

Public Opinion and Its Potential Impact on the U.S. Supreme Court

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Abstract

The Supreme Court of the United States has a fundamental role in the interpretation of the Constitution and the configuration of the legal landscape of the country. But, while the Framers isolated the Court from political pressures, the Court is not removed from the impact of public opinion. This essay considers the effect of public opinion on Supreme Court rulings by reviewing studies and cases to discover the part public opinion plays in the courtroom. My findings imply that public opinion impacts the Court. There are limited ways by which the Court can prevent this impact. I emphasize that the Supreme Court has potentially become a majoritarian body controlled by society rather than its appointed justices.

Public Opinion and Its Impact on the Supreme Court

The concept of separation of powers is one of the most important contributions the United States Constitution has given to constitutional republic. Protecting the American people against an overly powerful legislative branch was one of the Framers' many concerns. THE FEDERALIST NO. 51, (James Madison). In addition, they sought to protect the minority from the potentially oppressive power of the majority. Id. Their solution was to establish a separate federal judiciary that would serve as a check on the other two branches. This judicial branch would be separated from outside pressures and influences. According to the Framers, an independent judiciary is essential to a republican system of governance and "critical to fairness and impartiality." Paul L. Friedman, Threats to Judicial Independence and the Rule of Law, American Bar Association Eleventh Annual Judge Thomas A. Flannery Lecture, <https://www.americanbar.org/groups/litigation/about/awards-initiatives/american-judicial-system/threats-to-judicial-independence-and-rule-of-law/> (last visited Feb. 5, 2024, 9:05 PM). To ensure judicial independence, the Constitution stipulated that federal judges would be appointed for life, that Congress could not lower their pay, and that judges could only be removed from office for serious crimes and misdemeanors. U.S. Const. art. 3, § 1 & 3. Chief Justice Rehnquist called judicial independence "one of the crown jewels of our system of government today." Paul L. Friedman, Threats to Judicial Independence and the Rule of Law.

However, despite the Framers' attempts to isolate the Court from outside influences, it seems that external pressures and influences have reached the courtroom. Although systems such as lifetime and secure positions are in place to protect the Court from outside pressures, it is crucial first to note that the justices, just like anyone else, are connected to society and naturally shaped by the current issues and concerns in the political sphere. After all, the Supreme Court, as

the guardian of constitutional values, is conscious of the perception the general public has regarding the Court's authority and credibility. Therefore, as politically involved members of society, the justices know the public's opinion regarding the Court. Congressional Research Service, *History, Evolution, and Practices of the President's State of the Union Address: Frequently Asked Questions*, <https://crsreports.congress.gov/product/pdf/R/R44770/6> (last visited Mar. 26, 2024, 6:18PM). For example, the Justices even attend the State of the Union which serves as a report to the nation on national conditions and to act as a platform to announce and rally support for the President's legislative agenda for the coming year. As the Court seeks to bolster its legitimacy and power, the justices are affected by public opinion in various ways. In fact, from the time Supreme Court nominees are considered for the Court, the Court appears to be influenced by the public's opinion. Furthermore, judges are impacted by public opinion as they consider how their decisions will affect public sentiment, politics, society, media, public debate, and policy implementation.

Methods of Impact

The Confirmation Process

The public has a heightened view on the nomination process. It is important to understand how Supreme Court Justices are confirmed to identify the role, if any, which public opinion plays on the Supreme Court. While such an impact, if identified, does not directly impact the decisions the Justice's make during their time on the court, such a determination would suggest that majority opinion has crept its way into the legislative process and potentially the judicial process.

There are three main steps for the confirmation process of Supreme Court justices. First, the President chooses a nominee and names the nominee to the Court. U.S. Const. art. 2 § 2, cl.

2. Second, the nominee undergoes an intensive investigation by the Senate Judiciary Committee.

Georgetown Law Library, Supreme Court Nominations Research Guide,

<https://guides.ll.georgetown.edu/c.php> (last visited Mar. 3, 2024, 3:46 PM).

Nomination Phase

The public usually reacts quickly to the President's nomination of a potential justice when there is a vacancy on the Supreme Court. The public's opinion of a nominee for the Supreme Court is shaped by news organizations and pundits who examine their credentials, experience, and possible influence. Maya Sen, *How Political Signals Affect Public Support for Judicial Nominations: Evidence from a Conjoint Experiment*, 70 *Political Research Quarterly* 374, 380-381 (2017). This is significant as presidents consider popular opinion when choosing nominees, because the executive wants to appoint people who will be accepted by the majority of voters and who will have enough Senate support when it comes time to vote for the nominee's acceptance. Lee Epstein & Jeffrey A. Segal, *Advice and Consent: The Politics of Judicial Appointments*, Oxford University Press, 2005. The President considers the public's view of a nominee because acceptance of that nominee is likely to foster bipartisan support in the Senate and ensure a smoother confirmation process by avoiding unnecessary political disagreements. Presidents also consider the long-term impact of the Supreme Court nominations as they seek to be well-regarded and accepted by the majority.

Senate Judiciary Committee Hearings

Just as the public has impacted the President in the nomination process, the residual influence of public opinion carries into the next stage of the confirmation process by influencing the Senators. The confirmation hearings, which are held before the Senate Judiciary Committee, have become a somewhat high-visibility spectacle for television and an opportunity for media

outlets to generate dramatic media stories. Johnathan P. Kastellec, Making the Supreme Court: The Politics of Appointments 1930-2020, Oxford University Press, 2023. The hearings are usually dominated by the expert testimonies, and advocacy groups also help stage protests or rallies, displaying the public to be for or against the nominee, thus swaying public opinion and media attention. Additionally, the Senators voice their opinions. For example, to guarantee that judicial nominees are mainstream and qualified to serve in their states, the Blue-Slip Policy encourages consultation on judicial nominations between the White House and senators from home states. U.S. Senate Committee on the Judiciary, Explaining the Senate's Blue Slip Process. U.S. Senate Committee on the Judiciary, (Nov. 29, 2017).

<https://www.judiciary.senate.gov/press/dem/releases/explaining-the-senates-blue-slip-process>.

For instance, a lot of senators recommend and evaluate potential justices through bipartisan committees. The blue slip guarantees that those nonpartisan processes, which yield competent candidates, are not disregarded by the White House. Id. In more recent years, senators have voiced their opposition to specific nominees to the Supreme Court by presenting that the nominee's ideological stance or views on certain issues are out of the stream of legal thinking or public opinion. Congressional Research Service, Supreme Court Appointment Process: Senate Debate and Confirmation Vote, <https://sgp.fas.org/crs/misc/R44234.pdf> (last visited Feb. 5, 2024, 10:00 PM). For example, during the Senate Judiciary Hearing for the appointment of Neil Gorsuch, Senator Jeff Merkley (D) stated:

Why is it that throughout its history, this body has honored the rule of having a supermajority needed to close debate on a Supreme Court Justice? It has been to send a message to the President that you must nominate someone who is in the judicial mainstream, not way out in one direction or another, with bizarre findings that would undermine the integrity of the Court, not a pattern of attempting to twist the law so that we the people lose and we the powerful win time after time after time—no, someone in the middle of the judicial mainstream... The second

‘problem’ is that Trump nominated somebody completely outside the judicial mainstream.

Executive Session Congressional Record, pp. S2224-S2225 (2017) (Statement of Sen. Jeff Merkley).

Senator Merkley suggests that Supreme Court nominees' ideological stances must be considered normal or conventional in order to be a proper nominee to the Court. While Senator Merkley's remarks do not establish whether public opinion has its place in Supreme Court rulings, they do suggest that the Senators who vote in favor of or against the President's nominee may very well have public sentiment in mind.

More statements suggesting likewise were offered during Neil Gorsuch's nomination hearings. Senator Chris Murphy (D) offered:

I am deeply concerned about the politicization of the Supreme Court and its recent capture by corporate and special interests. I am convinced that Judge Gorsuch would exacerbate that slide and continue the activist bent of the existing Court, and for that reason I won't be supporting him in the vote tomorrow... it is not a question of whether Judge Gorsuch would be my choice; it is a question of whether I think he is going to be in the mainstream on the Supreme Court or whether I think he is going to be an outlier and bring potentially radical views into the courtroom.

Executive Session Congressional Record, pp. S2376-S377 (2017) (Statement of Sen. Chris Murphy).

Senator Murphy's comments, again, point to the Senators' concern with the potential justices' ability, or lack thereof, to conform to mainstream thought. While these statements showcase that Senate Democrats consider mainstream thought in their confirmation decisions, it appears Republicans do too. For example, during the confirmation process for Elana Kagan, Senator Saxby Chambliss (R) remarked,

When she served as senior advisor to then-President Bill Clinton, she was a key player in the White House efforts to keep partial-birth abortion—an abhorrent practice that was finally banned in 2003—from being outlawed by the Congress. Documents seem to show extensive efforts to prevent any restrictions being placed upon the procedure. In fact, it appears Ms. Kagan actually went so far as to participate in the redrafting of a report from a medical group—the American

College of Obstetricians and Gynecologists—on the practice that served to dilute the findings of the report and bolster her position of not restricting the procedure. These efforts appear to show a position on life-related issues that is well outside the view of mainstream Americans and mainstream legal thought. Executive Session Congressional Record, pp. S5596 (2010) (Statement of Sen. Saxby Chambliss).

While Senator Chambliss's comments are analyzing Alana Kagan's qualification for a Supreme Court justice position, her statements regarding the view of mainstream Americans further reinforces the idea that Senators are considering public opinion, among many other factors, as they decide whether or not to vote for or against the confirmation of the potential Justice. Offering such statements from both political parties during the confirmation hearing process points out the consistent consideration of public popularity regarding a nomination. Senate Democrats offer that the nominee should be someone who does not disrupt popular sentiment. And Senate Republicans agree. While it seems Senators believe such a factor should be considered in the nomination of Supreme Court Justices, the Framers would probably suggest otherwise. As mentioned previously, the Framers sought to protect the minority from the potentially oppressive power of the majority. "THE FEDERALIST NO. 51, (James Madison). Public opinion has certainly found its way into the Court if the ideas of the majority are being held in high consideration when confirming a Justice.

Senatorial Deliberations and Final Vote

Public sentiment is again present as the Senators cast their vote for the nominee. Senators are aware of the public opinion in their states and districts and are therefore vulnerable to pressure from their voters. Letters, emails, phone calls, and public statements from locals supporting or opposing the nominee are used to inform senators of such opinions. Senators' positions and votes may be impacted by several of these strong beliefs. . Congressional Research

Service, Supreme Court Appointment Process: Senate Debate and Confirmation Vote, <https://sgp.fas.org/crs/misc/R44234.pdf> (last visited Feb. 5, 2024, 10:00 PM). Ultimately, senators rely on voter support to maintain their positions. Due to such pressure, scholars suggest that during senatorial deliberations and voting, senators consider the potential electoral consequences of their vote. Philip Kestel, Jeffrey Lax, & Justin H. Phillips, *Public Opinion and Senate Confirmation of Supreme Court Nominees*, 72 *Journal of Politics* 767, 778-779 (2010). The public and media pay careful attention to the Senate's final vote on the nominee's confirmation, and Senators' votes are closely examined. *Id.* Therefore, as constituents expect their representatives to vote according to voter expectations, Senators may be correct in assuming the perception of their choices affects their political standing and chances of being reelected. *Id.*

It seems public opinion has made it into each step in this confirmation process. So, public opinion, with this inherent political and elected official nature, has a huge role in the Supreme Court nomination process despite its separate nature from official electoral politics. Ultimately, each step of the Supreme Court confirmation process is influenced by public opinion, starting with the nomination process and continuing through the Senate Judiciary Committee hearings, senatorial votes and discussions, and the final confirmation decision. Because of the political ramifications of their choices, elected officials are especially sensitive to public opinion. Hence, public opinion plays a large role in influencing the confirmation process. While Senators are charged with honoring their constituents as they vote on legislation, regulations, nominations, etc., ultimately, the Senators are tasked with voting based on the nominee's ability to adhere to the Constitution in deciding cases. If public opinion plays as large of a role as it appears, senators

are likely to vote for nominees that will serve their own interests rather than voting for those who will uphold the institutional legitimacy of the Supreme Court.

Societal and Political Climate

Evolving Standards

The public's opinion, which is evident in the societal and political climate, also impacts the decisions of the Court. The justices are not immune to the issues that plague society, nor are they unimpacted by the prevalent opinions of society. When cases are brought before the justices, these standards and ideals are naturally introduced and considered in the courtroom. For instance, shifting public perceptions of LGBTQ+ rights have impacted how judges understand equal protection, resulting in significant rulings like *Obergefell v. Hodges*, which made same-sex marriage legal across the country.

The relationship between changing social standards and judicial interpretation is intricate and multidimensional, and it is crucial to remember that it is also impacted by textual analysis, legal precedent, and other variables. While the interpretation of the Constitution should not evolve with every shift in societal standards, it seems many Supreme Court cases may have been decided accordingly. Many cases have been heard in the presence of shifting social standards. This has been for the benefit and detriment of the American people.

Racial de-segregation in public schools is one illustration of how the societal and political climate has positively impacted the Court. This is seen in the case of *Brown v. Board of Education*. This 1954 Supreme Court decision deemed racial segregation in public schools as unconstitutional and overturned the "separate but equal doctrine." *Brown v. Board of Education*, 349 U.S. 294 (1955). American society's views on racial segregation were beginning to change by the middle of the 20th century. Further, Michael Klarman suggests war can accelerate racial

equality trends. Michael J. Klarman, “Brown, Racial Change, and the Civil Rights Movement.” *Virginia Law Review* 80, no. 1 (1994): 9-16. Klarman suggests such an effect was present in the Revolutionary War, which started the trend towards abolition of slavery. Additionally, World War I had a destabilizing effect on the Jim Crow system. *Id.* Such a shift is encouraged “as the equality of sacrifice that war imposes on soldiers of different races points up the absurdity of demanding unequal treatment for civilians.” *Id.* It seems, after the war, African American soldiers were less tolerant of discrimination and segregation. *Id.* In addition, the racial segregation that was the norm in many facets of American society was being challenged by the Civil Rights Movement, which gained strength in the 1950s. Perhaps because of such evolving societal norms, the Court rejected racial discrimination. While in the case of *Brown*, shifting norms positively impacted the country, a shift in norms does not always lead to a positive impact on the nation.

The decision in *Roe v. Wade* is an example of shifting societal norms negatively impacting the nation. As the *Roe* case has demonstrated, the 1970s were characterized by significant shifts in morality and societal standards. In the case of *Roe*, the court determined that the 14th Amendment's Due Process Clause created a woman's constitutional right to an abortion. *Roe v. Wade*, 410 U.S. 113 (1973). The women's rights movement, which pushed for increased autonomy and control over reproductive decisions, gained momentum in the 1960s and early 1970s. The movement aimed to protect women's rights to make decisions about their own bodies and questioned conventional gender norms. Callie Edington, *Reflections on Feminist Views of Abortion and Motherhood*, Cedarville University, <https://digitalcommons.cedarville.edu/cgi> (last visited Mar. 26, 2024, 7:58 PM). Public opinion began to move in support of access to abortion and reproductive rights. *Id.* Additionally, a more accepting and liberal view of sexuality and

contraception emerged from the 1960s sexual revolution. Id. Premarital sex and non-traditional family arrangements have been more accepted as a result of this cultural shift, which has increased support for abortion availability and freedom. This is evidenced by the fact that as women become more sexually permissive and involved in romantic relations, they also become more tolerant of abortion. Alfred M. Mirande & Elizabeth L. Hammer, Premarital Sexual Permissiveness and Abortion, 17 *The Pacific Sociological Review* 485, 501-502 (1974).

Although direct evidence linking the women's rights movement to the justices may not exist, the movement's influence on the discourse surrounding reproductive rights potentially influenced the Supreme Court's decision in *Roe v. Wade* as justices are exposed to the status quo and hot topics present in the culture. As members of society, it is impossible to remove the justices from such a potential influence. Therefore, there is certainly potential for a movement, such as the Women's Rights Movement, to influence the justices' view of a case.

In time, a case would question whether or not *Roe* should be overturned. This case is *Planned Parenthood v Casey* which determined that 4 out of 5 Pennsylvania abortion laws were unconstitutional. Planned Parenthood v. Casey, 505 U.S. 833 (1992) The case also brought up whether or not *Roe* should be overturned. Ultimately, the court determined that it should not because of four factors one being that overturning *Roe* would weaken the institution. Randy E. Barnett & Josh Blackman, An Introduction to Constitutional Law: 100 Plus Supreme Court Cases Everyone Should Know, Aspen Publishing, 2023. Justice Rehnquist who dissented from the majority opinion in *Casey*, even stated:

The joint opinion's insistence on preserving the form, if not the substance of the rule, can just as easily be viewed as a surrender to those who have brought political pressure in favor of that decision. Once the Court starts looking to the currents of public opinion regarding a particular judgment, it enters a truly bottomless pit from which there is simply no extracting itself.

Planned Parenthood v. Casey, 505 U.S. 833 (1992) (Rehnquist, J., dissenting).

The court's concern with maintaining legitimacy coupled with Justice Rehnquist's comment regarding public opinion is indicative of the court's consideration of public opinion as cases are decided. The court and public opinion have clashed at times, but they've entered into a "symbiotic relationship" over the last 60 years. Barry Friedman, The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution, Farrar, Straus, and Giroux, 2010. In light of the cases presented, it appears the court doesn't stray too far from popular opinion. While this does not necessarily establish a relationship between the two it does lead legal scholars to question the relationship between the two. Maya Sen at the Harvard Kennedy School puts it best, "It's a complicated chicken-and-egg situation."

Legal Arguments

Furthermore, public opinion may impact the Court through attorneys' well-crafted arguments. These arguments reflect popular opinion or prevalent social attitudes regarding the case at hand. Justices, in turn, may take into account the broader social context, which encompasses the public's perspective on the subject at issue while interpreting laws and the Constitution. In order to provide the Court with other perspectives and arguments, interested parties also frequently submit amicus curiae (friend of the Court) briefs. These briefs are provided by individuals who are not a party to the case but by those who have an interest in the outcome of the case. Legal Information Institute, Amicus Curiae, Cornell Law School. Such briefs could serve as a window into public opinion and affect the justices' comprehension of the wider ramifications of their rulings.

Moreover, public opinion may also impact the cases the Court chooses to consider in its docket. The Court's agenda frequently includes high-profile cases that draw public attention and

deal with divisive topics like civil rights, abortion rights, or LGBTQ+ rights. The justices may be influenced by the weight of public opinion when deciding which cases to hear and how to decide since they are aware of the wider societal ramifications of their rulings. It appears that the justices carefully consider which cases to choose in light of many factors, one of these being the public's perception of the case. Perhaps the justices are considering public opinion in the Court room under the guise of considering public policy.

Public Perception

Justices are well aware of the importance of the public's view of the Court and its legitimacy. The Court knows that their decisions if regarded as incongruous with the societal norms and values, could potentially undermine the public's trust in the authority of the Court. Keith E. Whittington, Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History, Princeton University Press, 2007. So, it can be assumed that the justices are continuously weighing the public reaction towards their decisions and whether the decisions they are to make would enhance the reputation and legitimacy of the Court. Jeb Barnes, Overruled? Legislative Overrides, Pluralism, and Contemporary Court-Congress Relations, Stanford University Press, 2004. This information underlines the value of public approval in setting up legitimacy.

When the public views the Court as making fair, unbiased, and concurrent decisions with public sentiment, the public typically reveres the Court and views the institution as a legitimate arbiter of the law. Id. Beyond upholding the fundamental concept of the rule of law, which is essential for preserving order and stability within a society, there is also the issue of public acceptance, which can be a source of contention in itself. This is because when people believe in

the stability of the Court upholding the law and the rule of law, they are more likely to respect its authority and abide by its judgments.

Furthermore, the power of the Court to shape legal precedents, affect public policy, and resolve controversial legal and political disputes is greatly strengthened with respect and acceptance of the Court's decisions by the public. It is actually somewhat paradoxical: the ability of the Court to maintain judicial independence, to rely on legal principles rather than to kowtow to political pressures or to public opinion, is actually enhanced when the Court's decisions are embraced by the public. Ultimately, justices are aware of the leverage public opinion has on the Court. The Court knows that it would be a threat to their legitimacy if it ruled against the public consistently on pertinent matters.

Media and Public Discourse

Public opinion is known to subtly influence justices through media exposure and public discussions about their Court rulings. Media outlets often cover Supreme Court cases comprehensively, delving into court arguments, forecasting potential outcomes, and emphasizing the broader social implications of these cases. Cass R. Sunstein, After the Rights Revolution: Reconceiving the Regulatory State, Harvard University Press, 1993. Social media platforms and online forums also provide spaces where the public can engage in dialogue and debate regarding Supreme Court decisions. Such exposure to media coverage can inform justices about the public discourse and perspectives related to the cases they are handling. Id. While judges themselves might not be regular social media users, their clerks and staff are often tasked with monitoring online conversations, providing justices with summaries or analyses of the public sentiment. Id. This process ensures that justices, albeit indirectly, are aware of the public consensus and consider it in their deliberations.

Effects on Policy and Implementation

When considering cases, justices may also consider current arguments and values as well as the wider social effects of their rulings through policy ramifications. Id. Justices' assessments of the legal and policy ramifications of their decisions may be influenced by public discussions on topics like immigration, healthcare, and environmental regulation. Id. This is of great concern as not all public debates and discussions provide accurate information. A few cases display this concept of horrible arguments being accepted by the court in their decisions. For example, *Korematsu v United States* allowed for the internment of Japanese Americans during World War II. *Korematsu v United States*. 323 U.S. 214 (1944). The decision was based partly on findings presented by the Solicitor General's office which established that the internment of Japanese Americans would protect national security by thwarting espionage and sabotage. Randy E. Barnett & Josh Blackman, *An Introduction to Constitutional Law: 100 Plus Supreme Court Cases Everyone Should Know*, Aspen Publishing, 2023. Then in 2011, sixty-seven years after the internment of Japanese Americans the Solicitor General's office confessed that it had committed an error. Id. Specifically, while this case was being heard, the federal government failed to disclose to the Court a report showing that "only a small percentage of Japanese Americans posed a potential security threat." Id.

The case of *Buck v Bell* also offers an example of horrible arguments being considered in the Court room. *Buck v Bell* upheld a law authorizing the forced sterilization of individuals deemed "feeble minded." *Buck v Bell*. 274 U.S. 200 (1927). This Court partly based their decision on views presented by eugenicists who uses a woman named Carrie to show that "imbecility was hereditary and that it was in the interest of public health to sterilize these individuals. Randy E. Barnett & Josh Blackman, *An Introduction to Constitutional Law: 100*

Plus Supreme Court Cases Everyone Should Know. In light the findings presented in Carrie's case, Justice Olive Wendell Holmes stated, "Three generations of imbeciles is enough." Id. It was eventually brought to light that the government's findings regarding Carrie were completely false. Id. Carrie attended high school, could read and write, and was, in fact, not an imbecile. Id. The decisions in both of these cases are no longer considered good law but serve as an example of awful arguments being presented to the justices and the consequences of the Court entertaining the opinions of outside sources.

A History of Public Opinion and the Court

Foundational Period

The seminal case of *Marbury v. Madison* solidified the Court's image and its role in the American legal system. By establishing the concept of judicial review, the case shed light on the Supreme Court's power to interpret the Constitution. In addition, during this period, the Court's rulings were influenced by the political climate and the public's perception of the federal government. Historian Gordon S. Wood offers that the decisions made during this period were not made in a vacuum but reflected the broader political and social context of the time. Gordon S. Wood, *The Creation of the American Republic 1776-1787*, University of North Carolina Press, 1998. For example, Chief Justice John Jay and Justice John Marshall were very aware of the public sentiment towards the federal government, as evidenced by the tensions between the Federalists and Anti-Federalists. Id. These two competing ideologies and visions of government influenced the Court's interpretation of the Constitution. For example, the Court faced issues of taxation, representation, federalism, etc., and the Court's ruling on cases involving these issues was often decided based on the prevailing political dynamics and public debates about the proper

role of the new republic. Id. The Court's consideration of public sentiment would persist throughout the following phase.

The Era of Slavery and Civil War

Considerations of public opinion would carry into the era of slavery and civil war. Much of what the Supreme Court was deciding in the era of slavery and civil war was heavily based on popular opinion, specifically on matters like slavery and state sovereignty. This was specifically seen in the famous *Dred Scott v. Sandford* case of 1857, when the national sentiment towards slavery greatly influenced the Court's overall decision. The Court's ruling was consistent with the pro-slavery attitude that was prevalent in the South at the time, which considered African Americans to be inferior and considered slavery as an integral element of Southern culture and existence. Paul Finkelman, *Dred Scott v. Sandford: A Brief History with Documents*, Bedford Books, 1997. The legal notion that people in slavery were property was one of the main defenses used by proponents of slavery. Id. Thus, using the Fifth Amendment's protection against taking property without due process, slaveholders contended that they had a constitutional right to own and manage their slaves as property. Furthermore, slavery advocates stressed a literal reading of the Constitution, especially as it related to the rights of those who owned slaves in the territories. *Dred Scott v Sandford*, 60 U.S. 393 (1856). They contended that since Congress was not expressly given the authority to outlaw slavery in the territories by the Constitution, it lacked such jurisdiction.

Progressive Era

During the Progressive Era, the Court's rulings were impacted by social movements, including the Progressive movement and public opinion. Broader societal disputes impacted the Court's decisions on labor legislation, business regulation, and other social and economic issues.

The political climate and the goals of legislators were impacted by public pressure for progressive reforms. This included the U.S. Supreme Court, which came under growing criticism and calls for change from progressive groups and activists. Linda Greenhouse, The U.S. Supreme Court: A Very Short Introduction, Oxford University Press, 2012. The President himself examined the Court as well. The U.S. Supreme Court was openly attacked by President Franklin D. Roosevelt (FDR) for what he saw as judicial activity that obstructed progressive legislation. This resulted in the Court striking down a number of progressive statutes, including labor rules and antitrust laws. Id. FDR presented a contentious plan to increase the size of the Supreme Court and appoint more judges who would support his progressive agenda in reaction to the Court's decisions rejecting progressive legislation. Randy E. Barnett & Josh Blackman, An Introduction to Constitutional Law: 100 Plus Supreme Court Cases Everyone Should Know. The goal of this scheme dubbed the Court-packing plan, was to reduce the power of conservative justices and change the makeup of the Court.

The Supreme Court broke with its past decisions to overturn state-level economic controls when it maintained the validity of Washington state's minimum wage laws for women in the case of *West Coast Hotel Co. v. Parrish*. The change in the Court's doctrine, sometimes called the "switch in time that saved nine," is generally interpreted as a reaction to Roosevelt's suggestion that the Court be expanded and that more judges who support his New Deal programs be appointed. The Court showed that it was prepared to modify its reading of the Constitution in response to political pressure and to steer clear of possible disputes with the executive branch by maintaining the minimum wage law. West Coast Hotel v Parrish, 300 US 379 (1937).

Roosevelt's effort to pack the Court, though ultimately doomed, clearly sparked intense political pressure and public discussion that affected the Court's rulings and shaped the Court's

view of its relationship with the executive branch. The Court's approach to some cases and its interpretation of the law during Roosevelt's administration may have been impacted by its knowledge of public and political scrutiny, including Roosevelt's critiques.

Civil Rights Movement

Brown v Board of Education

As the Civil Rights Movement gained momentum, public opinion continued to exert a strong influence on Supreme Court decisions. As it turned out, the effect of public opinion on the Court in this period had been constructive. In this era, the American public was increasingly vocal in its support for the desegregation of public schools. James T. Patterson, Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy, Oxford University Press, 2002. Such dissatisfaction regarding segregation was manifest in the activities of civil rights activists and advocacy groups urging the U.S. public to support events advancing desegregation. So, as the evolution and change in American society and intergroup relations plowed ahead, particularly rapidly during the 20th century, it became clear to the Court that these issues were not likely to disappear. Across a century of changing ideas about racial segregation and civil rights between *Plessy v Ferguson* (1896) and *Brown v Board of Education* (1954), the public came to see racial segregation in public institutions in a less favorable light. The Court's unanimous decision to reverse the "separate but equal doctrine" established in *Plessy v Ferguson* (1896) reflected the changing public opinion and societal norms regarding racial equality and civil rights. Id.

Modern Era

Roe v Wade

Roe v. Wade – overturning the nullification of the Texas law decriminalizing abortion – also legalized abortion across the U.S. and signaled conversations that were shifting the public attitude toward abortion. The Court heard arguments from groups such as Planned Parenthood and the National Organizations for Women. The Court received many amicus briefs that reflected public interest and views. Likewise, the groups garnered great public sympathy for women's reproductive rights and the right to legal abortions. Public attitude began to change, and this kind of mobilization accompanied legalization, Leslie J. Reagan, *When Abortion Was a Crime: Women, Medicine, and Law in the United States 1867-197*, University of California Press, 2022. There was a rise in support for each of the six justifications for an abortion (health, rape, defect, poor, single, wanting no more children) according to the general trend in attitudes against abortion from 1972 to 1976. Lucky M. Tedrow & E.R. Mahoney, *Trends in Attitudes Toward Abortion: 1972-1976* 43 *The Public Opinion Quarterly* 181, 182-183 (1979). The *Roe* decision was, therefore, potentially a product of public sentiment of the time.

Obergefell v Hodges

This is also true of modern U.S. Supreme Court rulings. The legalization of same-sex marriages was established through the Supreme Court judgment in *Obergefell v. Hodges* (2015). Public opinion seemed to be shifting to a more tolerant stance on the rights of LGBTQ+ in the years preceding *Obergefell* as only thirteen states had bans on same-sex marriages. Vernon E. Jordan Law Library, *Brief History of Civil Rights in the United States: Obergefell v. Hodges*, <https://library.law.howard.edu/civilrightshistory/lgbtq/obergefell> (last visited Mar. 3, 7:12PM). With the rise in acceptance of same-sex marriage, perhaps the Court considered how the public

would interpret the Court's refusal to permit the same-sex unions. Indeed, it may be that, in its decision in *Obergefell*, the Court was taking note of the shift in societal attitudes about same-sex relationships. Chief Justice John Roberts in his dissenting opinion of the Court's decision stated:

The majority's approach has no basis in principle or tradition, except for the unprecedented tradition of judicial policymaking.
Obergefell v. Hodges, 576 U.S. 644 (2015) (Roberts, J., dissenting).

Additionally, Roberts stated:

The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent.
Obergefell v. Hodges, 576 U.S. 644 (2015) (Roberts, J., dissenting).

Robert's statements question the validity of the legal argument the majority presented in *Obergefell* in favor of same-sex marriages. If the Court was not basing its decision solely on the Constitution, perhaps the decision of the plaintiffs to file the lawsuit as well as the Court's decision-making process were impacted by the larger political and cultural background, which includes changing views on LGBTQ+ protections. Justices are not above the larger currents of society, and public sentiment can have an impact on how they interpret the evolving definition of equality before the law as well as fundamental constitutional principles. Despite the majority's justification of their decision to permit same-sex union, ultimately, *Obergefell* failed to follow the doctrines the Court had previously used to evaluate due process and equal protection claims—namely, the identification of a fundamental right or the existence of a suspect class. Randy E. Barnett & Josh Blackman, [An Introduction to Constitutional Law: 100 Plus Supreme Court Cases Everyone Should Know](#).

Dobbs v Jackson

The public may influence court rulings in a number of ways, such as by political mobilization, media campaigns, public rallies, and advocacy. Such an attempt to sway the court's

opinion was present in the case of *Dobbs v Jackson*. Advocates for maintaining abortion rights highlighted the public health implications of restricting access to abortion. They also cited evidence attempting to show that abortion restrictions lead to unsafe abortions, maternal health risks, and negative social outcomes. Richard L. Wittenberg, *Overturing Roe v Wade Would Take Away Equal Protection for Women*, The Columbus Dispatch, (Nov. 8, 2021 5:43 AM). <https://www.dispatch.com/story/opinion/columns/guest/2021/11/08/roe-v-wade-should-not-overturned/8528456002/>. Various news outlets also went to the extreme of suggesting that thousands of women die before *Roe* and such a tragedy would take place again with its overturning. Glenn Kessler, *Planned Parenthood's False Stat: 'Thousands' of Women Died Every Year Before Roe*, Washington Post (Mar. 29, 2019, 3:00 AM), <https://www.washingtonpost.com/politics/2019/05/29/planned-parenthoods-false-stat-thousands-women-died-every-year-before-roe/>. At the height of the discussion revolving around the *Dobbs* case, President of Planned Parenthood, Leanna Wen stated:

We face a real situation where *Roe* could be overturned. And we know what will happen, which is that women will die. Thousands of women died every year, pre-*Roe*.

Leana Wen, president of Planned Parenthood, in an interview with WFAA of Dallas, March 6, 2019.

When supporters utilize data that do not hold up to scrutiny, they damage their case. Fifty years ago, in 1969, a statistician praised by Planned Parenthood refuted these figures, and use of them is not warranted at this time. Glenn Kessler, *Planned Parenthood's False Stat: 'Thousands' of Women Died Every Year Before Roe*. It may certainly be assumed that such inflammatory language by proponents of abortion cite such false information in an attempt to tug on the public's heart strings- and maybe the justices'. Fortunately for the pro-life movement, the Court

ruled based on the text of the Constitution rather than being pressured by the false data presented in favor of upholding *Roe*.

Current Research on Public Opinion's Impact

The Marshall Hypothesis

The Marshall Hypothesis may offer an answer to this “chicken and egg” does public opinion impact the Court or does the Court impact the public sentiment by bringing light to these Constitutional issues. Research teams have analyzed the "Marshall Hypothesis," which theorizes that Supreme Court decisions are a function of public opinion. It would be John Marshall, the United States' fourth Chief Justice, who is credited with having advanced what has come to be known as the Marshall Hypothesis—the idea that the Supreme Court more often follows public opinion rather than shifts it. This notion says that, since the Court is an institution within a broader political system, its verdicts are influenced by public preferences and sentiments. The Marshall Hypothesis is fundamentally concerned with the question of judicial legitimacy and the Court's own desire to maintain its power and reputation in the public eye. Researchers who developed this theory find that the Court is responsive to public opinion because it is through popular respect and approval that the Court can implement its decisions and, more importantly, remain as the final arbiter in constitutional problems. Sean Wilson, *The Attitudinal Model, Political Science, Ecological Fallacy, and Exaggeration*, Wright State University, 2006. The Marshall Hypothesis suggests that the Court will tend to be more in accord with popular culture in its decision-making in order to lessen criticism and challenges to the Court's power since it is not elected and not directly responsible to the people. Researchers posit that the Court, not wanting to appear out of step with the public mood, is more likely to give judgments affirming

generally accepted ideas and values, especially on controversial or politically sensitive subjects. Ultimately, public opinion is hypothesized to underlie a great many of the Court's decisions. *Id.*

While researchers have found that the Marshall Hypothesis is supported, they also cautioned such a hypothesis due to certain discoveries. Specifically, the decisions of the Court were significantly swayed by public opinion in cases of criminal justice and civil liberties. *Id.* The Court became more reactive to the changing general opinion it was gauging on these topics in that its rulings began to resemble the general sentiment. In the aggregate, the study did provide some support for the assumption that public opinion has a greater impact on the decisions of the Supreme Court in some areas of interest, especially criminal justice and civil liberties. However, the correlation between public opinion and the Court's rulings varied depending on the subject matter studied.

To Be Determined?

Researchers suggest that the Court is potentially susceptible to public opinion. One study offers that through an analysis of a national survey, researchers determined that subjective ideological disagreement exhibits a potent, deleterious impact on legitimacy. *Brandon L. Bartels & Christopher D. Johnston, On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 *American Journal of Political Science* 184, 187–188 (2013). This research provides fact-based evidence from previous studies, indicating a complex interplay between the decisions by the Supreme Court and public opinion. There is a complex relationship between public opinion and decision-making at the judicial level, and while some researchers indicate that public opinion influences judicial behavior and, therefore, judicial outcomes, others point to the limited impact of public opinion on particular types of cases. The authors particularly point out

that more research is required to understand all the nuances of the relationship, which influence the work of the American legal system.

A Threat to Judicial Independence

An examination of the Court's legitimacy is necessary upon establishing its response to public opinion. As he analyzes the foundations of Supreme Court legitimacy, Michael Zilis, author of "The Rights Paradox: How Group Attitudes Shape U.S. Supreme Court Legitimacy," highlights that in recent years, doubts over the legitimacy of the Supreme Court have increased. Zilis points out that public opinion is not the only factor affecting the institution's legitimacy by pointing out that certain decisions have tarnished the Court's reputation. Justice Antonin Scalia, for instance, lamented a decree that turned an "unelected committee of nine" who relied on the "mystical aphorisms of the fortune cookie" into the "Ruler of 320 million Americans" in the wake of the Court's historic same-sex marriage verdict of *Obergefell v Hodges*. Michael Zilis, *The Rights Paradox: How Group Attitudes Shape U.S. Supreme Court Legitimacy*, Cambridge University Press, 2021. Zilis contends that such phrasing implies that the judgment lacked a valid foundation rather than just expressing dissatisfaction with the result. Then, when Judge Brett Kavanaugh was accused of sexual assault in 2018, his appointment to the Supreme Court set off a chain reaction. Certain critics believed that the Court was experiencing a "crisis of legitimacy." In the wake of such controversy, political figures suggested reorganizing the Court, claiming that its current form was no longer capable of serving the interests of the American people. Id.

Zilis offers two views regarding what determines the Court's legitimacy. For one, the public's political values and democratic standards may serve as the foundation for the Court's legitimacy. On the other hand, when the public disagrees with the Court's policy choices and ideological stance, its legitimacy may deteriorate. Id. Zilis provides that the former position is

bolstered by research studies. For example, evidence of a "negativity bias" or the theory that unfavorable responses to unpopular rulings often have a more significant impact on the legitimacy of the Court than favorable ones. Ultimately, Zilis offers such research findings to suggest that the Court's legitimacy is, in fact, affected when the public disagrees with the Court's policy choices and ideological stance.

Challenges and Considerations

There are certain challenges and consideration at play in the face of the public's potential impact on the Supreme Court. In a democratic system, the notion of judicial independence—which includes the idea of the Supreme Court being isolated from public opinion—serves a number of crucial functions. For example, the Court function protect individual rights. The judiciary serves as a check on the other branches of government, especially the Supreme Court. By interpreting the Constitution and laws, courts preserve individual rights and liberties, even when those rights are controversial or go against the dominant public attitude. Additionally, the maintenance of uniformity and predictability in the legal interpretation and application process is facilitated by judicial independence. The Court's verdicts could differ significantly based on the public's perceptions at the time, creating ambiguity and contradiction in the law. Paradoxically, the public's trust in the judiciary can be increased by its continued independence from popular opinion. People are more likely to have faith in the justice system's fairness and impartiality when they know that judges are applying the law to their rulings rather than political or popular opinion. Ultimately, if the court is in fact influenced by outside pressures, the institution does not completely serve the purpose intended by the Framers.

Judicial Independence

For judicial independence to be maintained, it is necessary for the justices to give judgment on the basis of legal reasons and not public sentiment. Chief Justice of the Texas Supreme Court Nathan Hecht, speaking in relation to the public accountability of the justices to their performance of the legal duties, has commented that justices perform their duties when they uphold the law, even in the face of public opinion—especially when that opinion is contrary to the law at the time. However, when a judge's responsibility is determined by how well they evaluate cases, and when the public's preferences diverge from the letter of the law, the judge feels pressure to cede their independence and the rule of law to the people. Paul L. Friedman, Threats to Judicial Independence and the Rule of Law, American Bar Association Eleventh Annual Judge Thomas A. Flannery Lecture, <https://www.americanbar.org/groups/litigation/about/awards-initiatives/american-judicial-system/threats-to-judicial-independence-and-rule-of-law/> (last visited Feb. 5, 2024, 9:05 PM). He adds, "Judicial independence is threatened" when judicial responsibility hinges on how well-received a judge's rulings are or will be. *Id.* Assuming public opinion is as present as the analysis of cases and studies has suggested, it appears judicial independence is at risk.

Politicization of the Court

Furthermore, justices who align their decisions with partisan interests or public sentiment rather than with legal principles and constitutional interpretation is another way that public opinion can contribute to the politicization of the Supreme Court. Again, while it cannot be determined whether justices are aligning with partisan principles versus an interpretation of the Constitution, studies show that public opinion is highly predictive of how the Court will rule. James F. Smith, Q&A With Maya Sen: Research Survey Shows Nation's Highest Court to be

Closely Aligned to Views of American Public on Major Issues Decided this Year, Harvard Kennedy School (Jul.13, 2020), <https://www.hks.harvard.edu/faculty-research/policy-topics/democracy-governance/us-supreme-court-v-american-public-opinion>. If there is anything that can jeopardize the credibility of judicial institutions, it could be the issue of 'judicial activism,' where the decisions by the Court are seen to be influenced by public opinion to the detriment of legal precedent. Paul L. Friedman, Threats to Judicial Independence and the Rule of Law. Ultimately, justices have to walk a thin line between vindicating democratic will and preserving the rule of law. Their pronouncements and judgments must be based on constitutional principles, not the inclinations of public opinion.

Public Scrutiny

Furthermore, undue public scrutiny and pressure might have an adverse impact on the internal deliberations of the Court and might even deny the justices opportunities for candid and frank deliberations. Because of this fear, justices may write dissenting opinions or argue strongly for fear of backlash or criticism from the public. Cass R. Sunstein, After the Rights Revolution: Reconceiving the Regulatory State. The Court is at risk if justices feel more pressure to cater their decisions to the tides of public opinion and the shifts in political dynamics than to legal analysis and precedent. Finally, if justices are sensitive to popular rebuke and legitimacy challenges to the Court, they may be reluctant to be called upon to make controversial decisions that threaten well-established norms of politics.

Support for enacting policy that would diminish judicial independence and Court authority increases when the public's confidence in the institution dwindles. In recent years, more people have thought the Court ought to relinquish its authority over contentious issues. A few even supports abolishing the Court entirely.

Avoidance and Calculated Behavior

In light of such backlash, the Court may choose to avoid deliberating on such controversial cases. The Supreme Court is an institutionally reactive body. Before it may comment on a political topic, cases must be filed before the Court, and it is only obligated to address the legal concerns raised. Additionally, the Court has virtually complete control over the cases on its docket, allowing it to sidestep or avoid controversy as it sees proper. In order to avoid controversy, the Court may engage in an array of questionable practices. For one, the Court may choose which cases to grant certiorari in part because of the potential ramifications for group-based legitimacy. Also, to avoid public uproar, the Court may reroute the course of its rulings.

A Limited Perception

Most Americans assess the Court even if they are not able to detect its ideology or how successful it is at carrying out its democratic functions. Michael Zilis, [The Rights Paradox: How Group Attitudes Shape U.S. Supreme Court Legitimacy](#). In fact, personal experience, along with morals and ideologies, reflect the way in which an individual views the Supreme Court. Additionally, individuals tend to analyze the Court's legal reasoning or constitutional interpretation through certain moral, religious, or political convictions. James L. Gibson & Gregory A. Caldeira, [Citizens, Courts, and Confirmations: Positivity Theory and the Judgments of the American People](#). Moreover, the legal and political affiliations of Americans, especially to some of the political parties or ideological pastures, may determine how they perceive the Supreme Court. Meanwhile, there may be perceptions that the Court is acting on partisan agendas or with a desired policy result. Lastly, different factors influence a person's opinion of the Court's overall performance in public faith in the Court, belief in the Court's ability to enforce

the law, and consistency with constitutional principles. In this light, then, when the justices on the Supreme Court give great consideration to public opinion, it is likely that the Court is being responsive to public opinion that is not properly or adequately informed.

Conclusion

Influencing the Supreme Court's rulings and its function in American democracy, public opinion is a potent force. The larger cultural currents that have impacts on public opinions and beliefs could not possibly remain immune, despite the best intentions on the part of the Court to remain independent and free from prejudice. A ruling case requires the Court to find the balance between the demands of democratic mandate and the need to manage complex inter-relationships among public opinion, precedents, and constitutional principles in order to maintain the rule of law. So, in order to protect the integrity and the functioning of the judiciary in the future and know the role of the judiciary in a democratic society, one has to know how public opinion influences the Court. In summation the public's opinion still affects the Supreme Court despite its status as a federal government institution. Despite its independence and unbiased interpretation of the law, the Court functions within a larger societal framework that is influenced by political processes, public opinions, and beliefs. Via a variety of indirect routes, including media coverage, political debate, public advocacy, and societal norms, the public can impact the Court's rulings. This is besides the public's acceptance of the decisions by the Court, which really enhances its validity and power as one of the institutions under the federal government. The delicate relationship the Supreme Court shares with public opinion while guarding the law and constitutional rights is thus underscored by a fine balance of legal principles, political forces, and the views of the general public.

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