philip Morris v. Williams
2006	Ledbetter v Goodyear
2007	Exxon Shipping v. Baker
2009	Citizens United v. FEC
2010	Bruesewitz v. Wyeth
2010	Pliva v. Mensing
2010	Walmart v. Dukes
2010	Brown vs. Entertainment Merchants Association
2010	ATT v. Conception
2010	Chamber of Commerce v. Whiting
2010	Williamson v Mazda

One challenge with matching business cases as a whole and Chamber of Commerce cases in particular with public opinion is that they are some of the ones least likely to appear in polling because they often concern narrow interests. The salience of business cases is often difficult to ascertain for the average individual. Yet despite the limited sample size, the data tell an interesting story. Of the fifteen paired cases that appeared in Roberts first term, there was only one that the Chamber of Commerce filed a brief. By the 2010-2011 term, there were seven cases out of thirteen matched that the Chamber of Commerce weighed in. This increase in cases suggests that either the cases were of a higher profile than ones in the past or that business cases in general are polling better among the public. Table 16 shows the year by year breakdown of cases:

Table 7.2 Pairwise Model Chamber of Commerce Cases- 2005-2010 per Term.

Term	**N**	**Percent**
2005:	1 out of 15 cases	6%
2006:	3 out of 9	33%
2007:	1 out of 10	1%
2008:	0 out of 10	0%
2009:	1 out of 6	16.7%
2010:	7 out of 13	54%

Beyond the increase in the number of Chamber of Commerce-business cases that polled in the 2010 term, all but three of the cases were inconsistent with public opinion. The court backed the Chamber of Commerce's decision in ten out of thirteen cases. Since the number of cases that could be matched with public opinion is so small, it is difficult to argue anything conclusive about these cases, but considering that the court has an overall consistency rate of over 63% with all cases, a 23% consistency rate in Chamber of Commerce-business cases suggests that the court may be agreeing with corporate interests.

Polling reveals that the public is generally anti-corporation. Corporate interests tend to poll lower than other issues and for the most part, people identify with the mass public over business interests.

Consider the following poll questions:

Table 7.3 Gallup Poll on Major Corporations

Gallup Poll. Jan. 7-9, 2011. N=1,018 adults nationwide. Margin of error ± 4.

"Next, I'm going to read some aspects of life in America today. For each one, please say whether you are very satisfied, somewhat satisfied, somewhat dissatisfied, or very dissatisfied. How about the size and influence of major corporations?"

	Very satisfied	Somewhat satisfied	Somewhat dissatisfied	Very dissatisfied	Unsure
	%	%	%	%	%
1/7-9/11	5	24	31	36	4
1/10-14/01	7	41	31	17	4

"Now here are some questions concerning where you stand on some of the issues we just talked about. Would you like to see major corporations have more influence in this nation, less influence, or keep their influence as it is now?"

	More	Less	Same as now	Unsure
	%	%	%	%
1/7-9/11	12	62	24	2
1/10-14/01	10	52	36	2

An October 2011 polls reveal the following about Wall Street:

Table 7.4 Gallup Poll on Wall Street Bankers and Brokers

Overall, how much do you trust Wall Street bankers and brokers to do what is best for the economy-- a great deal, somewhat, a little, or not at all?
Oct. 14-16 2011

A great deal	3%
Somewhat	20%
A little	22%
Not at all	54%
No opinion	1%

Please tell me whether you think each of the following descriptions apply or do not apply to Wall Street bankers and brokers:

Intelligent	82%
Greedy	80%
Overpaid	77%
Dishonest	65%
Community minded	24%

The point of these polls is that the public does not trust the business community. The Occupy Wall Street movement is one such manifestation of what the polls are showing. If the movement were to spread beyond the fringe and enter the mainstream, more business-orientated court decisions may reduce the popularity of the court.

What is quite surprising about the Chamber of Commerce model is that the court is so inconsistent with public opinion on this one issue. Consider the percentage of agreement with the public on issues as a whole:

Table 7.5 Supreme Court Agreement with Public Opinion by Types of Cases

Type of Case	**Number of Cases**	**Percent Agreement**
Religion:	3 cases	100%
Speech:	5 cases	60%
Criminal:	21 cases	76.2%
Business:	**13 cases**	**23%**
Death Penalty:	8 cases	75%
Terrorism:	3 cases	33%
State	2 cases	50%
Abortion	1 case	100%
AA	2 cases	100%
Gun Control	2 cases	100%
Voting	3 cases	67%

The justices between 2005 -2009 had a consistency rate of 23% with public opinion, the lowest consistency rate among all types of cases in the pairwise method. It means that the court sided against mass public opinion 77% of the time. While the small

sample size prevents drawing any solid conclusions , these findings replicate what other studies have shown and hint that further study may support the assertion that the court is receptive to the Chamber of Commerce's position.

Journalistic evidence also supports the argument that the justices are receptive to the arguments of the Chamber of Commerce. According to the *New York Times*, the Roberts Court ruled for business interests sixty one percent of the time, compared to a forty-two percent rate since 1953. According to the Chamber's most active practitioner, "I know from personal experience that the chamber's support carries significant weight with the justices," he wrote. "Except for the solicitor general representing the United States, no single entity has more influence on what cases the Supreme Court decides and how it decides them than the National Chamber Litigation Center."[119]

Justice Breyer has objected to the accusation that the Supreme Court is biased towards the Chamber of Commerce. In an interview with Bloomsberg TV in 2010, he said: "I looked back", and "I couldn't find a tremendous difference in the percentage of cases. They've always done pretty well."[120] Moreover, the Chamber does not always "win" before the Court. *Massachusetts vs. EPA* (2007), *Wyeth v, Levine* (2009) and *Williamson v. Mazda* (2011) are three cases in which the court ruled on behalf of the

[119] Liptak, Adam. "Justices Offer Receptive Ear to Business Interests." *The New York Times*. The New York Times, 18 Dec. 2010. Web.

[120] Stohr, Greg. "Breyer Says Supreme Court Doesn't Have Pro-Business Slant."*Bloomberg.com*. Bloomberg, 7 Oct. 2010. Web.

"masses' over the Chamber. As Damon Root of *Reason* magazine argues, "the allegedly pro-business Supreme Court has repeatedly made big business very unhappy."[121]

The Constitutional Accountability Center released a study in 2010 comparing the Roberts and Burger Courts as they voted on cases in which the Chamber of Commerce had an interest. They found that the Burger Court agreed with the Chamber only 43% of the time with no notable division amongst liberals and conservative and the Roberts Court's rate is much higher.[122]

The Roberts Court's conservative members voted with the Chamber 74% of the time, whereas the liberal members supported the Chamber only 43% of the time. From early 2006 until June of 2010, the CAC found that the Court gave a success rate of 68% to the Chamber. The study additionally showed that the justices who served under Burger and Rehnquist Courts were all less likely to support the Chamber of Commerce than their counterparts in the Roberts Court. The CAC showed that even Justice Stevens, who served under Roberts, Burger and Rehnquist supported the Chamber's position (40% to 32%) during the Roberts terms.[123]

The study found the following level of support for the Chamber of Commerce for the period between 2006-2011. In descending order, Alito (78%), Scalia (75%), Roberts

---

[121] Root, Damon. "The Business of the Court." *Reason.com*. Reason Foundation, 18 Mar. 2011. Web.

[122] Kendall, Doug, and Tom Donnelly. "Not So Risky Business: The Chamber of Commerce's Quiet Success Before the Roberts Court - An Early Report for 2012-2013."*Constitutional Accountability Center*. Constitutional Accountability Center, 1 May 2013. Web.

[123] Kendall, Doug, and Tom Donnelly. "Not So Risky Business: The Chamber of Commerce's Quiet Success Before the Roberts Court - An Early Report for 2012-2013."*Constitutional Accountability Center*. Constitutional Accountability Center, 1 May 2013. Web.

(72%), Thomas (71%), Kennedy (70%), Breyer (48%), Souter (48%), Stevens (40%), Ginsburg (40%). These numbers are similar to the level of support that the Chamber of Commerce received in the pairwise matches.

Table 7.6 Justice Consistency Rate With Chamber of Commerce In Pairwise Method

Justice	Rate	Cases	CAC Rate Over All Cases
Kennedy	77%	13	70%
Roberts	77%	13	72%
Alito	75%	13	78%
Scalia	69%	13	75%
Thomas	61%	13	71%
Breyer	23%	13	48%
Ginsburg	15%	13	40%
Stevens	0%	13	40%

While the numbers are similar with the CAC study, the gap in the level of support between "conservative" members of the Court and the "liberal" ones is somewhat striking. Where the CAC report looked at all Chamber of Commerce cases, this research only examined a relatively small sample (13 cases), but it still provides enough for a comparison. In the CAC study, Alito had a 78% support rate and ranked first, while in the pairwise study he had a 75% rate and ranked third, behind Kennedy and Roberts (ranked first and second at 77%). Kennedy and Roberts had a 70% and 72% support rate respectively in the CAC report and ranked third and fifth. On the other end of the spectrum, the liberals in the CAC report had a 48% support rate (Breyer and Souter) and two with a 40% rate (Ginsburg and Stevens). In the pairwise study, the four liberals were also at the bottom of the support listing, with Breyer (23%), Souter, Ginsburg (15%) and Stevens (0%) being at the bottom. In essence, conservative justices have a tendency to

support the Chamber of Commerce when they are either party to a case or have filed on behalf of a business interest and liberal justices do not.

This pairwise data support what many newspapers and media outlets have been reporting about the relationship between these two entities. And even if the media and the data are wrong about the influence of the Chamber on Supreme Court decisions, the perception by much of the media and the public at large is that they are supporting business interests over those of the American people. If this argument is accepted, then the question shifts to why the court may act in this manner. Are they "in the pocket" of business interests, automatically agreeing with the Chamber's position or do the justices simply happen to agree with what the Chamber believes?

The issue of the perceived favoritism of the Supreme Court towards corporations was such an issue during the Elana Kagan hearings that the chairman of the Judiciary Committee Senator Patrick Leahy of Vermont held a hearing in 2011 titled "*Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior."* The idea that hearings were held on such a topic supports two concepts. First, that Leahy felt strongly enough about the perceived influence of business cases on the court is consistent with the idea that he believes that the Court is serving business interests at the expense of the public. Why else hold hearings unless he believed that the public was on his side? Second, that hearings were held suggests that the court has done something that led to a negative response from another branch of government. From Senator Leahy's opening statement:

> This morning, we will highlight several recent Supreme Court decisions to examine the impact on the lives of hardworking Americans. Each of these decisions gives corporations additional power to act in their own self-interest,

> and each limits the ability of Americans to have their day in court. This hearing is a continuation of previous hearings about how Supreme Court rulings affect Americans' access to their courts. Especially in these tough economic times, American consumers and employees rely on the law to protect them from fraud and discrimination. They rely on the courts to enforce those laws intended to protect them. Unfortunately, these protections are being eroded by what appears to be the most business-friendly Supreme Court in the last 75 years.
>
> Last week, in *Wal-Mart v. Dukes*, five men on the Supreme Court disqualified the claims of 1.5 million women who had spent nearly a decade seeking justice for sex discrimination by their employer, Wal-Mart. They ruled that the women did not share enough in common to support bringing a class action. Perhaps more troubling, they told those women that Wal-Mart could not have had a discriminatory policy against all of them, because it left its payment decisions to the local branches of its stores.

Leahy's populist tone was designed to question the judgment of the Supreme Court members. He went on to say:

> The cases we are discussing today are just a few examples of how the Supreme Court's recent decisions will hurt individual Americans and benefit large corporations who engage in misconduct. A study by Lee Epstein, William Landes and Richard Posner, entitled "Is the Roberts Court Pro-Business?" illustrates this phenomenon. It found that the Supreme Court ruled in a pro-business fashion in 29 percent of cases under Chief Justice Earl Warren. Under Warren Burger the figure was 47 percent. Under Chief Justice Rehnquist, it was 51 percent. Now, under Chief Justice Roberts it has risen to 61 percent. The point of today's hearing is to put these statistics in context by examining some of the most troubling pro-business rulings from the Supreme Court's term and to consider the lasting effect of these divisive rulings.
>
> Over the past few years, the American people have grown frustrated with the notion that regardless of their conduct some corporations are too big to fail. The Supreme Court's recent decisions may make some wonder whether the Supreme Court has now decided that some corporations are too big to be held accountable. You get the unfortunate feeling that many of the Justices view plaintiffs as a mere nuisance to corporations. We cannot ignore that sex discrimination in the workplace continues, that corporations continue to deceive consumers and that fraud continues on Wall Street. I believe that the ability of Americans to band together to hold corporations accountable when these things occur has been seriously undermined by the Supreme Court. These decisions have been praised on Wall Street, but will no doubt hurt hardworking Americans on Main Street.[124]

[124] Testimony from the hearing, Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior, June 29, 2011. [United States. Cong. Senate. Committee on Judiciary. *Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior*. *Hearing.* 29 June. 2011. 112th Cong., 2nd sess. Washington.]

During the hearing (which was not the first one of its kind; Leahy also held hearings on *Citizens United* and the *Ledbetter* case), there were also invitees who defended the Supreme Court's handling of business cases. Included in this defense was the statement of Andrew Pincus of the law firm Mayer and Brown, who has argued cases before the Court. He disagreed with Senator Leahy saying:

> The logical way to assess the impact upon corporate behavior of the Court's recent decisions is to examine the outcomes in *all* of the cases involving private plaintiffs seeking damages from businesses. Business parties lost just as many times as they won such cases. Indeed, in the cases involving substantive interpretations of employment law, business parties lost *every* case decided by the Court. There simply is no basis for concluding that the Court's decisions, taken as a whole, favored business defendants over plaintiffs seeking damages.
>
> A review of the Court's decisions in which business parties prevailed reveals that the positions of the plaintiffs in those cases departed very substantially from existing law. It is not at all surprising that the Court refused to embark on the radical courses urged by the plaintiffs and instead adhered to the principles recognized in the Court's prior precedents.
>
> The scope of the Court's rulings will be debated in dozens, if not hundreds, of cases before the federal district courts and courts of appeals, and it will take several years for the lower courts to render a sufficient number of decisions to determine what the impact of the rulings will be. One thing is certain, however: predictions made today about the reach of the Court's decisions are highly likely to be incorrect.
>
> The Court's decisions will have significant positive effects on corporate behavior, avoiding an increase in the drain on companies' resources from unjustified litigation and leaving funds available for business expansion and job creation; preventing new disincentives to foreign investment in the United States; and preserving the availability of arbitration as a fair, efficient dispute resolution system that provides the only avenue of relief for the small injuries suffered by the vast majority of consumers and employees. Moreover, the Court's rulings leave undisturbed the principal deterrent of wrongdoing—the threat of government enforcement action.

The larger point of the discussion is that there is important and substantive disagreement on the extent to which the Supreme Court sides with business interests. While arguments both for and against the Chamber having influence on the Supreme Court have supporting evidence, the data presented here suggests that, at least among cases that register in polls, the court's decisions are consistent with the side that the Chamber of Commerce takes in cases.

Further study might reveal whether this pattern will remain consistent over time. But the larger question perhaps is not whether the Supreme Court is sympathetic to business interests, but why might that be? Is the 5-4 pattern that has developed in many business cases simply the result of conservatives being more pro-business? The fact that the four liberal justices were the lowest four on the consistency scale and the five conservatives were the top five is telling. Also, the gap between the highest consistency rate (77% for Kennedy and Roberts) and the lowest (0% for Stevens) is striking. The court may argue that it looks at cases through the legal lens only, but when faced with the fact that the conservatives appear to be more pro-business and the liberals seems to be anti-business, it does suggest that ideology is not too far away in Chamber of Commerce cases. In any event, if the court finds itself being accused of being in the "pocket" of big business, an accusation the court may have to live with.

Taken as a whole, the three models of indirect mentions, the pairwise method and the Chamber of Commerce model all suggest that the Supreme Court does reflect public opinion. The fact that there were so few cases that were able to be matched in the pairwise method makes causation impossible at the moment, but as the Roberts Court continues, it seems likely that the Roberts Court reflects public opinion at the same or similar rate to that of earlier Courts. Both the indirect mention and Chamber of Commerce model suggests that this may be the case, but more definitive data points are needed before that conclusion can be reached.

Even with limited data, this paper does provide some opportunities for further study. One thing that the Roberts Court has done is been unafraid in the last few years to wade into the cultural and political wars. As a result, many high profile cases have come before the court, ones that will certainly put the court under the public microscope. Will this glare

somehow force the court to operate in a middle-of-the-road approach? Or will the court rule on cases based strictly on the merits or the law? As more and more cases are added to the database, the Roberts Court has the opportunity to join earlier courts as being judiciously mindful of public opinion.

It is certainly possible that the Supreme Court does take mass opinion or more narrow public opinion into some cases and not others. This chapter hints at the fact that when cases are high enough profile that the issue or the case is asked about in polls, the court at least understands the political fallout that might ensue. At times they may decide to go along with public opinion, either as individuals or as a whole, and at other times, they may decide that their job is to, in fact, go against public opinion. The future will be ripe for a continuation of this study.

Chapter 8: When the Court Goes Against Public Opinion

In this chapter, I will explore both the ramifications and reaction of society when the court rules against public opinion and when they follow it. There are several cases where the court has acted boldly in the face of overwhelming public opinion. Some of these classic examples include *Brown v. Board of Education of Topeka Kansas* 347 U.S. 483 (1954), and most of the religion-in-schools cases. Despite generally remaining within the mainstream (Marshall 2008) the Rehnquist Court defied public opinion in several instances including *Lawrence v. Texas, Johnson v. Texas* and *Bush v. Gore*. Likewise, in these early years of the Roberts Court, there have been several high profile cases that suggest that the Roberts Court is willing to buck public opinion. As Justice Stevens reported in an interview just before he retired, "sometimes the job of the court is to go against public opinion"[125]. *Citizens United* is one example of such as case. The second, *U.S. v Stevens,* placed the court decisively in conflict with public opinion. The court upheld the right of film producers to compile and distribute videos which depicted animal cruelty. As with *Citizens United*, politicians and the public were outraged, and immediately looked for ways to reverse the ruling of the court. Only days after the ruling, members of Congress rewrote the statute that was declared unconstitutional.

Justice Roberts is acutely aware of how emotionally charged the public can be on First Amendment issues and, in his decisions, sometimes suggests ways to circumvent his own rulings. In his majority opinion upholding the right of Westboro Baptist Church to

[125] "Supreme Court Justice Stevens Opens Up." Interview by Scott Pelley. *60 Minutes*. CBS. WCBS, New York City, New York, 28 Nov. 2010. Television.

protest military funerals, for example, he proposes that the proper response to the protest is the creation of laws that install buffer zones far away from the protests:

> Westboro's choice of where and when to conduct its picketing is not beyond the Government's regulatory reach—it is "subject to reasonable time, place, or manner restrictions" that are consistent with the standards announced in this Court's precedents.

Roberts' response is a classic "O'Connorian" strategy in that Roberts wants to split the difference, preserving the values of free speech without eroding Court legitimacy in the face of potential public outrage. By doing this, he recognizes the outrage that could result from allowing this type of free speech at funerals but on the other, tries to mitigate the public rage by providing a road map for states and localities to legislate around the issue, thus keeping protesters away from funeral sites. He notes that forty-four states have such buffer zones and the facts involved do not warrant a discussion of the constitutionality of those bans. Justice Kagan set the tone for this line of reasoning in oral argument, when she asked of Snyder's lawyer:

> ... suppose you had a general statute that just said, there will be no disruptions of any kind at private funerals. You know, pick your distance, 500 feet, 1,000 feet, but something that didn't refer to content, that didn't refer to ideas, that just made it absolutely clear that people could not disrupt private funerals. What harm would that statute not address in your case?[126]

Legal analysts such as Andrew Cohen of *Politics Daily* implied that the Court's action might have won the war when the court declined to deal with the buffer laws. In fact,

[126] Cohen, Andrew. "Military Funeral Protests: A Wartime Supreme Court Searches For Answers." *Politics Daily*. AOL, Inc., 2011. Web.

Cohen reports, he may have been encouraging them.[127] Notable to the discussion is that in Roberts' majority opinion he does not specifically address the right of the Westboro Church to protest at funerals; rather he discusses more broadly rights of the public to free speech. "Speech on public issues occupies the highest rung of the hierarchy of First Amendment values." Such phrases rate very highly when presented in polls. In contrast, support for free speech drops precipitously when the question becomes whether or not people have the right to protest military funerals with signs that disparage the dead. Roberts argues that because the issues raised by the group are of public concern, they belong in the public domain and cannot be restricted.[128]

8.1 Can the Court Follow Public Opinion Too Much?

Have there been times that the Supreme Court could follow public opinion too much? Could the court get caught up in public hysteria that might be sweeping the nation? Four cases come to mind in deciphering the extent to which this is true. These cases hint at how the court can get caught up the mood of the country and rather than being a buffer against the majority, they serve to add fuel to the fire.

---

[127] Cohen, Andrew. "Supreme Court's 8-1 Westboro Ruling -- and Alito's Passionate Dissent."*Politics Daily*. AOL, Inc., 2011. Web.

[128] Seventy percent of respondents agreed with the statement, "People should have the right to say what they believe even if they take positions that seem deeply offensive to most people and twenty-eight said, "People should have the right to say what they believe, except when they want to say things that seem deeply offensive to most people
" Taken from an Associated Press poll in August of 2011. [GfK Roper Public Affairs & Corporate Communications. "The AP-National Constitutional Center Poll." Survey. 22-29. August. 2008.]

Yet, several other polls asking whether protesters ought to be allowed to protest military funerals showed that seventy percent of respondents said this ought not be allowed.

During World War I, the government's ability to stifle dissent was passed in the Espionage Act of 1917 and the Sedition Act of 1918. The Espionage Act, enacted immediately following U.S. entry into World War I, had two components. It forbade anyone from assisting its enemies and from interfering with the success of the United States Armed Forces. Furthermore, it also prohibited individuals from making false statements or publishing false reports that would interfere with the success of the armed forces. The immediate effect of this law was that it broadened the definition of espionage from passing on information to the enemy to prohibiting individuals from expressing negative opinions about the war or the armed forces. In 1919 the Supreme Court found the act Constitutional in *Schenck v. United States* 249 U.S. 47 (1919), which concerned the distribution of leaflets to potential draftees. Charles Schenck was a Secretary in the Socialist Party and was writing and speaking against the draft. The Supreme Court decided 9-0 that Schenck's actions presented a clear and present danger to society, thus affirming the constitutionality of Schenck's arrest and conviction. Oliver Wendell Holmes, writing for the majority, argued that free speech was not protected because "when a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right."[129] Moreover, he asserted that "the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[130] The

[129] *Schenck v. United States*. Supreme Court. 3 Mar. 1919. Print.

[130] *Schenck v. United States*. Supreme Court. 3 Mar. 1919. Print.

Supreme Court was defining the constitutional line between protected and unprotected speech.

Abrams v. United States 250 U.S. 616 (1919) was another such World War I-era lawsuit dealing with free speech during wartime. This case tested of a portion of the Espionage Act which made it a crime for anyone to attempt to hinder production of war materials in an endeavor to subvert wartime activities. Two protesters had thrown leaflets from New York City windows arguing against U.S. involvement in the war. They were arrested and sentenced to twenty years in prison for their act. The decision was 7-2 in favor of the arrest and conviction. Justice Holmes was a dissenter in this case, despite its striking similarity to Schenck in which Holmes argued for the constitutionality of the law prohibiting speech that would produce or intend to produce a clear and present danger. In *Abrams*, Holmes contradicted his previous argument, stating that Congress did not have the authority to restrict the leaflets in this case because the intent to produce a clear and present danger was absent.

Dennis v. United States 341 U.S. 494 (1951) is a third such example, where several Communist sympathizers were arrested for advocating the violent overthrow of the government. Eugene Dennis and ten others were convicted, sentenced and that conviction was upheld in federal court before the Supreme Court granted certiorari. By a 6-2 vote, the Supreme Court upheld the conviction on the grounds that the conviction did not violate the First Amendment rights of the defendants.

The charged mood surrounding the *Dennis* judgment had an clear impact on its decision. First, the Court was likely aware that the prosecution was operating within the

anti-communist atmosphere that was climaxing in Congress and throughout the United States. Second, despite the fact that the prosecution's case was largely based on hearsay, there was a conviction. The Vinson Court took the case believing that anti-American groups should be prosecuted before their plans came to fruition. The subsequent grave and probable danger rule that came out of this ruling was a bending of the clear and present danger concept that appeared earlier in the century.

In dissent, Justice Black focused on the free speech element of the case:

> These petitioners were not charged with an attempt to overthrow the Government. They were not charged with overt acts of any kind designed to overthrow the Government. They were not even charged with saying anything or writing anything designed to overthrow the Government. The charge was that they agreed to assemble and to talk and publish certain ideas at a later date: The indictment is that they conspired to organize the Communist Party and to use speech or newspapers and other publications in the future to teach and advocate the forcible overthrow of the Government. No matter how it is worded, this is a virulent form of prior censorship of speech and press, which I believe the First Amendment forbids. I would hold 3 of the Smith Act authorizing this prior restraint unconstitutional on its face and as applied...."[131]

He goes on to say;

> Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions, and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.[132]

While public opinion polling was largely in its infancy, at this early point in time of the Cold War, Americans were becoming concerned about the communist threat.

[131] *Dennis v. United States*. Supreme Court. 4 June 1951. Print.

[132] *Dennis v. United States*. Supreme Court. 4 June 1951. Print.

While the McCarthy hearings, for example, were just getting underway and his approval ratings in 1951 were only 19% favorable and 22% unfavorable. Certainly as the 1950's went on, however, many more people not only became knowledgeable as to what McCarthy was doing, but also were in favor of his actions in investigating alleged communists in the United States. It was likely not an accident that the Supreme Court 's decision in *Yates v. United States* 354 U.S. 298 (1957), overturning the conviction of the original 11 who were tried under the Smith Act, was essentially a correction to *Dennis v. United States*. Where the *Dennis* case upheld the conviction of Dennis at the outset of McCarthyism, the *Yates* decision came at a time when McCarthyism had run its course.

The final example where minority rights were not protected was *Korematsu v. United States* 323 U.S. 214 (1944). In this case, US citizens of Japanese decent were told to re-locate to internment camps in the western United States. The concern was that these citizens' default loyalty would be to Japan, not the United States. This argument was certainly couched in racist attitudes prevalent after the attack on Pearl Harbor. As Friedman argues, "…the currents of public opinion against the interned Japanese came to be very strong." The polling that Gallup conducted on the issue showed that that Court was in the mainstream of public opinion on the issue. Indeed, a plurality of respondents answered that the Japanese detainees ought not be released once World War II ended. In a follow-up, popular responses included sending the detainees back to Japan, forcible emigration and outright killing.

The history of the court with regard to cases such as *Korematsu* tells an interesting story. With a majority of editorials supporting the detainment, it is not entirely surprising that the court would have found in favor of the government, especially

in times of war. It lends creditability to the argument that the Court feels the pressure, especially in high profile cases.

What is comforting about the Supreme Court is that for each of these cases, the court relatively quickly reversed itself. When Hugo Black argued that Supreme Court decisions would be seen in a new light when the immediate passions subsided, he was referring to the Smith Act in 1951. Several years later, on Monday, June 17, 1957, *Yates* and three similar decisions were released. All four of these denounced the use of the law to restrict free speech and free association. In response, J. Edgar Hoover decried the day as 'Red Monday'. The Supreme Court, in six short years, had reversed itself. Considering the court had only changed slightly from 1951, the logical implication was that as public opinion changed on the communist threat, the Supreme Court evolved to mirror that public perspective.

The *Korematsu* case has never been overturned at the Supreme Court, but it was defacto-ly overturned in 1984 when the U.S District Court for Northern California overthrew its original detainment. In the 1980's the government officially apologized for the internments and paid out over $1.2 billion in reparations to the survivors and their descendants. And while the decision remains on the books, Judge Marilyn Hall Patel, ruling on the case forty years later said,

> *Korematsu* remains on the pages of our legal and political history. As a legal precedent it is now recognized as having very limited application. As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative,

> executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.

In chapter 8, the study swings to discuss what the ramifications are when the court goes against public opinion and to see examples of where the Court has been caught up too much in the heat of public opinion. Cases are presented that reveal that the Court sometimes goes along with the majority of opinion, even when those opinions ended up being wrong.

Chapter 9: Conclusion

The relationship between public opinion and the Supreme Court is complicated. It is impossible to conclude definitively that public opinion directs or even impacts decisions of the court, yet the literature suggests that the court likely does not stray too far from it. Scholars disagree on the extent public opinion, either in its mass or business forms, has on its members, some arguing that decisions generally fall within a zone of acceptable outcomes while others believe that it is largely a spurious association. Some members of the court are to be more willing to reference it than others. This study aimed to research whether the Roberts Court is following the Rehnquist Court's propensity to follow public opinion. Thomas Marshall (2008) found that the Rehnquist Court, as well as courts since the 1930's, has largely reflected public opinion between three-fifths and two-thirds of the time. Marshall uses a methodology known as the pairwise model, where cases were matched up with polls on the same issue. The methodology I employed uses Marshall's model as a foundation, but added two additional aspects. It also studies indirect mentions in opinions, and added an examination of the relationship between the Supreme Court and the Chamber of Commerce. The goal of this last section was to see if the court is responding to business opinions in some way. In all, I expected to improve Marshall's model to show that public opinion continues to be followed in the halls of the Supreme Court.

While I hoped to show a robust relationship between the Roberts Court and public opinion, the data remains inconclusive. Marshall's work leads me to believe that since most courts' have reflected public opinion, the Roberts Court will be no different. After

all, the Supreme Court not only enjoys its high approval ratings, but also needs the other branches of government and the public to enforce its rulings. And yet, uncertainty about the Roberts Court continues. Adding to the ambiguity are the new additions since 2005: John Roberts, Samuel Alito, Sonia Sotomayor and Elana Kagan. This study stands at the cusp of this major transformation, looking for among other things, how changes in the membership may be impacting how the court operates. And while I would still argue that the court continues to follow public opinion, it is with the caveat that the different personalities may play a role in the extent to which it plays a role.

Each of this study's three models suggests an association between Roberts Court decisions and public opinion. Evidence of this was seen in the indirect mention model, where court members were at times making an argument on behalf of the American people. By invoking the American people (or citizenry), the justices often were arguing that they were on the "side" of the American people. I found that regardless of ideology, justices were likely to mention public opinion indirectly when it helped bolster their case. It is not entirely surprising that members of the court would do this, but what was unexpected was that even members who have openly rejected the influence of public opinion were willing to argue that their views were in the majority.

The pairwise method was largely inconclusive based on the small number of cases that were able to be matched. The number of matches was only 12% of the total number of cases decided by the Court during the 2005-2010 terms. Certainly, the naked numbers showed that when public opinion was measured before decisions were made, the Supreme Court, more often than not, fell in line with those decisions more than sixty three percent of the time. It showed that the court might have been following public

opinion, but the small sample size makes finite conclusions difficult. It is promising for future study to find that some individual members of the court seemingly were more willing to follow public opinion. Despite the small sample size, there were some nuggets of information that are helpful in understanding the Roberts Court. Descriptive statistics did reveal that the Roberts Court was following the Rehnquist Court in following public opinion, right between the sixty and sixty-six percent that Marshall found. Not surprisingly, twelve out of thirteen unanimous cases (9-0 or 8-0) were consistent with public opinion while thirteen out of thirty 5-4 decisions were consistent with public opinion. With 43% of 5-4 decisions being consistent with public opinion and 57% being inconsistent, the Supreme Court is indeed on some level reflecting the nation's increasing polarization. Notably, while the court's consistency rate with public opinion went up and down during the terms studied, the 2010 term was striking in that it had such a low rate of consistency with public opinion. Perhaps an outlier, the 38.46% rate was very low in contrast to the other years studied. All six of the 5-4 decisions in that term went against mass public opinion. Perhaps the Roberts Court in 2010-2011 is the start of a time where the court acts in the countermajoritarian mode that the lifetime tenure allows for them. In all, the pairwise method allows for a unique look back at the Roberts Court's early years and intimates that future study will provide for a more complete conclusion of the judicial branch's relationship with public opinion.

The final model made the argument that the court responded to narrow interests over those of the masses. I argue that business interests can be considered such interests, as most surveys reveal that the masses do see the business community as being against their own populist interests. Taking that argument to the next logical level, the Chamber

of Commerce is different than the general public in that they are narrowly tuned to issues that impact the business community and are in a unique position to show policy preferences of business. As a result, they are influential on decision makers, including the Supreme Court. So the question is whether or not the court responds favorably to the Chamber of Commerce when they are either a party in a case or have filed an amicus brief. The data again was inconclusive, largely due to the small number of cases during the early years of the Roberts Court, but revealing nonetheless. As several journalists and scholars have suggested, the court does have a consistent record voting with the preferences of the Chamber of Commerce, rarely disagreeing with them when they are party (or have an interest) in a case. My data supports their findings, but since my study only covers the first six years of the Roberts Court, the results are not yet conclusive. But as was asked before, why is this the case? Is the Roberts Court really tuned to business interests over those of the mass public? This line of study is promising, and as the numbers of cases increase, a more thorough study can be undertaken.

Many authors highlighted in this paper argue that the Supreme Court will always have a robust relationship with public opinion because the court will be kept in line by the public if they stray too far. Consider Friedman's take on the Roberts Court: "….its decisions will fall tolerably within the mainstream of public opinion, or the Court will be yanked back into line."[133] While this concept of being "yanked-back" into line makes for good prose, how exactly is this done on the court? Indeed, what power do Americans

[133] Friedman, Barry. *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*. New York: Farrar, Straus and Giroux, 2009. pg. 369.

hold over the court? Is this power overstated? The most important idea that holds the court to the mainstream is legitimacy in that the court is essentially powerless without it. And while this desire for acceptance is a powerful adherent, there are other ways that the court can be 'punished' for going outside the mainstream. The most obvious of these is for the court to make an unpopular ruling, for Americans en mass to pressure their members of Congress, and for Congress to pass a measure that contradicts the ruling. The *Kelo* case was one such example of push back and *Citizens United* continues to have reverberations in the political world. In this scenario, Americans are outraged by the court's action in *Citizens United* as they see more and more money in the form of independent expenditures flood the election cycle. They put enough pressure on Congress to pass a law which restricts the kind of corporate giving that the *United* decision allows without infringing on free speech (if that is even possible). The president signs the bill and the court's decision is overridden.

The first challenge with the above setting is that the outrage over the court must be mobilizing enough for the average American to pressure their member of Congress. Even if outrage bubbled over at the time of the decision, in order for the court to be publically rebuked, the anger must be sustained over a long period of time. The indignation in response to *Bush v. Gore* is a good example of how anger against the Court is difficult to sustain and the court, much like a Senator who occasionally votes against the wishes of her constituency, generally has enough reservoir of goodwill that it can sustain short term hits to its popularity. The American public appears to move past their temporary outrage, as they did in *Kelo* and *Bush v. Gore.* Is *Citizens United* the tipping point? Hard to say at the moment. As the court takes on more and more difficult and

challenging cases, perhaps people through their state or federal legislators will find ways to get around court rulings, as was attempted throughout the South after *Brown v. Board of Education* desegregated the schools.

The other possibility is that the president can channel the public's disapproval of the court through appointments. Using *Citizens United* as an example, President Obama, would "hear" the anger of the people and nominate someone who would surely be against such rulings. This anger would lead to the selection of, for example, Elana Kagan. Considering that Kagan herself argued the case before the Supreme Court gives credence to this theory, but as Politico's Kenneth Vogel argued in a piece, "Neither Elena Kagan's oral argument in the case, which the court rejected in its sweeping January decision, nor her limited scholarly writings on the subject, have given supporters of strict campaign finance rules much confidence that she shares their views -- or Obama's -- on the subject." In other words, there is little evidence that Kagan in fact was nominated in order to take on *Citizens United*, or to somehow punish the court for that ruling. As Yale professor Bruce Ackerman noted, "I would be very surprised if she would vote with the majority [on behalf of Citizens United]. She is, on most of these matters, in the mainstream of legal opinion, and I think that decision took a lot of people by surprise. It was quite a striking decision attacking settled practice. But certainly, in this and in many other cases, she hasn't spoken to it. I know her as a person and she is certainly a person with her feet on the ground and who is alive to what I'd call real-world constitutionalism. But I don't think we have a smoking gun."[134] It is far more likely that the President

[134] Klein, Ezra. "Citizens United was a Shot Across the Bow", *The Washington Post*. The Washington Post, 11 May, 2010. Web.

Obama nominated Elana Kagan because she shared a variety of views with him, not just on *Citizens United*, but on a whole host of others. To conclude that one single issue was the reason behind the nomination fails to take a whole host of other issues into account.

This is not to say that the President does not try and "punish" the court for its rulings. I would argue that to get a public rebuke by the President in his State of the Union Address was an attempt by President Obama to do just that for its actions in *Citizens United*. The implication was that the president had the bully pulpit to "call out" the court at a time in which many people were watching and the court could not respond. Historical punishments that have been attempted by members of Congress and the president include the infamous Roosevelt Court Packing plan and a justice being impeached in 1888. Moreover, there have been attempts by Congress to threaten impeachment for justices who have seemingly voted against the wishes of the American people. But by and large, these punishment attempts have either failed or not have been enacted. The process would certainly run out of steam before real action ever really took place. In essence then, it is difficult to see how the other branches or the American public are actually able to yank the court back into line. And yet, despite this, the court does generally stay within the mainstream of public opinion. Indeed, the legitimacy argument is an esoteric one in that it is difficult to empirically support, but many court watchers subscribe to it. After all, they argue, the court members are human, have families, and need to function in the real world. I agree that this is one aspect that the court takes into account as it goes about its decision making. The challenge here, as with many other situations, is that is virtually impossible to support this argument without the justices' confirming what we believe about them.

The aversion to cameras in the Supreme Court is an interesting look at how the Supreme Court views themselves. From the beginning of the Roberts Court, there was the hope that the Chief Justice would be more amenable to having the Courts oral arguments broadcast on television, but to date, there remains sizable opposition within the court. The resistance can be largely summed up by Justice Scalia, who has vehemently argued that for the many people who might watch on C-Span, there will be millions more who will only see the court through thirty second sound bites. Obviously he is concerned about how the court members may look in this way, being politicized by the media. The fact that the members are concerned about how the American public may view them in sound bites supports the idea that the Supreme Court enjoys its relatively high standing amongst the public and does not want to damage this reputation or corresponding legitimacy. Having the court operate publically but exclusively to the audience present on any given day creates a sense of mystery surrounding the court. This mysteriousness of the Supreme Court is something, I would argue, that the court members enjoy. In that way, they can tightly control their public appearances and stay out of the public arena when they choose to do so. Notably, the aversion to the spotlight does not make the Supreme Court less willing to take on controversial cases. Indeed, there have been many recent cases where the media has pleaded for cameras, all to no avail. This roadblock may continue for some time, but eventually, with younger, more media savvy justices taking their place on the court, it is only a matter of time before the court will allow cameras.

Taken as a whole, we finish where we began in this study; there is anecdotal and some statistical evidence that the Roberts Court reflects public opinion more times than it

rules in opposition. The issue remains whether the justices are influenced more by mass or narrow public opinion or if the justices do ignore all the noise in their decisions. This study hints at the probability that the Roberts Court will continue down the well worn path of earlier courts. Indeed, as the Roberts Court matures, there will be more and more opportunity for scholars to study this question. Each year brings new cases, high and low profile ones alike that provide a window into the justices' thinking. As a result, there are lots of areas for further study. Thomas Marshall (2008) found that the Rehnquist Court was consistent with public opinion about two-thirds of the time. The data presented here found almost the same number, slightly below two-thirds. While this number is unsurprising in that there was an expectation of finding consistency, the more cases introduced into the pairwise method will likely strengthen these initial findings. Another area of further study should include further examination into the indirect mention model to see if there is an increase in the number of cases where justices argue that they are speaking on behalf of most Americans. Perhaps, justices will refer directly to a poll or survey. Finally as more and more cases that the Chamber of Commerce has taken a side in come before the court, research ought to be conducted to see if these preliminary results about the influence of narrow interests can be reinforced

Beyond what is presented here, the relationship between public opinion and the Supreme Court might take on new meaning when and if cameras are allowed into the courtroom. When the justices are faced with the same pressure of being on camera day in or day out, will they change how they decide cases? Will the public reaction to unflattering snippets and sound bites from oral arguments sway opinions between oral argument and final opinions? With direct access to the justices, there is no doubt that the

dynamic between the justices and the public will change. Research should be able to track these changes to see if and how the justices decide cases pre and post camera. Moreover, as justices take on celebrity status, will they play up to the public? Perhaps one day soon, maybe with cameras in the courtroom or not, the public will have the chance to know whether the most insular branch ever take their opinions into account as they decide the issues of the day.

9.1 Epilogue

As I complete this study in the fall of 2014, the data this study examined came from the 2005-2006 to 2010-2011 terms. During this six year period, the Supreme Court seemed to become more polarized, largely reflecting the country at large. Indeed, in the four terms since, there has been little change in this equation. In an article published in *The New York Times* in May of 2014, called *The Polarized Court*, Adam Liptak makes the argument that is being made in this paper, that the court is a product of its times, and the current political polarized climate is being reflected in the court. He argues that the court, for the first time, is divided along party lines. The court is reflecting the society in which it operates. As he says:

> The perception that partisan politics has infected the court's work may do lasting damage to its prestige and authority and to Americans' faith in the rule of law. "An undesirable consequence of the court's partisan divide," said Justin Driver, a law professor at the University of Texas, "is that it becomes increasingly difficult to contend with a straight face that constitutional law is not simply politics by other means, and that justices are not merely politicians clad in fine robes. If that perception becomes pervasive among today's law students, who will become tomorrow's judges, after all, it could assume a self-reinforcing quality."[135]

[135] Liptak, Adam. "The Polarized Court." *The New York Times*, The New York Times, 11 May 2014.

The court in the years since 2010 has taken on an even larger identity in several high profile cases, most particularly the Obamacare case and the gay marriage cases. For the health care case, the court held an almost-unprecedented three days of oral arguments on the merits. Despite the increase in cries for cameras in the courtroom, the Supreme Court left the country with its method of releasing oral transcripts a few hours after the case was heard. The fact that President Obama's health care mandate made it to the court at all is not surprising, but the pattern that is emerging about other cases before the court is somewhat alarming. Issues are no longer being solved at the congressional level as Congress continues to be paralyzed by infighting. Congress was unable to come to an agreement on the debt ceiling and when the super committee met to solve the issues that came up, they admitted failure. The government shut down for several days in the fall of 2013 because Congress could not agree on budget resolutions. The 2012 campaign turned out to be the most expensive and one of the nastiest campaigns in recent memory. The saga of Senator Richard Lugar, one of the most prominent and accomplished Senators of the modern era, where he lost his primary to an opponent promising *less* bipartisanship in Congress, is a stunning and sad reflection of where the country is politically. And in this atmosphere, the Supreme Court operates. If they in fact do reflect the times, then issues not solved at the Congressional and Executive levels will eventually end up at the Supreme Court. These large scale issues will force the Supreme Court to get involved at a political level they may be increasingly uncomfortable with. The continued slide in the court's approval rating may be reflecting this reality.

Public opinion may have played a role in two areas where the Supreme Court held center stage recently. In the Obamacare case, decided in 2012, Justice Roberts was the

deciding 5th vote, voting for Congress's ability to mandate that Americans buy health insurance or pay a fine. Most court watchers believed that it was Justice Kennedy who was going to be the swing voter, but it turned out to be Roberts. This turn of events was a little surprising given the information gathered from oral arguments. The six-hour debate in October of 2011 hinted at the law being declared unconstitutional. The more conservative justices were skeptically asking whether Congress could make people eat their broccoli in the same way they could force them to buy health insurance. From that line of questioning many court observers believed that there were five votes to overturn the healthcare law. Throughout the winter of 2012 into the spring of 2012 it seemed a foregone conclusion that the healthcare law would be overturned. In fact Democrats were trying to figure out the best way to respond once the individual mandate was overturned. Likewise, Republicans strategists told people not to gloat when the mandate was overturned. So when Roberts read the decision and agreed to uphold the law, there was sizable shock in both liberal and conservative circles. Many observers after-the-fact were flabbergasted by Roberts's decision to join the liberals in this case. Several prominent Republicans were left wondering whether Roberts had turned into a trader or was not as conservative as they once believed. A quick Internet search turns up a myriad of accusations that Roberts is a traitor to the conservative cause. Certainly, leaving for Malta as the decision was being released was curious. As Jan Crawford reported for CBS News, Roberts;

> …pays attention to media coverage. As chief justice, he is keenly aware of his leadership role on the court, and he also is sensitive to how the court is perceived by the public. There were countless news articles in May warning of damage to the court - and to Roberts' reputation - if the court were to strike down the mandate. Leading politicians, including the president himself, had expressed confidence the mandate would be upheld. Some even suggested that if Roberts

> struck down the mandate, it would prove he had been deceitful during his confirmation hearings, when he explained a philosophy of judicial restraint. It was around this time that it also became clear to the conservative justices that Roberts was, as one put it, "wobbly," the sources said.[136]

The reasons why Roberts chose to uphold the law is purely speculative, but some politicians and scholars have surmised that Justice Roberts is no stranger to the political environment in which he operates. He himself admitted as much when he concluded his Senate confirmation hearings by claiming "I'm not an ideologue." "It's enormously gratifying that the chief justice, who once was one of my star students in constitutional law, saved the day — and perhaps the court," said Harvard professor and constitutional law expert Laurence H. Tribe, who said the court's "place as a legal institution had begun to fall into dangerous disrepute."[137]

The other possibility is that his vote on the health care law was an O'Connorian vote. If Crawford is to be believed, then Roberts understands the role of the courts in modern society and is concerned about its legitimacy. So much so that he is willing to vote or uphold the law that was legitimately passed. If he had been an associate justice, perhaps he would have voted that the law was unconstitutional, but being in the position he was meant he had to vote differently. And yet in reading the decision, it also becomes clear that Roberts upheld the law, but did so in a way that limited its potential impact. In being the one to write the opinion, he found a way to thread the needle between upholding the law passed by the Congress and the president and understanding the limits of federalism at the same time. By restricting the potential penalties to the states for who

---

[136] Crawford Jan. " Roberts Switched Views to Uphold Health Care Law.."*Face The Nation*. CBS News 2012. Web.

[137] Palazzolo, Joe. "Law Blog Expert Panel: Reaction to the Health Care Ruling." *The Wall Street Journal*. The Wall Street Journal, 28 June 2012. Web.

did not want to expand Medicaid, Justice Roberts was trying to find common ground between the two positions. He accomplished the same thing in the Arizona immigration cases, where he upheld most of the law, struck down most of the law, but upheld one significant provision. In defining his role as Chief Justice role, perhaps Roberts understands that operating in a political world means that he needs to be apolitical at times.

The other case that deserves mention is *United States v. Windsor*, 570 U.S. ___ (2013) where the Supreme Court declared the Defense of Marriage Act to be unconstitutional. This case split along familiar ideological lines, with Anthony Kennedy joining the four liberal justices in deciding that the federal government could not prevent marriage because of 5th Amendment and Due Process issues. What is notable about this case and the *Hollingsworth v. Perry* 570 U.S. ___ (2013) case was that the Court, once again, threaded the needle between an outright ban on states outlawing gay marriage and allowing it to proceed in those states where it was already allowed. The significance of this ruling again has to do with the role that public opinion has played. Rarely has there been the chance to examine how public opinion has played a role on a specific issue, if not on the case itself. The basic argument of this paper is that the Robert Court reflects public opinion. The fact that now fifty percent of the country polled agree that gays ought to be allowed to marry has to have weighed heavily on the minds of the justices as they made their decisions. When DOMA was passed in the mid-1990's, the support for gay marriage was quite low. Is it reasonable to conclude that times have changed, the public has changed and the Supreme Court has changed as a result? Further research

here is warranted, but there can be little doubt that society's increasing acceptance of gay marriage is impacting the court.

Bibliography

08, January. "Chamber Vows to Spend Big on Campaign." *Los Angeles Times*. Los Angeles Times, 08 Jan. 2008. Web.

Abrams v. United States. Supreme Court. 1919. 250 U.S. 616. Web.

Adamany, David W., and Joel B. Grossman. "Support for the Supreme Court as a National Policymaker." *Law* and Policy Quarterly 5:405-37. 1983. Web.

Reeves, Anderson and Franze, Anthony. "Commentary: The Court's increasing reliance on amicus curiae in the past term", *The National Law Journal,* (2011). Web.

AP-National Constitution Center. *Supreme Court Impact on Daily Life. Aug. 11- 16, 2010.* 2010. Web.

Atkins, Burton M., and Terry Sloope. 1986. "The 'New' Hugo Black and the Warren Court. *Polity* 18:621-37. Web.

Atkins v. Virginia. Supreme Court. 20 June 2002. Print.

"Background Material." *Pledge of Allegiance and Its "under God" Phrase*. Ontario Consultants on Religious Tolerance, 2002. Web.

"Background Material." *Pledge of Allegiance and Its "under God" Phrase*. Ontario Consultants on Religious Tolerance, 25 Oct. 2008. Web.

Baker v. *Carr.* Supreme Court. 1962. 369 U.S. 186. Web.

Barnes, Robert. "Decisions Indicate Supreme Court Moved Rightward This Term." *Washington Post*. The Washington Post, 01 July 2009. 2 Dec. 2009. Web.

Barnes, Robert. "High Court: Justices Increasingly Speaking outside the Courtroom." *Washington Post*. The Washington Post, 05 Apr. 2010. Web.

Barnum, David G. "The Supreme Court and Public Opinion: Judicial Decisionmaking in the Post New Deal Period." *Journal of Politics* 47:65Z65. 1985. Web.

Baum, Lawrence and Devins, Neal. "Why the Supreme Court Cares About Elites, Not the American People." *College of William and Mary Law School.* Paper 1546. 2010. Web.

Baum, Lawrence. "Measuring Policy Change in the U.S. Supreme Court." *American Political Science Review* 82:905-12. 1988. Web.

Baum, Lawrence. "Membership Change and Collective Voting in the United States Supreme Court." *Journal of Politics* 54:>24. 1992. Web.

Berghuis v. Thompkins. Supreme Court. 2010. 560 U.S. 370. Web.

Bickel, Alexander M. *The Least Dangerous Branch.* Indianapolis: Bobbs Merrill. 1962. Print.

Brendlin v. California. Supreme Court. 2007. 551 U.S. 249. Web.

Brown v. Board of Education. Supreme Court. 1954. 347 U.S. 483. Web.

Brust, Richard. "New Theories of Evolution." *New Theories of Evolution*. American Bar Association, 1 July 2007. Web.

Bush v. Gore, Supreme Court. December 2000. Print

Caldeira, Gregory A. "Neither the Purse Nor the Sword: Public Confidence in the U.S. Supreme Court." *American Political Science Review* 80:1209-26. 1986. Web.

Caldeira, Gregory A. "Public Opinion and the U.S. Supreme Court: FDR's Court Packing Plan." *American Political Science Review* 81:1139-53. 1987. Web.

Caldeira, Gregory A. "Courts and Public Opinion." In *The American Courts,* ed. John B. Gates and Charles A. Johnson. Washington: Congressional Quarterly. 1991. Web.

"Cameras in the Court." *C-SPAN*. National Cable Satellite Corporation, Web.

Canon, Bradley, and S. Sydney Ulmer. "The Supreme Court and Critical Elections: A Dissent." *American Political Science Review* 70:1215-18. 1976. Web.

Caplan, Lincoln. "A Judge's Warning About the Legitimacy of the Supreme Court." *The New York Times*. The New York Times, 26 Sept. 2010. Web.

Casper, Jonathan D. "The Supreme Court and National Policymaking." *American Political Science Review* 70:5066. 1976. Web.

Central Virginia Community College v. Katz. Supreme Court. 2006. 546 U.S. 356. Web

Chandler v. Florida. Supreme Court. 1981. 449 U.S. 560. Web.

Christopher L. Tomlins, Ed.. *The United States Supreme Court: The Pursuit of Justice,* New York, New York. Houghton Mifflin Company. 2005. Print. Page 72.

Citizens United v. FEC, Supreme Court. January 21, 2010. Print

Clawson, Rosalee, Harry Strine and Eric Waltenburg. Framing Supreme Court Decisions The Mainstream Versus the Black Press. *Journal of Black Studies,* 2003. 33:784-800. Web.

Cohen, Andrew. "Military Funeral Protests: A Wartime Supreme Court Searches For Answers." *Politics Daily*. AOL, Inc., 2011. Web.

Cohen, Andrew. "Supreme Court's 8-1 Westboro Ruling -- and Alito's Passionate Dissent." *Politics Daily*. AOL, Inc., 2011. Web.

Collins, Paul M. *Friends of the Supreme Court: Interest Groups and Judicial Decision Making*. New York: Oxford UP, 2008. Print.

Crawford Jan. " Roberts Switched Views to Uphold Health Care Law.."*Face The Nation*. CBS News 2012. Web.

Crimmins, Jerry. "Scalia Criticizes Kelo Ruling on Private Property. *Chicago Daily Law Bulletin*. 19 October 2011. Web.

"Cruel and Unusual Punishment: The Juvenile Death Penalty Evolving Standards of Decency." *Juvenile Justice Center* Jan. 2004: 1-3. Web.

Dahl, Robert. "Decisionmaking in a Democracy: The Supreme Court as a National Policymaker." *Journal of Public Law* 6:279-95. 1957. Web.

DC vs. Heller. Supreme Court. 26 June 2008. Print.

Dennis v. United States. Supreme Court. 4 June 1951. Print.

Dickerson v. United States. Supreme Court. 2000. 530 U.S. 428. Web.

Dred Scott v Sanford. Supreme Court. 1856. 60 U.S. 393. Web.

Dolbeare, Kenneth M. 1967. "The Public Views the Supreme Court." In *Law, Politics, and the Federal Courts*, ed. Herbert Jacob. Boston: Little, Brown. Print.

Dye, Thomas. *Top Down Policymaking*. Washington DC: CQ Press, 2000. Print.

Engle v. Vitale. Supreme Court. 1962. 370 U.S. 421. Web.

Estes v Texas. Supreme Court. 1956. 381 U.S. 532. Web.

Fox News/Opinion Dynamics. *June 29-30, 2010.* 2010. Web.

Friedman, Barry. *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*. New York: Farrar, Straus and Giroux, 2009. Print.

Funston, Richard. "The Supreme Court and Critical Elections." *American Political Science Review* 69:795-811. 1975. Web.

Furman v. Georgia. Supreme Court. 1976. 428 U.S. 153. Web.

Gallup Poll. *Major Corporations. Jan. 7-9, 2011*. 2011. Web.

Gallup Poll. *Supreme Court Approval Ratings. Sept. 8-Nov. 11, 2011*. 2011. Web.

Gallup Poll. *Wall Street Bankers and Brokers*. October 2011. 2011. Web.

GfK Roper Public Affairs & Corporate Communications. "The AP-National Constitutional Center Poll." Survey. 22-29. August. 2008.

Gratz v. Bollinger. Supreme Court. 2003. 539 U.S. 244. Web.

Gonzales v. Carhart. Supreme Court. 2007. 550 U.S. 124. Web.

Gonzales v. Oregon. Supreme Court. 2006. 546 U.S. 243. Web.

Graham v. Florida . Supreme Court. 17 May 2010. Print.

Gregg v. Georgia. Supreme Court. 1976. 428 U.S. 153. Web.

Griswold v. Connecticut. Supreme Court. 1965. 381 U.S. 479. Web.

Grutter v. Bollinger. Supreme Court. 23 June 2003. Print.

Hamdi v. Rumsfeld. Supreme Court. 2004. 542 U.S. 507. Web.

Herring v. United States. Supreme Court. 2009. 555 U.S. 135. Web.

"HOLDING COURT: The Legacy of the Rehnquist Court." Interview by Peter Robinson. *Uncommon Knowledge*. Leland Stanford Junior University, 26 May 2005. Web.

Hollingsworth v. Perry. Supreme Court. 2013. 570 U.S. ___. Web.

H.R. 4288, 111 Cong. 2009 (enacted). Print.

"Interview with Supreme Court Justice Antonin Scalia." Interview by Maria Bartiromo. *NBC Today Show*. CNBC. New York City, New York, 10 Oct. 2005. Television.

Jones, Jeffrey M. "Record-Low 26% in U.S. Favor Handgun Ban." *Record-Low 26% in U.S. Favor Handgun Ban*. Gallup, Inc., 26 Oct. 2011. Web.

"Justice Breyer Calls for Experts To Aid Courts in Complex Cases." *The New York Times*. The New York Times, 16 Feb. 1998. Web.

"Justice Scalia on the Record." Interview by Lesley Stahl. *60 Minutes*. CBS. New York City, New York, 27 Apr. 2008. Television.

Kelo v. City of New London. Supreme Court. 2005. 545 U.S. 469. Web.

Kendall, Doug, and Tom Donnelly. "Not So Risky Business: The Chamber of Commerce's Quiet Success Before the Roberts Court - An Early Report for 2012-2013." *Constitutional Accountability Center*. Constitutional Accountability Center, 1 May 2013. Web.

Kennedy v. Louisiana. Supreme Court. 25 June 2008. Print.

Kessel, John H. "Public Perceptions of the Supreme Court." *Midwest Journal of Political Science* 10:167-91. 1966. Web.

Kessler, Robert. "Why Aren't Cameras Allowed at the Supreme Court Again? - The Wire." *The Wire*. The Atlantic Monthly Group, 28 Mar. 2013. Web.

Klein, Ezra. "Citizens United was a Shot Across the Bow", *The Washington Post*. The Washington Post, 11 May, 2010. Web.

Koramatsu v. *The United States.* Supreme Court. 1944. 323 U.S. 214. Web.

Lane, Charles. "Narrow Victories Move Roberts Court to Right." *Washington Post*. The Washington Post, 29 June 2007. Web.

Lawrence, Jill. "Sandra O'Connor's Choice: What Her Missing Supreme Court Vote Means to Women and America." *Politics Daily*. AOL, Inc., 2010. Web.

Ledbetter v. Goodyear Tire & Rubber Co.. Supreme Court. 2007. 550 U.S. 618. Web.

Lee, Rachel. *Ex Parte Blogging: the Legal Ethics of Supreme Court Advocacy in the Internet Era*, 61 Stanford Law Review 1339 2009. Web.

Lee v. Weisman. Supreme Court. 24 June 1992. Print.

Lehne, Richard, and John Reynolds. "The Impact of Judicial Activism on Public Opinion." *American Journal of Political Science* 22896-904.Vol. 87, No.1. 1978. Web.

Lilly Ledbetter v Goodyear Tire Company. Supreme Court. 2007. 550 U.S. 618. Web.

Link, Michael W. "The Countermajoritarian Difficulty: Tracking Public Mood in the Supreme Court." University of South Carolina. Typescript. 1992. Print.

Liptak, Adam. "Do the Judicial Math on Health Care." *The New York Times*. The New York Times, 05 Feb. 2011. Web.

Liptak, Adam. "Justices Offer Receptive Ear to Business Interests." *The New York Times*. The New York Times, 18 Dec. 2010. Web.

Liptak, Adam. "A Significant Term, With Bigger Cases Ahead." *The New York Times*. The New York Times, 28 June 2011. Web.

Liptak, Adam. "The Polarized Court." *The New York Times*, The New York Times, 11 May 2014. Web.

Liptak, Adam. "You Have the Right to Remain Silent. But Don't, If You Want to Use It." *The New York Times*. The New York Times, 01 June 2010. Web.

Lithwick, Dahlia. "Clarence Thomas' Supreme Court Silences Are Far Less Worrisome than His Private Speeches." *Slate Magazine*. The Slate Group, 15 Feb. 2011. Web.

Lithwick, Dahlia. "The Souter Factor." *Slate Magazine*. The Slate Group, 3 Aug. 2005. Web.

Loving v. Virginia. Supreme Court. 1967. 388 U.S. 1. Web.

Martin, Andrew D. and Quinn, Kevin M.. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999." *Political Analysis*. 10:134-153. Web.

Mark, David. "New Push to Bring Cameras in Supreme Court." *Politico*. Capitol News Company, 11 May 2009. Web.

Marbury v Madison. Supreme Court. 1803. 5 U.S. (1 Cranch) 137. Web.

Marshall, Thomas. *Public Opinion and the Rehnquist Court.* New York: Longrnan. 2008. Print.

Marshall, Thomas. *Public Opinion and the Supreme Court.* New York: Longrnan. 1989. Print.

Mathewson, Joe. *The Supreme Court and the Press: The Indispensable Conflict*. Evanston, IL: Northwestern UP, 2011. Print.

Mauro, Tony. "Roberts Court Takes Narrow Road to Right." *National Law Journal* (2009). Print.

McDonald v. Chicago. Supreme Court.28 June, 2010. Print

Milbank, Dana. "A Tea Party of Populist Posers." *Washington Post*. The Washington Post, 20 Oct. 2010. Web.

Mishler, William and Reginald S. Sheehan. The Supreme Court as a Countermajoritarian Institution?: The Impact of Public Opinion on Supreme Court Decisions. Presented at the Annual Meeting of the Southern Political Science Association, Tampa. 1991 Web. .

Mishler, William & Reginald S. Sheehan. "Response: Popular Influence on Supreme Court Decisions." *American Political Science Review* 88:716-724. 1994. Web.

Mishler, William & Reginald S. Sheehan. Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective." *Journal of Politics* 58:169-200. 1996. Print.

Morse Et Al v. Fredrick. Supreme Court. 25 June 2007. Print.

National Labor Relations Board v. *Jones and Laughlin Steel Company.* Supreme Court. 1937. 301 U.S. 1. Web.

NBC News/Wall Street Journal. *June 17-21, 2010*. 2010. Web.

Newdow v. United States Congress, Elk Grove Unified School District, et al., 542 U.S. 1 2004. Web.

Northwest Austin Municipal Utility District No. 1 v. Holder. Supreme Court. 2009. 557 U.S. ___ . Web. (*Gonzales v. Carhart*, 550 U.S. 124 (2007)).

Padgett, Tim. "Is the Supreme Court Too Packed With Ivy Leaguers?" *Time*. Time, 12 May 2010. Web.

Page, Benjamin I.,and Robert Y. Shapiro. "Effects of Public Opinion on Policy." *American-political Science Review* 77:175-90. 1983. Web.

Padilla v. Rumsfeld. Supreme Court. 2004. 542 U.S. 426. Web.

"Patterns of Public Support for the Supreme Court: A Panel Study." *Journal of Politics* 43:24-39. Web.

Palazzolo, Joe. "Law Blog Expert Panel: Reaction to the Health Care Ruling." *The Wall Street Journal*. The Wall Street Journal, 28 June 2012. Web.

Planned Parenthood of Southeastern Pennsylvania v. Casey. Public Opinion and the Rehnquist Court 958-959. Supreme Court. 29 June 1992. Print.

Planned Parenthood of Southeastern Pennsylvania v. *Casey.* 1992. 120 L.Ed. 2d 674. Web.

Reed v. Reed. Supreme Court. 1971. 404 U.S. 71. Web.

Reeves, Anderson and Franze, Anthony. "Commentary: The Court's increasing reliance on amicus curiae in the past term", *The National Law Journal*, (2011). Web.

Ricci v. DeStefano. Supreme Court. 2009. 557 U.S. ___. Web.

Rohde, David, and Harold Spaeth. *Supreme Court Decision Making.* San Francisco: Freeman. 1976. Print.

Root, Damon. "The Business of the Court." *Reason.com*. Reason Foundation, 18 Mar. 2011. Web.

Rosen, Jeffrey. "Supreme Court Inc." *New York Times*, The New York Times, 16 March 2008. Jan. 2010. Web.

Rosen, Jeffrey. "The Dissenter." *The New York Times*. The New York Times, 22 Sept. 2007. Jan. 2010. Web.

Rosen, Jeffrey. "The New Republic." *New Republic*. The New Republic, 1 July 2011. Web.

Rosen, Jeffrey. "Why I Miss Sandra Day O'Connor." *New Republic*. The New Republic, 1 July 2011. Web.

Rosenberg, Gerald N. *The Hollow Hope: Can the Courts Bring About Social Change?* Chicago: University of Chicago Press. 1991. Print.

Santa Fe Independent School District v. Jane Doe. Supreme Court. 19 June 2000. Print.

Schenck v. United States. Supreme Court. Supreme Court. 3 Mar. 1919. Print.

SCOTUSblog. STAT PACK. October Term 2002. 5-4 Decisions. 22 June 2013. Web.

Segal, Jeffrey A. "Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases, 1962-1981." *American Political Science Review* 78:891-900. 1984. Web.

Segal, Jeffrey A. "Measuring Change on the Supreme Court: Examining Alternative Models." *American Journal of Political Science* 29:461-79. 1985. Web.

Segal, Jeffrey A., and Albert Cover. "Ideological Values and Votes of U.S. Supreme Court Justices." *American Political Science Review* 83:557-65. 1989. Web.

Shapiro, Stephen M. "Amicus Briefs in the Supreme Court." *Appellate.net*. Mayer, Brown & Platt, 1999. Web.

Sheehan, Reginald S., William Mishler, and Donald R. Songer. "Ideology, Status, and the Differential Success of Direct Parties Before the Supreme Court." *American Political Science Review* 86:464-71. 1992. Web.

Silver, Nate. "Supreme Court May Be Most Conservative in Modern History." *The New York Times*. The New York Times, 29 Mar. 2012. Web.

"Souter Won't Get Taste of His Own Medicine." *Msnbc.com*. Associated Press, 15 Mar. 2006. Web.

Spaeth, Harold J. *United States Supreme Court Data Base*, 1953-1989 *Terms* Ann Arbor: Inter-University Consortium for Political and Social Research. 1991. Web.

Stein, Sam. "Harry Reid Slams Supreme Court Justices John Roberts, Anthony Kennedy For Campaign Finance Decision." *The Huffington Post*. TheHuffingtonPost.com, 10 Mar. 2010. Web.

Stohr, Greg. "Breyer Says Supreme Court Doesn't Have Pro-Business Slant." *Bloomberg.com*. Bloomberg, 7 Oct. 2010. Web.

Stimson, James A. *Public Opinion in America: Mode, Cycles, and Swings.* Boulder: Westview. Tanenhaus, Joseph, and Walter F. Murphy. 1992. Print.

"Supreme Court Justice Stevens Opens Up." Interview by Scott Pelley. *60 Minutes*. CBS. WCBS, New York City, New York, 28 Nov. 2010. Television.

"Supreme Slip-Up." *Washington Post*. The Washington Post, 05 July 2008. 07 Mar. 2014. Web.

Taranto, James. "The Ineffective Greenhouse." *The Wall Street Journal*. Dow Jones & Company, 22 Mar. 2012. Web.

Time Poll. *June 20-21, 2011*. Abt SRBI. 2011. Web.

Tocqueville, Alexis De, Gerald E. Bevan, and Isaac Kramnick. *Democracy in America: And Two Essays on America*. London: Penguin, 2003. Print.

Toobin, Jeffrey. "Gerald Ford's Affirmative Action." *The New York Times*. The New York Times, 29 Dec. 2006. Web.

Trop v. Dulles. 1958. 356 U.S. 86, 101. Web.

Turner v. Rogers, 131 Supreme Court, 2507 2011. Print.

United States v. Booker. Supreme Court. 2005. 543 U.S. 220. Web.

United States. Cong. Senate. Committee on Judiciary. *Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior*. *Hearing*. 29 June. 2011. 112th Cong., 2nd sess. Washington.

United States. Cong. Senate. Committee on Judiciary. *Hearings on the Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States*. *Hearing*. 19 September. 1990. 101st Cong., 2nd sess. Washington.

United States v. Windsor. Supreme Court. 2013. 570 U.S. ___ . Web.

USA Today. *Gallup Poll. July 27-Aug. 1, 2010. N=1,208*. 2010. web.

Uttecht v. Brown. Supreme Court. 2007. 551 U.S. 1. Web.

Wal-Mart v Dukes. Supreme Court. 2011. 564 U.S. ___. Web.

West Coast Hotel v. Parrish. Supreme Court. 1937. 300 U.S. 379. Web.

Wilson, James, John Dilulir, Jr, and Meena Bose. *American Government Essentials Edition*. 2006. Print

Wilkinson III, J. Harvie**.** "The Rehnquist Court at Twilight: The Lures and Perils of Split-the-Difference Jurisprudence." *The Stanford Law Review* 58:1969. 2006. Web.

Wittes, Benjamin. "The Supreme Court's Looming Legitimacy Crisis." *Brookings*. The Brookings Institution, 25 June 2007. Web.

Yates v. United States. Supreme Court. 1957. 354 U.S. 298. Web.

Zalan, Kira. "Justice John Paul Stevens on How the Supreme Court Works." *US News and World Report*. 23 Jan. 2012. Web.

Zaller, John R. *The Nature and Origins of Mass Opinion.* Cambridge: Cambridge University Press, 1992. Print.