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ARTICLES

Why the Supreme Court Cares About Elites, Not the American People

LAWRENCE BAUM & NEAL DEVINS*

TABLE OF CONTENTS

INTRODUCTION 1516

I. SOCIAL AND POLITICAL INFLUENCES ON SUPREME COURT DECISION MAKING 1519

A. CHANGING SOCIAL NORMS 1521

B. THE APPOINTMENTS PROCESS 1522

C. ELECTED GOVERNMENT BACKLASH 1525

D. SUMMARY 1528

II. THE SOCIAL PSYCHOLOGY OF THE JUSTICES 1529

A. THE POLITICAL SCIENCE MODEL 1529

B. THE SOCIAL PSYCHOLOGY MODEL 1532

C. THE SALIENCE OF ELITE AUDIENCES 1537

1. The Legal Profession 1537

2. Public Interest Organizations 1540

3. The News Media and Academia 1542

D. SUMMARY 1544

III. ANALYZING THE EMPIRICAL EVIDENCE 1546

A. LEGITIMACY AS A SOURCE OF RESPONSIVENESS TO PUBLIC OPINION 1547

B. THE IMPACT OF PUBLIC OPINION ON THE JUSTICES 1555

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1. Avoidance of Unpopular Decisions on Salient Issues . . . 1556
2. Reponse to Ideological Shifts in Public Opinion 1560
3. The Court's Adherence to Public Opinion Over Time . . 1563
C. THE EFFECTS OF ELITES ON THE JUSTICES' CHOICES 1566
1. Specific Knowledge of Elite Opinion Through Amicus Curiae Briefs 1566
2. Evidence of Elite Opinion Contributing to Voting Shifts in Specific Cases 1568
3. Alignment of Supreme Court Decision Making and Attitudes of Highly Educated People 1570
4. Ideological Shift by Justices Over Time: The "Greenhouse Effect" 1574
D. SUMMARY 1579
CONCLUSION 1580

INTRODUCTION

Supreme Court Justices care more about the views of academics, journalists, and other elites than they do about public opinion. This is true of nearly all Justices and is especially true of swing Justices, who often cast the critical votes in the Court's most visible decisions. In this Article, we will explain why we think this is so and, in so doing, challenge both the dominant political science models of judicial behavior and the significant work of Barry Friedman,[1] Jeffrey Rosen,[2] and others who link Supreme Court decision making to public opinion.

Our argument is grounded in social psychology. In particular, we will argue that Supreme Court Justices are not single-minded maximizers of legal or policy preferences.[3] Instead, Justices seek both to advance favored policies and to win approval from audiences they care about. These audiences may include the public but are more likely to include elites—individuals and groups that have high socioeconomic status and political influence. The primary reason is that Supreme Court Justices themselves are social and economic elites. As such, they are likely to care a great deal about their reputations among other elites,

1. *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

2. *See* JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA (2006).

3. *But see* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 22–51 (1998) (arguing that most Justices are "policy seekers" who "want to move the substantive content of law as close as possible to their preferred position[s]"); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 86–114 (2002) (describing the attitudinal model which posits that "justices make decisions by considering the facts of the case in light of their ideological attitudes and values").

including academics, journalists, other judges, fellow lawyers, members of other interest groups, and their friends and neighbors.

This view leads us to a different conception of the forces that shape the Court from the one expressed by legal scholars such as Friedman[4] as well as by many political scientists.[5] As those scholars see it, the Justices are devoted to achieving what they see as the best legal policies, and they deviate from their most preferred policies when doing so advances those policies in the long run. Thus, to take one important example, the Justices accede to public opinion in order to maintain the Court's legitimacy and its ability to make legal policy effectively.[6]

In our view, in contrast, the Justices have concerns other than maximizing the achievement of their preferred legal policies, and prominent among those concerns is their interest in the regard of other people who are important to them. When the Justices deviate from their preferred legal policies, it may be because of strategic considerations, some of which relate to public opinion. However, it is more often the case that Justices are influenced by the views of other elites who are important to them for personal rather than strategic reasons. Thus, we agree with the scholars who emphasize that the Justices are primarily motivated by what they regard as good law or good policy; we disagree on the reasons that Justices sometimes deviate from the positions that they prefer.

Our argument will proceed in three parts. Part I will call attention to the various ways in which the Supreme Court is shaped by social and political forces, including changing social norms, appointments to the Court, and backlash from elected officials. These forces give a majoritarian element to Supreme Court decisions, in that there is a tendency for the Court's positions on policy issues to match the views of elected officials and society at large. However, our argument is that this majoritarian element does not reflect substantial direct influence on the Court from the public, and this Part will draw important distinctions between direct and indirect influences on Supreme Court decision making. For example, the Democratic Senate's rejection of Robert Bork's Supreme Court nomination and Ronald Reagan's subsequent nomination of Anthony Kennedy directly influenced judicial decision making; the voters who elected Ronald Reagan and Senate Democrats indirectly influenced Supreme Court decision making. By disaggregating the various social and political influences on Supreme Court decision making, Part I will examine the ways in which public and elite opinion might influence the Court.

Part II will lay out the social psychology model that we will employ in this Article. We will criticize the dominant political science models for failing to take into account that Supreme Court Justices, like other people, care a great deal about what people

4. *See* FRIEDMAN, *supra* note 1.

5. *See, e.g.*, EPSTEIN & KNIGHT, *supra* note 3; Lee Epstein & Jack Knight, *Toward a Strategic Revolution in Judicial Politics: A Look Back, a Look Ahead*, 53 POL. RES. Q. 625 (2000) (describing the trend towards scholars using the strategic account to study and understand judicial politics).

6. *See* FRIEDMAN, *supra* note 1, at 370; ROSEN, *supra* note 2, at xii–xiii.

think of them.[7] Part II will also explain why we think Supreme Court Justices are more likely to be influenced by elite audiences than by public opinion.

Part III, the heart of this Article, will provide evidence in support of this hypothesis. In the first section of this Part we will call attention to some of the reasons that the Court need not worry about public opinion, highlighting both public ignorance of Court decision making and public support for judicial independence. Our central argument is that the Justices have little reason to worry that their decisions will endanger their legitimacy with the general public. In the second section, we will discuss evidence of public influence on the Court. We will point both to disagreement between public opinion and Court policies on some important issues and to other evidence that there is limited public influence on the Court. In the third section, we will present evidence of elite influence on the Justices. We will make use of opinion poll data which suggests that the Court is often more attentive to the views of individuals with post-graduate degrees than it is to the public as a whole. Part III will also provide empirical support for the so-called "Greenhouse effect"—the pattern in which some Supreme Court Justices have drifted away from the conservatism of their early votes and opinions towards the stated preferences of cultural elites, including left-leaning journalists and the "liberal legal establishment that dominates at elite law schools."[8]

Following Part III, a brief Conclusion will consider the implications of all this. We will argue that the Court, although shaped by broader social and political influences, is only indirectly and partially majoritarian. There is little reason to think that the mass public exerts a strong, direct influence on the Court; indeed, Court decision making sometimes veers from public opinion.

We have already discussed the relationship between our broad theoretical position and that of scholars who emphasize a strategic conception of the Justices' behavior. Before turning to Part I, it is useful to focus more specifically on the Court's relationship with public opinion and to identify both the common ground and differences between our project and the recent work of scholars who link Supreme Court decision making with public opinion. To start, we think that the American people play a significant role in the shaping of constitutional values. Elections, after all, determine who controls Congress, the White House, and much more. The American people, therefore, play an important role in shaping interactions between the Judiciary and the other branches, including the determination of who is nominated and confirmed to the Supreme Court. Correspondingly, we agree with longstanding claims that the Supreme Court "has seldom lagged far behind or forged far ahead of America,"[9] and that, over

7. This discussion is informed by LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES (2006), and (to a much lesser extent) Neal Devins & Will Federspiel, *The Supreme Court, Social Psychology, and Group Formation*, *in* THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 85 (David Klein & Gregory Mitchell eds., 2010).

8. Evan Thomas & Stuart Taylor, Jr., *O'Connor's Rightful Heir?*, NEWSWEEK, Jan. 30, 2006, at 38. On the Greenhouse effect, see *infra* notes 332–44 and accompanying text.

9. ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 224 (1960).

time, Supreme Court decision making will generally reflect "the policy views dominant among the lawmaking majorities."[10] Likewise, we think that the Court is not immune from changing social norms and that the Justices' opinions will eventually reflect changing social conditions.

At the same time, we do not think that public opinion has a significant direct effect on Court decision making. Although a Court decision may match the majority view among the general public, it does not mean that the Court, in fact, took public opinion into account; likewise, Court decisions may diverge from public opinion even while they are shaped by social and political forces. More to the point, Part I calls attention to the need for law professors and political scientists to identify, with some specificity, whether majoritarian judicial review is tied to elected government pressures, changing norms over time (sometimes reflected in the appointments process), or public opinion.[11] For this reason, although we agree with many of the specific claims (by Friedman, Rosen, and others) about the majoritarian nature of judicial review, we disagree with the broader claim that modern Court decision making is directly influenced by public opinion to any substantial degree; rather, we believe that the effect of public opinion on the Court is primarily indirect. The balance of this Article builds on this point, employing social psychology to understand why the Justices are likely to care about the esteem in which others hold them and why it is that the Justices are likely to care more about elite audiences than public opinion.

I. SOCIAL AND POLITICAL INFLUENCES ON SUPREME COURT DECISION MAKING

Supreme Court decision making is shaped by social and political forces. To start, the opinions and writings of the Justices make clear that the Court is a product of its times. On a broad spectrum of constitutional issues, for example, the Court has looked to state practices to sort out the scope of constitutional protections.[12] The Court, moreover, often employs majoritarian formulas to uphold the judgments of electorally accountable actors.[13]

Perhaps more telling, Supreme Court decision making and the writings of Supreme Court Justices sometimes reference public opinion. The Rehnquist Court, for example, made specific reference to public opinion polls in cases involving the death penalty, information given to jurors during sentencing,

10. Robert A. Dahl, *Decision-making in a Democracy: The Supreme Court as a National Policy-maker*, 6 J. PUB. L. 279, 285 (1957).

11. This tendency to conflate a broad range of social and political forces epitomizes scholarship, including our own, on dialogue between the Court and the elected government. *See, e.g.*, NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION (2004) (highlighting, among other things, the numerous ways that social and political forces contribute to the shaping of constitutional values).

12. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 571–73 (2003) (examining state practices with regard to anti-sodomy laws). For a thoughtful discussion of the Supreme Court's practice of looking at state legislative practices, see Corrina Lain, *The Unexceptionalism of "Evolving Standards,"* 57 UCLA L. REV. 365 (2009).

13. The classic Supreme Court statement on this point is *Vance v. Bradley*: "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted . . . ." 440 U.S. 93, 97 (1979) (footnote omitted).

trademarks, and commercial free speech.[14] When reaffirming *Roe v. Wade*[15] in *Planned Parenthood v. Casey*, moreover, the plurality opinion proclaimed that the Court protects its "legitimacy" by "speak[ing] and act[ing] in ways that allow people to accept its decisions."[16]

In other important ways, the Justices have made clear that they are not immune from the social and political forces that surround them. In a lecture entitled *Constitutional Law and Public Opinion*, for instance, Chief Justice Rehnquist acknowledged that Supreme Court Justices "go home at night and read the newspapers or watch the evening news on television; they talk to their family and friends about current events" and, consequently, cannot "escape being influenced by public opinion."[17]

However, the significance of this evidence should not be exaggerated. For example, on those rare occasions when the Justices acknowledge the influence of public opinion, they are usually referring to subsets of the population—subsets such as Chief Justice Rehnquist's "family and friends"—rather than to the public at large or to broader trends and developments in society. The latter influence was captured by Justice Cardozo's insight that the Court cannot escape the "great tides and currents which engulf the rest of men."[18]

For the balance of this section, we will identify some of the social and political forces that shape Supreme Court decision making. We will focus our attention on three areas—changing social norms, the appointments process, and backlash and other implementation concerns. Public opinion arguably figures indirectly into all three of these influences because there is a linkage between public opinion and both social norms and the actions of elected officials (whether those actions are tied to appointments politics or elected government resistance to judicial edicts). At the same time, for reasons we will detail in Parts II and III, there is no reason to think that public opinion directly, independently, and meaningfully influences Supreme Court decision making. By way of contrast, we think that elite opinion—something that also affects social norms and the actions of elected officials—is more likely to directly and independently influence Supreme Court decision making. Parts II and III will explain why we think elite opinion influences the Court in this way.

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14. *See* THOMAS R. MARSHALL, PUBLIC OPINION AND THE REHNQUIST COURT 6 (2008). In *Atkins v. Virginia*, a 2002 decision striking down the death penalty for the mentally impaired, the Court pointed to "polling data show[ing] a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong." 536 U.S. 304, 316 n.21 (2002).

15. 410 U.S. 113 (1973).

16. 505 U.S. 833, 865 (1992). Chief Justice John Roberts also references concerns of institutional legitimacy in explaining why the Court should avoid five–four decisions in cases "involving the most controversial questions in American politics." Jeffrey Rosen, Op-Ed., *The Trial of John Roberts*, N.Y. TIMES, Sept. 13, 2009, at WK18.

17. William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 768 (1986); *see also* WILLIAM H. REHNQUIST, THE SUPREME COURT 95–98 (1987) (discussing how a confluence of various social and political forces contributed to the Supreme Court's invalidation of President Harry Truman's order seizing the steel mills during the Korean War).

18. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 168 (1921).

A. CHANGING SOCIAL NORMS

Supreme Court Justices are members of society, and their decision making, over time, will reflect changing social norms.[19] In part, the appointments process will result in new Justices bringing the Court up-to-date with changing social values. For example, when the Court upheld, by a five-to-four vote, Georgia's power to criminalize homosexual sodomy in 1986,[20] Justice Lewis Powell (the Court's swing Justice) flipped positions—initially voting to overturn the law and then voting to uphold it.[21] The reason, as revealed in a conversation with one of his law clerks, was that Justice Powell didn't believe he had "'ever met a homosexual'" and simply could not find in the Constitution a right to engage in sexual practices that he could not comprehend.[22] Justice Powell's replacement, Justice Anthony Kennedy, approached the gay rights issue from a much different position, and cast the decisive fifth vote to overturn the Georgia case in 2003.[23] In particular, the Court of 2003 was a gay-friendly workplace,[24] and Justice Kennedy (who cited the European Court of Human Rights in his decision)[25] has held extensive meetings with foreign judges and sees himself as a participant "in a worldwide constitutional conversation."[26]

Even when there is no change in the Court's composition, decision making may shift to better reflect prevailing social norms. Indeed, it is sometimes the case that the Court moves in a direction opposite to what we would expect from changes in its membership. A clear example of the Court's updating of doctrine this way and, in so doing, reflecting changing social conditions, is the nexus between the 1960s women's movement and the Court's increasing receptiveness to constitutional attacks on gender classifications. Before 1971, the Court had never invalidated a gender classification under the Equal Protection Clause. By 1976 (with five Nixon and Ford appointees on the Court), the Court had deemed gender a problematic classification[27]—a change very much in line with "'the single most outstanding phenomenon of this century,'" that is, a profound change in gender roles, including the doubling, from 1940 to 1960, of the number of women working outside the home.[28]

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19. Even when the Court does not revisit earlier decision making, it sometimes recognizes that earlier doctrine has been nullified "by the court of history." New York Times v. Sullivan, 376 U.S. 254, 276 (1964) (discussing that the Court had never formally invalidated the now discredited Alien and Sedition Acts, Federalist-era legislation criminalizing speech critical of the government).

20. Bowers v. Hardwick, 478 U.S. 186 (1986).

21. *See* JOHN C. JEFFRIES, JUSTICE LEWIS F. POWELL, JR. 523–25 (1994).

22. *Id*. at 521–22 (quoting Justice Powell).

23. Lawrence v. Texas, 539 U.S. 558 (2003).

24. Linda Greenhouse, *Heartfelt Words from the Rehnquist Court*, N.Y. TIMES, July 6, 2003, at WK3.

25. *Lawrence*, 539 U.S. at 573.

26. Greenhouse, *supra* note 24.

27. *See* Craig v. Boren, 429 U.S. 190, 197–98 (1976).

28. FRIEDMAN, *supra* note 1, at 290 (quoting Eli Ganzberg, a Columbia economics professor). The women's movement also contributed to a dramatic spike in the number of women earning college and graduate degrees and, correspondingly, to changes in the demographics of elites. More significant (for our purposes), the women's movement resulted in Supreme Court Justices increasingly interfacing with

In calling attention to some of the ways that changing social norms affect Court decision making, we recognize that these norms are the confluence of a range of influences—media and elite opinion, popular culture, public opinion, elections and elected government action, social movements, and interest group initiatives. Our point is simply that the Court is part of the larger society. That is why new Republican appointees helped push the Court to embrace heightened scrutiny of gender classifications. At the same time, because of the varied range of factors that contribute to changing social norms, it would be wrong to isolate any one factor; for example, it would be wrong to suggest that the Court's responsiveness to changing social conditions means that the Court is especially influenced by either public or elite opinion.[29]

B. THE APPOINTMENTS PROCESS

The appointments and confirmation process is the most direct way that elected officials put their imprimatur on Court decision making. "The practical play of the forces of politics," as Justice Robert Jackson said in 1953, "is such that judicial power has often delayed but never permanently defeated the persistent will of a substantial majority."[30] That does not mean, however, that the appointments process necessarily moves the Court closer to the prevailing views of the American people. In part, the appointments process is anything but instantaneous—there is a significant lag between the appointment of new Justices and the transformation of judicial decision making. More significant, the appointments process is not moored to the policy preferences of the American people; instead, the appointments process helps to ensure that the Court does not stray from the dominant views of the President and the Senate.

We will start with two well-known examples of the appointments and confirmation process resulting in the Court's overturning a disfavored precedent. First, there is the Court's 1871 overturning of *Hepburn v. Griswold*[31] in *The*

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professional women—and the Justices' attitudes towards gender issues were undoubtedly affected by these changes in the composition of elites. As we will discuss in Parts II and III of this Article, Supreme Court Justices seek to win approval from reference groups that matter to them. For this very reason, it is to be expected that basic changes in the composition of elite groups will affect the Justices' attitudes towards those groups. Indeed, just as Justice Powell's vote in *Bowers v. Hardwick*, 478 U.S. 186 (1986), reflected the absence of openly gay individuals in the Justice's personal and professional life, fundamental changes in the demographics of elites are likely to spill over to Court decision making. *See supra* notes 20–26 and accompanying text (discussing the nexus between the personal experiences of Supreme Court Justices and their decision making).

29. Likewise, in calling attention to the role of social norms, we are not speaking to the phenomenon of "ideological drift"—that is, the movement of individual Justices towards the right or (more typically) the left. That phenomenon is not about macro-social conditions; instead, it speaks to an individual Justice's embrace of one or another ideological position. For additional discussion, see *infra* notes 332–44 and accompanying text, discussing the "Greenhouse effect."

30. Robert H. Jackson, Maintaining Our Freedoms: The Role of the Judiciary, Speech Delivered to the American Bar Association, Boston, MA (Aug. 24, 1953), *in* 19 VITAL SPEECHES OF THE DAY 759, 761 (1953).

31. 75 U.S. (8 Wall.) 603, 639 (1870) (holding the Legal Tender Act unconstitutional).

Legal Tender Cases.[32] President Ulysses Grant and the 1870 Congress supported the Legal Tender Acts, and after the Senate's 1870 confirmation of two Grant Supreme Court nominees,[33] the Court soon backed elected government preferences. Within one year of the *Hepburn* decision, Grant's appointees provided the critical votes to overturn the decision.[34] Second (and more striking), there is the New Deal Court's decimation of *Lochner*-era precedent. By appointing four Justices from 1937 to 1939 (and nine Justices through 1943), Franklin Delano Roosevelt transformed Supreme Court decision making.[35] From 1937 to 1944, the New Deal Court had created a "new constitutional order," overruling thirty cases—"two-thirds as many as had been overruled in the Court's previous history."[36]

The President and Senate do not always act in concert, however. During periods of divided government, conflicts between the President and Congress limit the President's power to move the Court to the right or left. For example, when the Senate rejected Ronald Reagan's nomination of Robert Bork to the Supreme Court, Bork's opponents (the Senate's Democratic leadership and its interest group allies) capitalized on the American people having signaled—through opinion polls and focus groups—their opposition to Bork and their support of privacy and other rights.[37] In particular, wavering Senators were convinced that it would be politically costly to back Bork, who was ultimately rejected by the Senate.

That the Justices often reflect prevailing presidential or congressional preferences at the time of their nomination does not necessarily mean that Court decisions track either public opinion or the preferences of elected officials. In particular, the national political establishment may be to the left or the right of median voter preferences. For example, from 1962 to 1967, Presidents Kennedy and Johnson's judicial appointees helped "rewr[ite] the corpus of our constitutional law" in ways that did not always match public opinion.[38] Among other

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32. 79 U.S. (12 Wall.) 457, 553 (1871) (overturning *Hepburn* and upholding the Legal Tender Acts as constitutional).

33. *See* Sidney Ratner, *Was the Supreme Court Packed by President Grant?*, 50 POL. SCI. Q. 343, 351 (1953) (noting Grant's support for the Legal Tender Acts and his belief that his judicial nominees would uphold their constitutionality).

34. *See* The Legal Tender Cases, 79 U.S. at 553–54.

35. For information on Roosevelt's appointments to the Supreme Court, see ALBERT P. BLAUSTEIN & ROY M. MERSKY, THE FIRST ONE HUNDRED JUSTICES 107–08 (1978).

36. LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 485–86 (2000).

37. *See* MARK GITENSTEIN, MATTERS OF PRINCIPLE: AN INSIDER'S ACCOUNT OF AMERICA'S REJECTION OF ROBERT BORK'S NOMINATION TO THE SUPREME COURT 112 (1992) (discussing the use of focus groups as well as the efforts of Senate leadership to coordinate with interest groups); MICHAEL PERTSCHUK & WENDY SCHAETZEL, THE PEOPLE RISING: THE CAMPAIGN AGAINST THE BORK NOMINATION 257–58 (1989) (discussing interest group efforts to capitalize on Bork's opposition to privacy rights). *See generally* ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (1989) (providing a history of the Bork nomination and Senate hearings).

38. Bernard Schwartz, *Earl Warren as a Judge*, 12 HASTINGS CONST. L.Q. 179, 179 (1985). These appointees became part of "the most cohesive [voting] bloc in modern Court history," Edward V. Heck, *Justice Brennan and the Heyday of Warren Court Liberalism*, 20 SANTA CLARA L. REV. 841, 872 (1980),

things, the Warren Court bucked public opinion polls by constitutionalizing criminal procedure.[39] When deciding *Miranda v. Arizona*,[40] the Court ignored both opinion polls showing opposition to post-1962 criminal procedure decisions and the calls by twenty-seven states for the Court to slow down its criminal procedure revolution.[41]

Over time, Republican appointees to the Rehnquist Court narrowed several of these landmark Warren Court rulings—moving the Court closer to the preferences of state officials and the American people.[42] At the same time, the Rehnquist Court's revitalization of federalism resulted in the judicial invalidation of laws popular with the American people (for example, prohibition of guns in or near schools[43] and religious liberty protections[44]) and the states (for example, disposal of radioactive waste[45] and domestic violence protections[46]). Perhaps more telling, increasing party polarization along ideological lines makes it more likely that the appointments process will produce Justices who reflect the views of one or the other party.[47]

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more willing to overturn constitutional precedent than any Court before it, *see* MICHAEL BELKNAP, THE SUPREME COURT UNDER EARL WARREN 1953–1969, at 308 (2005).

39. *See* James H. Fowler & Sangick Jeon, *The Authority of Supreme Court Precedent*, 30 SOC. NETWORKS 16, 28 (2008) (noting that when Chief Justice Warren stepped down, more than twenty percent of the Court's docket consisted of criminal cases); Steven F. Smith, *Taking Lessons from the Left?: Judicial Activism on the Right*, 1 GEO. J. L. & PUB. POL'Y 57, 59 (2002) (noting that Warren Court innovations have transformed our dialogue about criminal procedure so that we now "speak of '*constitutional* criminal procedure' instead of simply 'criminal procedure'").

40. 384 U.S. 436 (1966).

41. POWE, *supra* note 36, at 394–95. See Corinna Barrett Lain, *Countermajoritarian Hero or Zero?: Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1451–52 (2004), for a competing perspective arguing that Warren Court decision making was less countermajoritarian than it is often portrayed.

42. *See* Louis D. Bilionis, *Criminal Justice After the Conservative Reformation*, 94 GEO. L.J. 1347, 1350–52 (2006); Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court's Criminal Justice Jurisprudence*, 94 GEO. L.J. 1385, 1387, 1393–94, 1410 (2006); Stephen F. Smith, *The Rehnquist Court and Criminal Procedure*, 73 U. COLO. L. REV. 1337, 1338–39 (2002).

43. *See* United States v. Lopez, 514 U.S. 549 (1995); *see also* STANLEY M. ELAM ET AL., THE 26TH ANNUAL PHI DELTA KAPPA/GALLUP POLL OF THE PUBLIC'S ATTITUDES TOWARD THE PUBLIC SCHOOLS 43–44 (1994) (noting "fighting/violence/gangs" as among the highest responses for "biggest problem" facing public schools, and "[e]asy availability of weapons (guns, knives)" as among the highest responses for cause of increased violence).

44. *See* City of Boerne v. Flores, 512 U.S. 507, 511 (1997); *see also* Cheryl Wetzstein, *Polls Find Growing Concern Over 'Moral Direction*,' WASH. TIMES, Apr. 23, 1997, at A5.

45. *See* New York v. United States, 505 U.S. 144, 188 (1992).

46. *See* United States v. Morrison, 529 U.S. 598, 601–02 (2000) (striking down a portion of the federal Violence Against Women Act on federalism grounds). Only one state supported the challenge to the statute, *see* Brief for the State of Alabama as Amicus Curiae Supporting Petitioners, *Morrison*, 529 U.S. 598 (Nos. 99-5, 99-29), but thirty-six supported the position of the federal government, *see* Brief of the States of Arizona et al. as Amici Curiae in Support of Petitioners' Brief on the Merits, *Morrison*, 529 U.S. 598 (Nos. 99-5, 99-29).

47. For a discussion of the ways in which party polarization has transformed the "separation of powers" into the "separation of parties," see Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006). For a discussion of how party polarization has dramatically transformed judicial confirmation politics, see Sarah A. Binder & Forrest Maltzman, *The*

The lesson here is that the Court can simultaneously be a product of its times and at odds with the views of the American people, the states, or federal officials. And while subsequent judicial appointments can steer the Court towards either the American people, states, or federal officials, there is no guarantee that a consensus view will emerge among the President, the Senate, the states, and the American people. Indeed, given the dramatic ideological gap between Democrats and Republicans, the prospect of a consensus majoritarian view seems more illusory than real.

C. ELECTED GOVERNMENT BACKLASH

The Supreme Court sometimes takes into account the risk of elected government backlash, by which we mean any negative action directed at the Court or its decisions.[48] In particular, lacking the powers of purse and sword, the Court cannot assume that other parts of government will implement its decisions. For this reason, the Court sometimes takes implementation concerns into account when deciding a case. The Court, moreover, sometimes beats a retreat from an earlier decision in response to elected government opprobrium.

Justices are well aware of the potential backlash risks of a sweeping constitutional ruling. For example, the Justices thought that President Richard Nixon might disobey a divided Court ruling in the Watergate tapes case—so, in order to speak unanimously, they compromised with each other and issued a narrow, indeterminate ruling.[49] Likewise, Chief Justice Earl Warren, recognizing poten-

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Politics of Advice and Consent: Putting Judges on the Federal Bench, *in* CONGRESS RECONSIDERED 241 (Lawrence C. Dodd & Bruce I. Oppenehimer eds., 9th ed. 2009).

48. There is a fierce debate among political scientists concerning whether and when the Justices will deviate from their preferred policy positions because of possible elected government backlash. *Compare* EPSTEIN & KNIGHT, *supra* note 3, at 12–17 (arguing that Supreme Court Justices are strategic actors who moderate their decision making in order to best advance their preferred policy position), *with* Jeffrey A. Segal, *Separation-of-powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 42 (1997) (presenting theoretical and empirical evidence that Supreme Court decision making is independent of congressional preferences). For reasons we will detail in the next few paragraphs, we think that some Justices (often the critical swing Justices) take backlash risks into account. At the same time, we do not think that the risks of backlash are as great as proponents of the strategic and public opinion models assert. *See, e.g.*, EPSTEIN & KNIGHT, *supra* note 3, at 10, 13–15; FRIEDMAN, *supra* note 1, at 14–18; ROSEN, *supra* note 2, at 13, 15. For example, Congress rarely uses its institutional powers against the Court in significant ways. *See* Lawrence Baum, *The Supreme Court in American Politics*, 6 ANN. REV. POL. SCI. 161, 167 (2003); Neal Devins, *Should the Supreme Court Fear Congress?*, 90 MINN. L. REV. 1337, 1348, 1357 (2006). Likewise, the President typically implements Supreme Court rulings. *See* John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 382 (1999).

49. *See* United States v. Nixon, 418 U.S. 683, 713–15 (1974) (holding that the President's "generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial" while also affirming that "[i]t is . . . necessary in the public interest to afford Presidential confidentiality the greatest protection consistent with the fair administration of justice"). During oral argument, Nixon's lawyer, James St. Clair, equivocated on the President's willingness to accept an adverse judgment from the Court—noting that the case "is being submitted to the Court for its guidance" and that the "President, on the other hand, has his obligations under the Constitution." 79 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 872 (Philip B. Kurland & Gerhard Casper eds., 1975); *see also* BOB

tial Southern resistance to *Brown v. Board of Education*, felt strongly that the Court should issue a unanimous holding—even if it meant that the decision would be watered down in order to accommodate the competing preferences of different Justices.[50] The Justices can also take potential backlash risks into account either by issuing narrow, minimalist constitutional rulings or by ruling on statutory, rather than constitutional, grounds. For example, by ducking a constitutional challenge to the 2006 Voting Rights Act reauthorization,[51] the Roberts Court—as Barry Friedman put it—may well have recognized that "[o]ver-ruling a key provision of the recently-renewed congressional law might have brought the Court in for some serious and uncomfortable criticism."[52]

The most vivid examples of the Justices taking backlash into account are decisions in which the Court distances itself from earlier, unpopular decisions.[53] In some cases, the Court's composition has changed—so it may be that appointments and confirmation politics explains the change of position.[54] In other

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WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 308–46 (1979) (discussing internal Court deliberations in the Watergate tapes case).

50. *See* Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1, 2 (1979); S. Sidney Ulmer, *Earl Warren and the* Brown *Decision*, 33 J. POL. 689, 699 (1971). Indeed, well aware of the "'momentum of history'" and the "'deep feeling' people had about these laws," the Court refused to hear a 1955 challenge to Virginia's miscegenation law rather than risk "'thwarting or seriously handicapping'" its decision in *Brown* and, with it, its institutional prestige. Del Dickson, *State Court Defiance and the Limits of Supreme Court Authority:* Williams v. Georgia *Revisited*, 103 YALE L.J. 1423, 1476 & n.316 (1994) (quoting Memorandum from Justice Felix N. Frankfurter to the Conference on *Naim v. Naim* (Nov. 4, 1955)).

51. *See* Nw. Austin Mun. Dist. No. One v. Holder, 129 S. Ct. 2504 (2009).

52. Posting of Barry Friedman to Balkinization, http://balkin.blogspot.com/2009/09/why-citizens-united-may-not-be-namundo.html (Sept. 26, 2009, 09:09). By way of contrast, Friedman argued that "campaign finance is not an issue that seems to rank high on the public's list of important issues," and, consequently, the Roberts Court could safely overrule prior precedent in the then-undecided *Citizens United* case. *Id*. As Friedman and Dahlia Lithwick subsequently noted after the decision in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), the Court's decision in that case was difficult to reconcile with public attitudes. Barry Friedman & Dahlia Lithwick, *Speeding Locomotive: Did the Roberts Court Misjudge the Public Mood on Campaign Finance Reform?*, SLATE, Jan. 25, 2010, http://www.slate.com/id/2242557/; *see also* Jeanne Cummings, *Supreme Court Ruling Fuels Voter Ire,* POLITICO, Jan. 9, 2010, http://www.politico.com/news/stories/0210/32713.html (reporting a survey in which two-thirds of respondents opposed the Court's decision). For a related argument, see Barry Friedman*, Benched: Why the Supreme Court Is Irrelevant*, NEW REPUBLIC, Sept. 23, 2009, at 7, 8, explaining how the Court in general and the Roberts Court in particular takes backlash risks into account. The perceived unpopularity of the Court's decision in *Citizens United* probably helps to account for President Obama's highly public criticism of it and efforts by congressional Democrats to craft legislation that would limit its impact. *See* David D. Kirkpatrick, *Democrats Try To Rebuild Campaign-spending Barriers*, N.Y. TIMES, Feb. 12, 2010, at 19; Sheryl Gay Stolberg, *Obama Turns Up Heat Over Ruling on Campaign Spending*, N.Y. TIMES, Jan. 24, 2010, at 18.

53. For a sampling of cases, see Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 94–96 (1998).

54. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Court's willingness to moderate, but not overrule, *Roe v. Wade*, 410 U.S. 113 (1973), including the overruling of past precedent on waiting periods and informed consent requirements, was tied to the appointments of the three Justices who wrote the plurality decision (Sandra Day O'Connor, David Souter, and Anthony Kennedy). In making this point, we recognize that the views of the Justices in the *Casey* plurality were shaped by a broad range of events—including but not limited to elected government resistance to *Roe*. For a related

cases, the Court is clearly responding to elected government attacks on its earlier rulings.[55] Following a spate of 1956–1957 Term rulings rejecting (on statutory grounds) governmental efforts to clamp down on subversives, the Court reversed course in the wake of legislative efforts to strip the Supreme Court of jurisdiction in five domestic security areas.[56] Moreover, after turning the Court into an election issue in 1972 by abolishing the death penalty as it was then administered,[57] the Burger Court subsequently approved reinstatement of the death penalty.[58]

In highlighting instances where the Court takes backlash into account, we are not making the broader point that the Court inevitably moderates its decision making to conform to the preferences of either elected officials or the American people. As we will detail in Part III, there are numerous examples of the Court holding fast to rulings unpopular with the American people and elected officials. Correspondingly, it may be that some Supreme Court Justices rarely or never take potential elected government backlash into account. Furthermore, in saying that the Court is sometimes responsive to the views of elected officials, elected government backlash, or both, we are not saying that the Court takes public opinion into account when deciding cases. Aside from strong public support for judicial independence (something we will discuss in Part III), the linkage between public opinion and elected government backlash is indirect. Even if the willingness of elected officials to strike back against the Court is tied to popular views (often informed by media and other elites), there is a world of difference between the Court's taking into account actual or anticipated action by elected officials and its independently considering each of the various factors that contribute to elected government action. This is especially true today, when elected official action may be less a barometer of public opinion and more a

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argument, see Neal Devins, *Social Meaning and School Vouchers*, 42 WM. & MARY L. REV. 919, 936–37 (2001) (noting how changes in Court doctrine governing aid to religious schools were shaped by changing social norms—norms which intersected with the appointment of Justices sympathetic to some school voucher schemes).

55. The Court may also be responding to attacks from other quarters, including elites. This is what happened in 1943, when the Court backed away from a 1941 ruling approving state mandated flag salutes. *See infra* notes 300–05 and accompanying text.

56. *See generally* Phillip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Years*, 93 CAL. L. REV. 397 (2005) (examining the 1950s Warren Court's use of the constitutional avoidance canon to render statutes regulating subversives compatible with the Constitution, leaving Congress free to amend the statutes). For another Warren Court example, see Yale Kamisar, *The Warren Court and Criminal Justice*, *in* THE WARREN COURT: A RETROSPECTIVE 116, 116–17 (Bernard Schwartz ed., 1996), discussing how, in its later years, the Warren Court scaled back its controversial criminal procedure revolution in the face of criticism from members of Congress and political candidates.

57. Furman v. Georgia, 408 U.S. 238, 239–40 (1972). Following this decision thirty-five states enacted new death penalty statutes, there was a huge spike in public support for the death penalty, and presidential candidates Jimmy Carter and Gerald Ford both backed the death penalty. *See* Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 22–24 (2007).

58. *See* Gregg v. Georgia, 428 U.S. 153, 207 (1976). Although the exact cause of the Court's retreat is unclear, the negative response to *Furman* probably contributed to the Court's about-face in *Gregg*.

measure of ideological polarization between the parties and related interest group pressures.[59]

Even when the Court seems to take backlash risks into account, it is often the case that the Court may be responding to other developments as well. For example, the Court's retreat from 1956–1957 era decisions protecting Communists and other subversives was not simply a response to threatened Court-curbing measures.[60] There is also reason to think that the flip was connected to the desires of then-swing Justice Felix Frankfurter to maintain his image—among his associates in the legal and political communities—as someone who held his liberal beliefs in check because of his commitment to judicial restraint.[61] With Congress, the American Bar Association, and prominent jurists—including Learned Hand[62]—attacking the Court for its 1956–1957 decisions, Frankfurter may well have wanted to uphold subsequent restrictions on Communists in order to win favor with those audiences that mattered a great deal to him.[63] We will pick up on this theme in Part III. For now, we simply want to highlight that backlash risks sometimes matter to the Court—but that these risks are one in a number of factors that steer the Court towards positions favored by elected officials.

D. SUMMARY

Supreme Court decision making is shaped by a broad array of social and political forces that include elected government decision making, public opinion, and elite opinion. In calling attention to some of the ways that social and political forces influence Court decision making, this Part reinforces the idea that the Court is part of the larger society. At the same time, it is true that some of these factors are more salient than others and that some factors operate as direct constraints and others are more indirect. For example, public and elite opinion influence who the President appoints to the Court, whether the Senate will confirm that nominee, whether elected government will adhere to Court rulings, and the social norms that sometimes influence Court decisions. In these ways, public and elite opinion indirectly influence Supreme Court decision making.

The question of whether public and elite opinion directly influence Supreme Court decision making is the subject of Parts II and III of this Article. Recent

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59. *See supra* note 47 and accompanying text (discussing party polarization and its effects). For discussion of how party polarization shapes congressional consideration of constitutional issues, including the power of interest group constituents to push lawmakers to embrace positions at odds with popular opinion, see Neal Devins, *Tom DeLay: Popular Constitutionalist?*, 81 CHI.-KENT L. REV. 1055 (2006); Sam Rosenfeld, *Disorder in the Court*, AM. PROSPECT, July 2005, at 24.

60. *See supra* note 56 and accompanying text.

61. *See* BAUM, *supra* note 7, at 42, 44.

62. LEARNED HAND, THE BILL OF RIGHTS 58–59 (1958); *see also* FRIEDMAN, *supra* note 1, at 256–57 (discussing attacks on the Court in the late-1950s by state court judges, the American Bar Association, and legal academics).

63. *See* BAUM, *supra* note 7, at 42 (noting Frankfurter's admiration of Hand).

scholarship linking public opinion to Court decision making does not isolate public opinion from some of these other influences.[64] As we will argue in Parts II and III, the correlation between public opinion and Supreme Court decision making does not demonstrate that the Justices actively seek out the approval of the American people. Indeed, occasional but important divergences between Court decision making and public opinion point to the possibility that the Justices are much more sensitive to elite audiences than to the views of the American people.

The dominant political science models, although recognizing that the Justices are products of their time, suffer from a different vice. By assuming that the Justices seek to advance legal or policy objectives and nothing else,[65] these models do not consider that individual Justices might be moved by audiences—whether those audiences are the American people, elites, or something else. For reasons we will now detail, Supreme Court Justices are not the "Spock-like judges of the dominant models [who] have no interest in public approval as an end in itself"; instead, Supreme Court Justices, like other people, "care a great deal about what people think of them."[66]

II. THE SOCIAL PSYCHOLOGY OF THE JUSTICES

In this Part, we will make use of social psychology to better understand the motivations of Supreme Court Justices. In particular, we will call attention to how self-presentation figures into a Justice's decision making. Correspondingly, we will explain why Supreme Court Justices are interested in winning favor with audiences they care about. We will argue that Supreme Court Justices care more about elite audiences than they do about the mass public. This is especially true of swing Justices. Ordinarily, swing Justices have more moderate preferences about legal policy than do their colleagues; consequently, they are typically more willing than their colleagues to depart from positions that fully reflect their legal or policy preferences in order to exercise power or win favor with groups that are important to them.[67]

A. THE POLITICAL SCIENCE MODEL

Before turning to the social psychology model, we want to highlight the assumptions which underlie the dominant political science models and call attention to ways that the social psychology and political science models both converge and diverge. To start, while there are sharp disagreements among

64. For examples of this view, see *supra* note 10, and *infra* notes 71–72.

65. For a fuller discussion of these models (including the ways in which they diverge from one another), see *infra* sections II.A–B.

66. BAUM, *supra* note 7, at 22.

67. On a strongly liberal or conservative Court, the median Justice might not be a moderate. *See* Devins & Federspiel, *supra* note 7, at 87. For reasons detailed *infra* notes 96–101 and accompanying text, the ability of the median Justice to swing between the Court's liberal and conservative factions is tied to ideological diversity among the Justices.

political scientists concerning whether Supreme Court Justices are motivated by legal or policy goals[68] and the extent to which Justices act strategically to advance the policies they prefer,[69] leading political science models share a basic premise about the Justices' motivations. This premise is that Justices care only about the substance of legal policy.[70] Whether they seek to make good law, good policy, or some combination of the two, scholars think that Justices devote themselves to those ends. Any other goal is of minor importance at most, compared with the Justices' interest in shaping legal policy.

The belief that public opinion affects Supreme Court decisions rests heavily on this premise. As many scholars see it, the Justices respond to public views because they are concerned with the Court's efficacy as a maker of legal policy. Lacking concrete sources of power, the Court depends on its public legitimacy.[71] Insufficient legitimacy will lead to negative consequences, including poor implementation of the Court's decisions and attacks on the Court and its powers by the other branches of government. As a result, the Justices are hesitant to adopt lines of decisions that diverge sharply from public opinion or

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68. *Compare* SEGAL & SPAETH, *supra* note 3, at 92 (suggesting that Supreme Court Justices vote policy preferences), *with* Howard Gillman, *What's Law Got To Do with It?: Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 446, 490 (2001) (arguing that legal considerations play a significant role in Supreme Court decision making).

69. *Compare* EPSTEIN & KNIGHT, *supra* note 3, at 10 (suggesting that strategic considerations figure prominently in Supreme Court decision making and "best explain the choices of [J]ustices"), *with* SAUL BRENNER & JOSEPH M. WHITMEYER, STRATEGY ON THE UNITED STATES SUPREME COURT 161–65 (2009) (concluding that Justices act strategically to only a limited degree).

The term "strategic" is used in multiple ways. The most common meaning of strategic behavior by judges is that they take into account the potential reactions of other people and institutions when making choices. Thus, a strategic, policy-oriented judge takes a position in a case that diverges from the judge's most preferred position when doing so elicits reactions (from judicial colleagues, the other branches of government, or others) that best advance the judge's policy goals. The simplest example is compromise with other judges on an appellate court in order to secure a more desirable majority opinion than would have resulted if the judge had simply taken her most preferred position. On definitions and conceptions of judicial strategy, see LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 89–94 (1997).

70. This shared premise is discussed in BAUM, *supra* note 69, at 27–28; Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV 615, 615–17 (2000).

By "substance of legal policy" we mean the content of the policies that the Supreme Court and other government bodies make. To the extent that law and policy can be distinguished, a Justice who cares about legal policy might seek to make what the judge sees as good law or as good policy.

71. *See* Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018, 1019 (2004) ("[A] Court that cares about its perceived legitimacy must rationally anticipate whether its preferred outcomes will be respected and faithfully followed by relevant publics."); Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703 (1994). This view is widely held—even by Supreme Court Justices who claim that public opinion should play no formal role in Supreme Court decision making. Chief Justice Rehnquist, for example, commented that the "design of our Constitutional system" makes it inevitable that the courts would "encounter challenges to [their] independence," and, consequently, judicial independence is linked in "some measure [to] the public's respect for the judiciary." William H. Rehnquist, *Judicial Independence*, 38 U. RICH. L. REV. 579, 595–96 (2004).

to engage in practices that conflict with public expectations of the Court.[72]

The premise that Justices seek solely to advance their conceptions of good legal policy is often accepted reflexively, without any consideration of its validity. At times, however, scholars argue for its validity on the ground that attributes of the Supreme Court as an institution render other goals irrelevant. Those scholars give particular emphasis to the irrelevance of career goals to the Justices, pointing out that few Justices of the current era have shown any interest in positions outside the Court.[73] As a result, it is thought, the Justices are free to concentrate their efforts on advancing their legal or policy goals.[74]

This premise might be contested by pointing to other goals that the Justices arguably seek to advance through their choices as decision makers. These goals may include harmonious relations with other Justices[75] as well as "money income, leisure, power, prestige, reputation, self-respect, the intrinsic pleasure (challenge, stimulation) of the work, and the other satisfactions that people seek in a job."[76] For our purposes, however, it is more important to think about motivation at a deeper level. Whatever goals the Justices seek to advance, there must be a motivational basis for that goal.[77]

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72. *See* EPSTEIN & KNIGHT, *supra* note 3, at 157–59; FRIEDMAN, *supra* note 1, at 370, 375; Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971, 973–74 (2009); Roy B. Flemming & B. Dan Wood, *The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods,* 41 AM. J. POL. SCI. 468, 494 (1997); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 89–90 (1993); Jeffery L. Mondak & Shannon Ishiyama Smithey, *The Dynamics of Public Support for the Supreme Court*, 59 J. POL. 1114, 1114 (1997).

73. *See* EPSTEIN & KNIGHT, *supra* note 3, at 36–39; SEGAL & SPAETH, *supra* note 3, at 95–96.

74. *See* EPSTEIN & KNIGHT, *supra* note 3, at 36–49 (analyzing several possible goals Justices might pursue and concluding that "most [J]ustices in most cases" seek to advance their policy preferences); SEGAL & SPAETH, *supra* note 3, at 92–96.

75. *See generally* PHILLIP J. COOPER, BATTLES ON THE BENCH: CONFLICT INSIDE THE SUPREME COURT (1995) (presenting a history of conflicts on the Supreme Court); Devins & Federspiel, *supra* note 7 (highlighting the role of intragroup dynamics in Supreme Court decision making).

76. RICHARD A. POSNER, HOW JUDGES THINK 36 (2008). Posner's point of reference is all judges, not simply Supreme Court Justices. At the same time, all items on his list might extend to Supreme Court Justices. For example, both Justices Scalia and Stevens have arguably embraced limiting the workload of Supreme Court Justices, saying that they appreciate the reduction in the number of cases that the Court has accepted since the mid-1980s. *See* M.R. Kropko, *Justice Scalia Says Smaller Docket Leads to Better Opinions*, ASSOCIATED PRESS STATE & LOCAL WIRE, Jan. 11, 2007 (Scalia); Pamela A. MacLean, *9th Circuit Reversal Rate Is Misleading*, NAT'L L.J., July 30, 2007, at 14 (Stevens). For additional discussion of the range of goals that might guide judges' choices, including some goals with only limited relevance to the Supreme Court, see, for example, Gary M. Anderson, William F. Shughart II & Robert D. Tollison, *On the Incentives of Judges to Enforce Legislative Wealth Transfers*, 32 J. L. & ECON. 215 (1989), examining the effects of judicial salaries on judicial independence; Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, 61 LAW & CONTEMP. PROBS. 157 (1998), examining the effect of differences in publication practices of federal circuits on judicial decision making; Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does),* 3 SUP. CT. ECON. REV. 1 (1993), presenting a positive economic theory of judicial behavior.

77. The Justices, after all, get nothing concrete from advancing favored policies; rather, they get symbolic benefits. But they also get symbolic benefits from other things as well, so it is not self-evident that the Justices will devote themselves single-mindedly to advancing policies they favor.

The social psychology and political science models generally—but not completely—converge. In particular, just as political science models talk about the pursuit of legal or policy preferences, social psychology likewise talks about the importance of personal beliefs. Although calling attention to the reasons why Supreme Court Justices will pursue goals other than the advancement of preferred legal or policy positions, social psychology recognizes that individuals will not act in ways that are inconsistent with matters central to their cognitive networks.[78] For this reason, Justices will typically cast votes that match their preferred legal or policy positions. This is especially true of Justices with strong ideological predispositions—in large part because they will place a high value on self-presentation with audiences who are likely to share their core legal policy preferences.[79]

B. THE SOCIAL PSYCHOLOGY MODEL[80]

The desire to be liked and respected by other people is a fundamental psychological motivation, and self-esteem depends heavily on the esteem in which one is held by others.[81] We would hardly expect Supreme Court Justices to be immune to this motivation. Indeed, it is likely to be especially salient to them.[82] The very process by which we select Supreme Court Justices tends to favor those with a strong interest in the esteem of other people. Accepting a judgeship entails accepting relatively significant constraints on personal activities and behaviors and, for most judges on higher courts, a significant reduction in monetary compensation. One of the things that Justices gain in compensation (in addition to an increase in potential power) is the esteem that attaches to a position on the highest court in the country. By no means would all people find this tradeoff attractive; rather, it would be most attractive to people who care the most about the esteem in which they are held.

Individuals seek to link themselves with other people and to win their esteem through the ways they present themselves to others.[83] Put differently, they engage in impression management—that is, the "process of controlling how one

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78. *See* Devins & Federspiel, *supra* note 7, at 90.

79. *See infra* notes 91–95 and accompanying text (discussing Justices Ginsburg and Thomas).

80. On the application of psychological theory to the Supreme Court, see LAWRENCE S. WRIGHTSMAN, THE PSYCHOLOGY OF THE SUPREME COURT (2006). On its application to judicial decision making more broadly, see THE PSYCHOLOGY OF JUDICIAL DECISION MAKING, *supra* note 7.

81. *See, e.g.*, RICK H. HOYLE ET AL., SELFHOOD: IDENTITY, ESTEEM, REGULATION 31–35 (1999); Roy F. Baumeister & Mark R. Leary, *The Need To Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 PSYCHOL. BULL. 497 (1995).

82. *See* BAUM, *supra* note 7, at 32–33. On judges' interest in how they are viewed by other people, see generally Thomas J. Miceli & Metin M. Coşgel, *Reputation and Judicial Decision-making*, 23 J. ECON. BEHAV. & ORG. 31 (1994); Schauer, *supra* note 70, at 625–31.

83. On self-presentation and the related concept of impression management, see generally ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959); MARK R. LEARY, SELF-PRESENTATION: IMPRESSION MANAGEMENT AND INTERPERSONAL BEHAVIOR (1996); Barry R. Schlenker & Michael F. Weigold, *Interpersonal Processes Involving Impression Regulation and Management,* 43 ANN. REV. PSYCHOL. 133 (1992).

is perceived by other people."[84] Like group dynamics generally, impression management is a universal phenomenon. Everyone engages in some form of impression management every day. It is an "essential component of social interaction" and affects both social and professional roles.[85]

Leaving aside their private interactions with colleagues, Supreme Court Justices have numerous forums in which they can engage in self-presentation and impression management. Impression management is a universal phenomenon and, as such, is still at work when one adopts a professional persona. In particular, Supreme Court Justices will "project images of themselves that are consistent with the norms in a particular social setting and with the roles they occupy."[86] In their Court work, they participate in oral argument, announce decisions and dissents, and publish opinions. Outside the Court, Justices have opportunities to give speeches, give interviews, and participate in seminars—and in the current era, some Justices make ample use of those opportunities.[87]

It is hardly difficult to identify efforts at self-presentation when Justices participate in those forums. In oral argument, for instance, some Justices clearly seek to project images of themselves as thoughtful or incisive or witty.[88] The same kind of image building is often evident in concurring or dissenting opinions, which are individual statements in a way that majority opinions are not.[89] That some Justices devote considerable time and energy to appearances outside the Court indicates their interest in self-presentation. To some degree, Justices' presentations of themselves might advance their interests in good legal policy as they see it. But for the Justices, as for other people, the primary motive for self-presentation undoubtedly is to appeal to people whose esteem they care about.

It might be that the Justices' interest in the esteem of other people does not extend to their choices as decision makers, but that seems unlikely. Justices surely understand that audiences outside the Court care—often a great deal—about the votes they cast and the legal rules they support. If judges seek popularity and respect, they have good reason to do so as decision makers. And although the Justices will not cast votes that undermine their preferred legal or policy preferences, they are also attentive to how they present themselves to audiences they care about. Put another way, Justices are not single-minded pursuers of their preferred policy positions; instead, they adopt legal policy

84. LEARY, *supra* note 83, at 2.

85. *Id.* at 3.

86. *Id.* at 67.

87. *See infra* Table 1.

88. On wit, see Jay D. Wexler, *Laugh Track*, 9 GREEN BAG 2D 59 (2005); Adam Liptak, *So, Guy Walks Up to the Bar, and Scalia Says . . .* , N.Y. TIMES, Dec. 31, 2005, at A1.

89. As Justice Scalia wrote, "To be able to write an opinion solely for oneself, without the need to accommodate, to any degree whatever, the more-or-less differing views of one's colleagues . . . that is indeed an unparalleled pleasure." Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 42. On the admiration that Justice Scalia's opinion writing has garnered, see MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 147 (2005).

positions that take account of both their ideological and personal preferences.

If all this is true, then the relative salience of various audiences to the Justices is a matter of considerable importance. Justices might seek popularity and respect from an array of audiences, including friends and acquaintances, judges on other courts, legal academics, political and ideological groups, the mass media, and the general public or subsets of the public.[90] The weights that Justices give to the various types of audiences help determine the ways that their concern with the esteem of others affects their decision making.

One factor that may influence both the relative salience of audiences and the ways that a Justice seeks to appeal to them is that particular Justice's position on the Court's ideological spectrum. Justices who stand at or near the ends of the spectrum may have strong identifications with reference groups that care more about the staking out of positions on core issues than anything else. These Justices, moreover, may care comparatively little about cultivating their images with reference groups outside of their inner-circles.

To make this point more concrete, consider two Justices from opposing ideological extremes of the Court—Clarence Thomas and Ruth Bader Ginsburg. Justices Thomas and Ginsburg almost certainly care about personal reference groups that identify with them and, in turn, they identify with. Even though their legal and policy views are largely in sync with these groups, there is good reason to think that either of these Justices would be reluctant to disappoint their respective reference groups. Justice Thomas strongly identifies with conservative political groups, an identification that is exemplified by his appearances at meetings of the Federalist Society, and the tone of his remarks at those meetings.[91] His links with conservative groups are strengthened by their support for him when he has been under attack and his antipathy toward liberal groups that he has identified as enemies.[92]

Without question, Justice Thomas's record on the Court is primarily a reflection of his personal values. But his values are reinforced by his group ties, which provide a strong incentive not to stray from positions that are important to conservatives. It is difficult to imagine that Justice Thomas could have voted against Governor Bush's claims in *Bush v. Gore*,[93] because such a vote would

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90. *See* BAUM, *supra* note 7, 50–155 (describing a variety of judicial audiences and how they affect judicial behavior). Fellow Justices may also be an important audience, and certainly group processes within the Court play a part in the Court's decision making. *See generally* Devins & Federspiel, *supra* note 7.

91. *See, e.g.*, Clarence Thomas, Be Not Afraid, Francis Boyer Lecture at the American Enterprise Institute Annual Dinner (Feb. 13, 2001) (transcript available at http://www.aei.org/speech/15211).

92. *See* JOHN C. DANFORTH, RESURRECTION: THE CONFIRMATION OF CLARENCE THOMAS 87–90, 130 (1994); CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR 75, 99, 107–08, 130, 210, 252, 257 (2007); Jeffrey Toobin, *The Burden of Clarence Thomas*, NEW YORKER, Sept. 27, 1993, at 38. According to one law clerk, early in his Court tenure Justice Thomas said that he would serve as a Justice until 2034: "The liberals made my life miserable for 43 years, and I'm going to make their lives miserable for 43 years." Neil A. Lewis, *2 Years After His Bruising Hearing, Justice Thomas Can Rarely Be Heard*, N.Y. TIMES, Nov. 27, 1993, at 7.

93. 531 U.S. 98 (2000).

have severely damaged his standing with groups that were important to his identity (and, in the process, would have brought joy to groups that he dislikes).

Like Justice Thomas and conservative groups, Justice Ginsburg would have great difficulty in taking positions with which her political reference groups strongly disagree. For example, it is unfathomable that Justice Ginsburg would cast the deciding vote to restrict abortion rights or limit sex discrimination claims. Not only was Justice Ginsburg a leading participant in the effort to expand women's rights through litigation as head of the Women's Rights Project of the American Civil Liberties Union,[94] Justice Ginsburg's ties to the women's movement did not dissolve when she reached the Court. In 2004, for example, Justice Ginsburg appeared at a lecture series named in her honor and cosponsored by the National Organization for Women Legal Defense Fund.[95]

Caring both about the advancement of their legal policy agendas and about their standing with groups they care about, Justices Ginsburg and Thomas have allied themselves with ideologically simpatico reference groups. We do not mean to overstate that point. Justices Ginsburg and Thomas, like other Justices, undoubtedly are interested in approval from a wide range of groups, not just those that share their points of view on issues of legal policy. Moreover, the two are not necessarily mirror images of each other in the extent of their integration into groups with ideological orientations. But for each, groups with ideological orientations similar to their own undoubtedly constitute important audiences.

By highlighting dramatic differences in the reference groups that Justices Ginsburg and Thomas identify with, this discussion highlights that the Supreme Court is not a unified body. The Justices identify with different reference groups, have different legal policy agendas, and so on and so forth.[96] For that reason, power typically lies at the center of the Court—so that the reference groups that matter most to the Court's swing Justices are the reference groups most likely to influence Court decision making.[97]

In thinking about swing Justices, we need to expand our consideration of social psychology.[98] David Winter has argued that political leaders act on their

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94. *See* FRED STREBEIGH, EQUAL WOMEN RESHAPE AMERICAN LAW 31–77 (2009). Justice Sandra Day O'Connor did not share Justice Ginsburg's ties with the women's movement, but her friendships and acquaintanceships with women in the legal and social elites may have shaped her positions on issues relating to the status of women. Justice Harry Blackmun speculated that Justice O'Connor would find it difficult to support the overturning of *Roe v. Wade* because she "may fear somewhat any accusation of being a traitor to her sex." Interview by Harold Hongju Koh with Harry A. Blackmun (June 20, 1995), *in* THE JUSTICE HARRY A. BLACKMUN ORAL HISTORY PROJECT 504–05, *available at* http://lcweb2.loc.gov/diglib/blackmun-public/page.html?FOLDERID=D0901&SERIESID=D09.

95. That appearance was the subject of some criticism. *See* Richard A. Serrano & David G. Savage, *Ginsburg Has Ties to Activist Group*, L.A. TIMES, Mar. 11, 2004, at A1.

96. *Cf.* Jeff Yates, Brian Levey, Justin Moeller, 'For the Times They are a Changin': Explaining U.S. Supreme Court Justices' Voting Through Identification with Micro-Publics (July 14, 2009) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1434250.

97. *See infra* notes 150–53 and accompanying text.

98. Portions of the next two paragraphs are drawn from Devins & Federspiel, *supra* note 7, at 91–92.

needs for achievement, power, and affiliation.[99] An individual's interest in the approval of others arises largely from the need for affiliation. But that interest may also reflect a need for power—that is, a need to influence others and to control or shape the surrounding world.[100]

Like other types of political leaders, Justices undoubtedly have inherent differences in their need for power. It may be, for instance, that Justices who take strong ideological positions care less about power on the Court than about expressing their views and receiving reinforcement for those expressions from like-minded groups. But any inherent differences among Justices are probably less important than their positions on the Court's ideological spectrum. In particular, swing Justices find themselves in a position that allows them to exercise disproportionate power over the Court's decisions.[101]

Assuming that the Court is sharply divided (so that the median Justice is positioned to cast the deciding votes on the most visible, divisive issues confronted by the Court), a swing Justice will have numerous opportunities to exercise substantial power. Swing Justices can exercise that power by writing consequential concurring opinions that limit the reach of the majority's ruling or by insisting that their legal policy preferences are reflected in the majority opinion. That is why Court commentators speak as much of the O'Connor or Kennedy Courts as they do of the Rehnquist or Roberts Courts.[102] As we have suggested, swing Justices are not necessarily different from other Justices in their motivations; a Justice's position as the Court's median may reflect the Court's ideological configuration more than anything else. But to the extent that swing Justices are ideologically moderate, they might have comparatively weak legal policy preferences and a comparatively strong desire to either exercise power or curry favor with reference groups that do not demand ideological conformity. Moreover, their status as swing Justices might lead them to cultivate reputations of neutrality and amenability to persuasion by groups with disparate ideological positions.

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99. David G. Winter, *Measuring the Motives of Political Leaders at a Distance*, *in* THE PSYCHOLOGICAL ASSESSMENT OF POLITICAL LEADERS 153–54 (Jerrold M. Post ed., 2003); David G. Winter, *Motivation and Political Leadership*, *in* POLITICAL LEADERSHIP FOR THE NEW CENTURY: PERSONALITY AND BEHAVIOR AMONG AMERICAN LEADERS 25 (Linda O. Valenty & Ofer Feldman eds., 2002).

100. On the question of how an individual's need for power influences his or her willingness to join a coalition, see DONELSON R. FORSYTH, GROUP DYNAMICS 92 (3d ed. 1999).

101. The question of whether swing Justices truly exercise more power than their colleagues is an intriguing one. Arguably, all Justices are equal in power because each casts one vote. But because the votes of swing Justices are less predictable than those of their colleagues, and because they find themselves in the majority more often, they have at least the appearance of greater power. That appearance affects both the perceptions of swing Justices by their colleagues and people outside the Court as well as the self-perceptions of swing Justices, which are the most relevant concerns for our purposes.

102. *See, e.g.*, Posting of Lyle Denniston to SCOTUSblog, http://www.scotusblog.com/2010/04/the-kennedy-court-only-more-so/ (Apr. 28, 2010, 18:49).

C. THE SALIENCE OF ELITE AUDIENCES

To what extent do Justices—especially swing Justices—care about the esteem of the general public, and to what extent do they care about the esteem of groups that consist of people who are political and social elites (groups such as lawyers, political leaders, and reporters for high-status publications)? The answer seems self-evident. Like others, Supreme Court Justices want most to be liked and respected by people to whom they are personally close and people with whom they identify.[103] For the Justices, those people are overwhelmingly part of elite groups.

"Except for Justice Thomas," as Judge Richard Posner observed, "the current Justices of the Supreme Court grew up in privileged circumstances and do not rub shoulders with hoi polloi."[104] Because the Justices are "sheltered, cosseted,"[105] and "overwhelmingly upper-middle or upper-class and extremely well educated, usually at the nation's more elite universities,"[106] the views of social and economic leaders are likely to matter more to the Court than to popularly elected lawmakers (who must appeal to popular sentiment in order to win elections).[107]

Correspondingly, a considerable degree of the salience of elite groups is tied to the simple fact that all Supreme Court Justices—irrespective of their family background—are themselves part of the elite of American society and spend a high proportion of their time with other members of the elite. Certainly their associations are not limited to members of elite groups. But the people who are most important to them typically have high status. Supreme Court Justices are like other people in that they are very concerned with how they are perceived by the people closest to them. As a result, they are most susceptible to influence by people who share their educational attainment and social status.[108]

1. The Legal Profession

Beyond their close personal circles, the Justices interact with people who are part of specific elite groups in American society. On the whole, the most salient

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103. The scholarship on social identity emphasizes the importance of people's identifications with groups of which they themselves are a part. *See generally* SOCIAL IDENTITY AND SOCIAL COGNITION (Dominic Abrams & Michael A. Hogg eds., 1999); HENRI TAJFEL, DIFFERENTIATION BETWEEN SOCIAL GROUPS: STUDIES IN THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS (1978); Marilynn B. Brewer, *The Many Faces of Social Identity: Implications for Political Psychology,* 22 POL. PSYCHOL. 115 (2001); Kay Deaux, *Reconstructing Social Identity,* 19 PERSONALITY & SOC. PSYCHOL. BULL. 4 (1993).

104. POSNER, *supra* note 76, at 306.

105. *Id.*

106. Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 189 (1998).

107. *See also* Schauer, *supra* note 70, at 622–23 (discussing life tenure and its influences on judicial decision making and contrasting judicial to legislative decision making).

108. In Part III, we will make this point more concrete by looking at empirical evidence supporting our claim that Justices care about elite audiences. For additional discussion of how the Justices' elitist background contributes to their isolation from the mass public, see Klarman, *supra* note 106, at 189–94.

group—more accurately, a set of interconnected groups—is the legal profession. Justices were trained in the law, and most spent a high proportion of their pre-appointment careers working in the law. As Justices, they work most closely with other lawyers. Thus, the Justices have good reason to care about how they are regarded by other lawyers. Further, those legal professionals—especially fellow judges and legal academics—perform the most intensive evaluations of the Justices' voting behaviors and judicial opinions.[109] This attentiveness to the Justices' work, combined with the salience of the legal profession to the Justices, makes members of that profession an important audience for members of the Supreme Court.

All of this is especially true in the current era, in which Justices typically come from careers in law rather than politics. In a development that has received considerable attention,[110] since 1969, Presidents have turned primarily to sitting judges for their nominees to the Supreme Court. Every appointment between 1975 and 2009 was of a sitting judge, and every new Justice from Justice Scalia in 1986 through Justice Sotomayor in 2009 was a current member of a federal court of appeals.[111] As a result, from 2006 to 2010, all nine members of the Court had come to the Court from the courts of appeals. Moreover, the prior careers of the Justices appointed since 1969 have been dominated by the practice of law, law teaching, and judging rather than political positions.[112] This trend is made evident when one notes that Justice O'Connor, in 1981, was the last appointee who had ever run for public office.[113]

One indicator of the salience of the legal profession to the Justices is the public and semi-public appearances they make. Table 1 provides summary information on the Justices' reimbursed appearances between 1998 and 2008, based on the lists of reimbursements in their annual financial reports. For the Justices as a group, more than one-quarter of the appearances for which they received substantial reimbursements were before groups of lawyers or judges,

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109. *See* Benjamin J. Roesch, *Crowd Control: The Majoritarian Court and the Reflection of Public Opinion in Doctrine*, 39 SUFFOLK U. L. REV. 379, 396 (2006).

110. *See, e.g.*, Lawrence Baum, *Recruitment and the Motivations of Supreme Court Justices*, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 201, 209–10 (Cornell W. Clayton & Howard Gillman eds., 1999); Lee Epstein, Jack Knight & Andrew D. Martin, *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CAL. L. REV. 903 (2003).

111. *See* LAWRENCE BAUM, THE SUPREME COURT 51 (9th ed. 2007); Federal Judicial Center, Biographical Directory of Federal Judges, http://www.fjc.gov/history/judges.html (biographical information on Justice Sonia Sotomayor). (Of course, that was not true of every presidential nomination: Harriet Miers, nominated by President George W. Bush in 2005 to succeed Sandra Day O'Connor, had not served as a judge.) Thus, if Elena Kagan is confirmed as a justice, she would be the first appointee who was not sitting on a federal court of appeals since Sandra Day O'Connor in 1981 and the first non-judge appointed to the Court since Lewis Powell and William Rehnquist in 1971.

112. Among the Justices appointed between 1969 and 2009, the median proportion of their post-law school careers spent in private practice, law school teaching, and the judiciary was 87 percent. The comparable figure for appointees between 1937 and 1968 was 67 percent. LAWRENCE BAUM, THE SUPREME COURT 58 (10th ed. 2010).

113. *See* Baum, *supra* note 110.

Table 1. Reimbursed Appearances by Supreme Court Justices, 1998–2008[116]

			Categories			
Justice	**Years**	**Total Appearances**[117]	**Colleges/ Universities**[118]	**Law Schools**[119]	**Bar/ Bench**[120]	**Other**[121]
Alito[122]	3	24	14	8+	7	3
Breyer[123]	11	174	88	38+	46	45
Ginsburg[124]	11	136	77	64+	41	18
Kennedy[125]	11	154	69	31+	58	32
O'Connor[126]	8	148	53	30+	56	42
Rehnquist[127]	7	24	22	14+	1	1
Roberts[128]	3	23	20	12+	3	1
Scalia[129]	11	239	128	65+	49	64
Souter[130]	11	5	5	4+	0	0
Stevens[131]	11	24	8	3+	13	3
Thomas[132]	11	100	52	41+	15	33
Total		1051	537	301+	289	242

and a minimum of about the same number were at law schools.[114] Undoubtedly, the frequency of the Justices' interactions with legal audiences of various sorts is in part a result of their sense of duty as Justices. But that frequency also reflects the Justices' interest in legal audiences. In themselves, such appearances reinforce the relevance of those audiences to the Justices. Furthermore, "[f]or many of the Justices, the clerks [they hire], and the larger law school culture around which the Justices themselves travel . . . [provides them with evidence] of the current attitudes of young intellectuals, of law professors, and of the intellectual classes in general."[115]

114. *See infra* Table 1. That number is an underestimate, perhaps a substantial underestimate, because the Justices do not always indicate in their financial reports that appearances at colleges and universities are specifically at law schools.

115. Schauer, *supra* note 70 at 628. In Part III, we will build upon this point—discussing how it is that the Justices take signals from legal academics and other elites.

116. Data are from the Justices' annual Financial Disclosure Reports. In general, the Justices must report reimbursements of more than $250. 5 U.S.C. § 102(a)(2)(B). The figures in the tables are approximate rather than exact because of incomplete information in some entries and differences in reporting practices. In particular, multiple appearances in a single trip are sometimes placed in single entries, and sometimes in multiple entries.

117. Totals across the four categories (colleges/universities, law schools, bar/bench, other) add up to more than the "total appearances" column because some appearances fell into multiple categories.

118. "Colleges/Universities" includes any appearance that is listed as occurring at a college or university, or before a college alumni group. All appearances in the "Law Schools" category are also counted in this category.

119. "Law school" includes any appearance that is listed as occurring at a law school. The "+" signs indicates that the numbers for law schools are underestimates, because it appears that Justices

2. Public Interest Organizations

In addition to lawyer groups and the legal academic community, Supreme Court Justices are likely to care about the media and members of public interest organizations. All of these groups (the "intellectual class")[133] are part of the same "upper-middle, professional class" that Supreme Court Justices have attained and in which most grew up and, for this reason, "the values judges . . . single out as fundamental . . . are likely to have the smell of the lamp about

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frequently list law school appearances only by the name of the college or university. All appearances in this category are also counted in the "Colleges/Universities" category.

120. "Bar/Bench" includes any appearance before a group composed primarily of lawyers, judges, or both.

121. "Other" includes all appearances that do not fall into the "college" or "bench/bar" categories.

122. *See* Samuel A. Alito, Financial Disclosure Reports for Calendar Years 2006–2008, *available at* http://moneyline.cq.com/flatfiles/editorialFiles/moneyLine/reference/scotus/scotus.html.

123. *See* Stephen G. Breyer, Financial Disclosure Reports for Calendar Years 1998–2003 (obtained from the Financial Disclosure Office of the Administrative Office of the U.S. Courts) (on file with authors); Stephen G. Breyer, Financial Disclosure Reports for Calendar Years 2004–2008, *available at* http://moneyline.cq.com/flatfiles/editorialFiles/moneyLine/reference/scotus/scotus.html.

124. *See* Ruth B. Ginsburg, Financial Disclosure Reports for Calendar Years 1998–2003 (obtained from the Financial Disclosure Office of the Administrative Office of the U.S. Courts) (on file with authors); Ruth B. Ginsburg, Financial Disclosure Reports for Calendar Years 2004–2008, *available at* http://moneyline.cq.com/flatfiles/editorialFiles/moneyLine/reference/scotus/scotus.html.

125. *See* Anthony M. Kennedy, Financial Disclosure Reports for Calendar Years 1998–2003 (obtained from the Financial Disclosure Office of the Administrative Office of the U.S. Courts) (on file with authors); Anthony M. Kennedy, Financial Disclosure Reports for Calendar Years 2004–2008, *available at* http://moneyline.cq.com/flatfiles/editorialFiles/moneyLine/reference/scotus/scotus.html.

126. *See* Sandra Day O'Connor, Financial Disclosure Reports for Calendar Years 1998–2005 (obtained from the Financial Disclosure Office of the Administrative Office of the U.S. Courts) (on file with authors).

127. *See* William H. Rehnquist, Financial Disclosure Reports for Calendar Years 1998–2005 (obtained from the Financial Disclosure Office of the Administrative Office of the U.S. Courts) (on file with authors).

128. *See* John G. Roberts, Jr., Financial Disclosure Reports for Calendar Years 2005–2008, *available at* http://moneyline.cq.com/flatfiles/editorialFiles/moneyLine/reference/scotus/scotus.html.

129. *See* Antonin Scalia, Financial Disclosure Reports for Calendar Years 1998–2003 (obtained from the Financial Disclosure Office of the Administrative Office of the U.S. Courts) (on file with authors); Antonin Scalia, Financial Disclosure Reports for Calendar Years 2004–2008, *available at* http://moneyline.cq.com/flatfiles/editorialFiles/moneyLine/reference/scotus/scotus.html.

130. *See* David H. Souter, Financial Disclosure Reports for Calendar Years 1998–2003 (obtained from the Financial Disclosure Office of the Administrative Office of the U.S. Courts) (on file with authors); David H. Souter, Financial Disclosure Reports for Calendar Years 2004–2008, *available at* http://moneyline.cq.com/flatfiles/editorialFiles/moneyLine/reference/scotus/scotus.html.

131. *See* John Paul Stevens, Financial Disclosure Reports for Calendar Years 1998–2003 (obtained from the Financial Disclosure Office of the Administrative Office of the U.S. Courts) (on file with authors); John Paul Stevens, Financial Disclosure Reports for Calendar Years 2004–2008, *available at* http://moneyline.cq.com/flatfiles/editorialFiles/moneyLine/reference/scotus/scotus.html.

132. *See* Clarence Thomas, Financial Disclosure Reports for Calendar Years 1998–2003 (obtained from the Financial Disclosure Office of the Administrative Office of the U.S. Courts) (on file with authors); Clarence Thomas, Financial Disclosure Reports for Calendar Years 2004–2008, *available at* http://moneyline.cq.com/flatfiles/editorialFiles/moneyLine/reference/scotus/scotus.html.

133. ROBERT H. BORK, THE TEMPTING OF AMERICA 242 (1990).

them."[134] Consider, for example, political and ideological groups, those that are primarily concerned with issues of public policy. Even in the current era, when Justices as a group are heavily oriented to the legal profession, they have often been actively involved in politics or with groups that have ideological positions prior to their judicial service.

Inevitably, Justices who strongly identify with such groups carry those identifications with them when they join the Supreme Court. Indeed, some Justices maintain concrete relationships with ideological groups. Those relationships are only hinted at by records of reimbursed appearances, since most contacts between Justices and ideological groups are informal, and many take place in Washington, D.C. (where appearances seldom involve reimbursements that are listed in the Justices' financial reports).[135] However, in combination with other sources, the Justices' financial reports indicate the continued salience of ideological groups to some Justices.

The attachment of Justices to interest groups, as noted above, is best seen in the practices of Justices at either end of the ideological spectrum.[136] Justice Scalia, for example, helped organize the Federalist Society[137] and he continues to participate at Federalist Society events, including frequent appearances at events outside Washington D.C.[138] In addition to Justice Scalia, Justices Thomas, Alito, and Chief Justice Roberts all have active ties with the Federalist Society.[139] Indeed, all four appeared at the 2007 Federalist Society annual convention.[140] For their part, some of the Court's left-leaning Justices maintain ties with the Federalist Society's liberal counterpart, the American Constitution

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134. JOHN HART ELY, DEMOCRACY AND DISTRUST 59 (1980).

135. Of the 1031 reimbursed appearances in the 1998–2008 period, only five took place in Washington, D.C.

136. *See supra* notes 91–95 and accompanying text. For more than thirty years, the Court has not been dominated by either a left- or right-leaning faction, so that power has typically resided in so-called swing Justices. As a result, Justices with strong ties to groups at either end of the ideological spectrum have not dominated Court decision making on visible, divisive issues.

137. *See* Peter S. Canellos, *A Call to Order Sounds for Liberals on Message*, BOSTON GLOBE, Aug. 5, 2003, at A3.

138. Justice Scalia's financial reports for 1998–2008 list thirteen appearances at Federalist Society events.

Appearances in the "other" category were coded as "ideological" if the group before which the Justice appeared had an identifiable position on the ideological spectrum. This coding is necessarily inexact, but it is worth noting that the proportion of all appearances that were coded as ideological was highest for Justice Scalia and Justice Thomas, at eight percent and nine percent, respectively. However, the need for caution in interpreting these figures is underlined by one of Justice Scalia's appearances before an ideological group—a state chapter of the American Civil Liberties Union.

139. Increasingly, the Justices—especially conservative justices—have tended to hire law clerks who have worked for court of appeals judges with ideological positions similar to their own. *See* Corey Ditslear & Lawrence Baum, *Selection of Law Clerks and Polarization in the U.S. Supreme Court*, 63 J. POL. 869, 882–83 (2001). On broader ideological linkages between Justices and clerks, see William E. Nelson, Harvey Rishikof, I. Scott Messinger & Michael Jo, *The Liberal Tradition of the Supreme Court Clerkship: Its Rise, Fall, and Reincarnation?*, 62 VAND. L. REV. 1749 (2009).

140. Robert Barnes, *Federalists Relish Well-placed Friends: President, Several Justices Help Celebrate Legal Society's 25 Years of Conservatism*, WASH. POST, Nov. 16, 2007, at A3.

Society. For example, Justices Ginsburg and Breyer were featured speakers at the Society's first two national conventions.[141] Close ties between Justices and groups that share their views are hardly surprising. As suggested above, it is to be expected that Justices would want to be held in high regard by reference groups they care about.[142]

3. The News Media and Academia

As we have suggested already, legal academics may be an especially salient audience within the legal profession. The news media may also be a salient audience, and the impact of these two groups is parallel in some important respects. The potential salience of academics and the news media has three different sources.

First, the news media and academia play an important role in defining the Justices' status and reputation within their own inner circles. Supreme Court Justices read the newspapers, as do their family and friends. Their clerks and the advocates who appear before them typically served as the editors of the nation's leading law reviews, and many of their clerks will become academics—writing journal articles and books about their handiwork. Supreme Court Justices, moreover, are part of the larger law school culture. They frequently travel to law schools and have strong ties to the elite schools that they and their clerks attended.[143]

Second, the news media and academia also define the Justices' status and reputation to society at large.[144] Political elites in general and the news media in

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141. *See* Ruth Bader Ginsburg, Associate Justice, U.S. Supreme Court, Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication, Keynote Address, First National Convention of the American Constitution Society (Aug. 2, 2003), *in* 22 YALE L. & POL'Y REV. 329; Stephen G. Breyer, Associate Justice, U.S. Supreme Court, Keynote Speaker at the American Constitution Society Conference (June 18, 2004) (transcript available at http://www.acslaw.org/files/2004%20convention_Breyer_speech%20transcript.pdf).

142. It is likewise noteworthy that some Justices maintain informal social and professional ties with people outside the Court who are on the same side of the ideological spectrum. One well known example is the lunchtime interaction among liberal Justices, lower court judges, and other Washingtonians in the 1960s and 1970s. *See* Fred Barbash, *Judge Bazelon's "Network": The Salon of the Ultimate Liberal*, WASH. POST, Mar. 1, 1981, at A2; Francis X. Clines & Warren Weaver Jr., *Briefing*, N.Y. TIMES, May 18, 1982, at A18.

143. *See supra* tbl.1; Schauer, *supra* note 70, at 628. With the exception of Justice Stevens, who attended Northwestern Law School, all the Justices who served in the Court's 2009 Term attended either Harvard or Yale Law School (although Justice Ginsburg transferred from Harvard to Columbia). Federal Judicial Center, Biographical Directory of Federal Judges, http://www.fjc.gov/public/home.nsf/hisj (last visited Mar. 24, 2010). If Elena Kagan is confirmed as Justice Stevens's successor, every Justice will have gone to law school at Harvard or Yale. For commentary on the prospects of a Harvard–Yale Supreme Court, see Christopher Edley, Jr., *Why Elites Do Belong on the Supreme Court*, WASH. POST, May16, 2010, at B-1, arguing that elite institutions rightfully serve as "gatekeepers" and that the graduates of elite institutions "are more diverse in aspirations and passions than can be imagined"; Jonathan Turley, *It's Their Private Court*, L.A. TIMES, May 12, 2010, at A-17, contending that the "favoritism" shown Harvard and Yale is "clearly arbitrary and capricious," running "against the grain of a nation based on meritocracy and opportunity."

144. *See* Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 GEO. L.J. 897, 928–30 (2005) (noting public opinion is shaped by political

particular play a significant role in opinion formation among the mass public. Indeed, on issues "that are not ideologized in the mass public," there is a convergence between elite opinion (typically reinforced by Supreme Court decision making) and public opinion—as "media discussion [of a Court decision] and elite behavior" change public norms in ways that "reduce the differences between the pattern of elite and mass opinion on an issue."[145]

Third, whereas the mass public knows very little about the specific decisions of the Court,[146] elites are far more likely to pay attention to reports on Court decision making. In other words, elites are the principal consumers of media reports about the Court, especially in specialized media such as legal newspapers and blogs.

The media's influence in shaping the Justices' decision making is something that we will take up in Part III, when we discuss whether there is empirical evidence backing the so-called Greenhouse effect, whereby Justices shift their views to reflect the left-leaning values of media and academic elites.[147] At this point, two observations are in order: First, there is little question that Justices pay attention to reports about the Court and about themselves personally in the news media. Although the Justices interact with reporters far less than their counterparts in the other branches, such interactions are not rare[148] and they are becoming more common. Justices may engage in those interactions for several reasons, but it is likely that an interest in shaping news coverage is one of those reasons.[149]

Second, there is good reason to think that the Court's swing Justices are especially sensitive to their reputations among academic and media elites. Swing Justices typically have comparatively weak legal policy preferences, and as such, are more likely to engage in externally focused impression management.[150] In particular, rather than seeking to win the esteem of some ideologi-

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elites); Amnon Reichman, *The Dimensions of Law: Judicial Craft, Its Public Perception, and the Role of the Scholar*, 95 CAL. L. REV. 1619, 1637–43 (2007) (noting how the media defines the social meaning of Supreme Court decisions).

145. Patrick Egan, Nathaniel Persily & Kevin Wallsten, Gay Marriage, Public Opinion and the Courts 43 (Apr. 2006) (paper prepared for delivery at the Midwest Political Science Association Annual Conference, *available at* http://www.allacademic.com/meta/p_mla_apa_research_citation/1/3/9/6/2/p139621_index.html).

146. *See infra* Part III.

147. Today, social and cultural issues are the dominant issues before the Court. Before 1930, however, economic issues dominated and the cultural elite supported "a constitutional jurisprudence that was somewhat more protective of property rights than was majoritarian politics." Klarman, *supra* note 106, at 190.

148. *See* RICHARD DAVIS, DECISIONS AND IMAGES: THE SUPREME COURT AND THE PRESS 102–31 (1994); WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 128–29 (1964); DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT 150 (1992); Linda Greenhouse, *Nixon Appointee Eased Supreme Court Away from Liberal Era*, N.Y. TIMES, June 26, 1995, at A1.

149. The Justices' interest in the content of news coverage is reflected in their occasional complaints about it. *See, e.g.*, Antonin Scalia, Letter to the Editor, *Scalia: Article Off Base*, LEGAL TIMES, Oct. 2, 2000, at 85; Potter Stewart, Letter to the Editor, *Justice Stewart Dissents*, WALL ST. J., July 3, 1968, at 6.

150. *See supra* notes 83–85 and accompanying text.

cally identifiable group, swing Justices are often drawn to the norm of judicial independence and the idea that a neutral, impartial arbiter would not join one or another faction that regularly favors liberal or conservative outcomes.[151] For example, Justice Anthony Kennedy—the super median on today's Roberts Court—seems particularly concerned with his public persona. According to one of his law clerks, Justice Kennedy "'would constantly refer to how it's going to be perceived, how the papers are going to do it, [and] how it's going to look.'"[152] On the very day that the Court reaffirmed *Roe* in *Planned Parenthood v. Casey*, Justice Kennedy told a reporter that "'[s]ometimes you don't know if you're Caesar about to cross the Rubicon or Captain Queeg cutting your own tow line.'"[153] No doubt, Justice Kennedy may be an extreme case. Nevertheless, there is good reason to think that swing Justices are more apt to be externally focused and, as such, more interested in press and academic commentary about the Court.

D. SUMMARY

Social psychology provides important insights into Supreme Court decision making. Unlike political science models which emphasize the pursuit of legal policy preferences, social psychology highlights how issues of self presentation also contribute to the choices Justices make. In so doing, social psychology takes into account both the legal policy preferences of Justices (by recognizing that a Justice will only back up legal or policy positions that are roughly in sync with their personal preferences) and a Justice's interest in power and reputation (by recognizing that a Justice's preferences and votes—consciously or unconsciously—are influenced by audiences they care about).

By highlighting how Justices take audiences into account, this Part has called attention to divergences between the social psychology and political science models. At the same time, it is important to recognize that both models anticipate that Justices will diverge from favored policy positions to pursue other objectives. Political science models that argue that the Court accommodates itself to public opinion, for example, anticipate that Justices will calibrate their decision making to stave off public disapproval. The social psychology model, on the other hand, highlights the pivotal role that personal motivation plays in judicial decision making. There is reason to think that political science models that view public opinion as a significant influence on the Justices anticipate greater divergence by the Justices from positions that reflect their policy preferences than does the social psychology model. Social psychology anticipates that the formation of legal policy preferences is driven by both

151. Impression management figures prominently into this calculation. According to Mark Leary, "people try to project images of themselves that are consistent with the norms in a particular social setting and with the roles they occupy." LEARY, *supra* note 83, at 67.

152. TUSHNET, *supra* note 89, at 176 (quoting an anonymous Justice Kennedy clerk).

153. JAN CRAWFORD GREENBURG, SUPREME CONFLICT 159 (2007) (quoting Justice Kennedy).

ideological and personal motivations, so there is likely to be considerable agreement between Justices' preferences and the preferences of the audiences that are most important to them. In contrast, any mechanisms that lead to agreement in preferences between the Justices and the general public are likely to be weaker.

Social psychology is important for three other related reasons. First, even though the Supreme Court Justices are members of a single Court, it is wrong to describe the Court as a unitary body. Not only do the Justices have different legal policy preferences, they also place different values on power and reputation—including their willingness to be associated with ideologically identifiable groups.

Second, in looking at the Supreme Court as a conglomeration of individual preferences, social psychology—consistent with the political science models—calls attention to the often pivotal role that median Justices play in Court decision making.[154] Unlike the political science models, however, social psychology calls attention to the important role that audiences play in the decision making of median Justices.

Third, and finally, social psychology is instructive in understanding which audiences matter most to Justices. Supreme Court Justices are elites whose reference groups are also elites. And although there are both liberal and conservative elite audiences—so that highly ideological Justices are likely to garner praise from the interest groups they identify with so long as they generally support the positions of those groups—the Court's swing Justices are especially likely to look to the media, law professors, and lawyers' groups like the American Bar Association. These are the very audiences that will dissect and write about the Justices' opinions, both in specialty journals for the legal profession and in books and articles that reach across elite audiences (and ultimately filter to the mass public).[155] As it turns out, these audiences are left-leaning, at least on civil liberties issues, in the current era.[156] For that reason, it is to be expected that Supreme Court decision making will sometimes

154. The median Justice plays an often decisive role on an ideologically divisive Court. When there is a dominant coalition of five or more Justices, swing Justice preferences may give way to intra-group dynamics within the majority coalition. *See* Devins & Federspiel, *supra* note 7.

155. *See supra* notes 144–45 and accompanying text.

156. On legal scholars, see John O. McGinnis, Matthew A. Schwartz, & Benjamin Tisdell, *The Patterns and Implications of Political Contributions by Elite Law School Faculty,* 93 GEO. L.J. 1167, 1170 (2003); Deborah Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 CHI.-KENT L. REV. 765, 780 n.54 (1998); Gregory C. Sisk, Michael Heise, & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1463 (1998). On academics in general, see Patricia Cohen, *Professor Is a Label That Leans to the Left*, N.Y. TIMES, Jan. 18, 2010, at C1. On the news media, see DAVID H. WEAVER & G. CLEVELAND WILHOIT, THE AMERICAN JOURNALIST: A PORTRAIT OF U.S. NEWS PEOPLE AND THEIR WORK 28, 31 (1991), showing a reduced but still substantial tendency toward liberalism and Democratic identification among executives and staff members of "prominent" news organizations; Stanley Rothman & S. Robert Lichter, *Personality, Ideology and World View: A Comparison of Media and Business Elites*, 15 BRIT. J. POL. SCI. 29, 31 (1985).

favor these elite preferences over the preferences of the American people.[157]

In the next Part of this Article, we will examine empirical evidence relevant to our theory. We will initially consider whether the Supreme Court has reason to value the opinion of the mass public. We will then examine whether the Supreme Court does in fact prefer elite opinion to public opinion. In the course of this analysis, we will both consider whether some Supreme Court Justices shift their views in order to curry favor with elite audiences and examine divergences between elite and public opinion.

III. ANALYZING THE EMPIRICAL EVIDENCE

In Part II, we discussed the implications of psychological theory for the relationship between Supreme Court Justices and the world outside the Court. Those implications lead us to expect that the Justices will respond more to elite groups in American society than to the general public. Correspondingly, by highlighting both the pivotal role played by the median Justice and reasons why the median Justice is likely to pay close attention to left-leaning audiences (the media, the academy, bar groups), Part II signaled that the Court would veer left of the mass public on socially divisive issues.[158]

In this Part, we analyze empirical evidence on several of the issues that we raised in Part II. In the first section, we discuss the primary link that scholars have posited between the Court and the general public: the Court's need for legitimacy to preserve its effectiveness as a policy maker. We show that the Court's legitimacy is robust and that it is not subject to significant damage from the Court's decisions. Thus, the Justices have little reason to adapt their decisional outputs in order to maintain their legitimacy.

In the second section, we analyze the empirical evidence on the influence of public opinion on the Court. We consider evidence on agreement between the Court and the public and on actions by the Justices to align the Court more closely with public opinion. Although the evidence is inherently ambiguous in some respects, it suggests that the general public exerts at most limited influence over the Court's decisions.

The final section examines evidence on elite audiences' relationships with the Justices and their impact on the Court. Because elite groups cannot be defined with precision and because systematic information on elite attitudes is limited, the evidence that we present is necessarily suggestive. Nevertheless, we find evidence of elite influence in three forms. First, case studies suggest that under some circumstances, the Justices respond to segments of the elite that express

157. The preferences of elites and those of the mass public are often in sync. When they are in tension, however, the Supreme Court often favors elite views. In Part III, *infra*, we provide empirical support for this claim.

158. This conclusion is somewhat dependent on the Court being ideologically divided—as the power of the median Justice is tied to the absence of a majority coalition of five or more ideologically simpatico Justices. *See supra* note 67.

opinions about prospective and actual decisions. Second, on salient issues the Court aligns itself more closely with the opinions of highly educated people than with the general public as a whole. Finally, we show that the Justices' voting patterns in salient cases are consistent with the most popular conception of elite influence among people who are interested in the Court, the hypothesis of a "Greenhouse effect" of elite groups on the Justices.

As we will reiterate, none of this evidence is conclusive. However, it supports the conception of the Justices that we presented in Part II. At the same time, it raises questions about the validity of a conception in which the Supreme Court follows the lead of the general public in charting its collective path.

A. LEGITIMACY AS A SOURCE OF RESPONSIVENESS TO PUBLIC OPINION

Scholars who perceive a linkage between the Court and the public emphasize what they see as the Justices' concern with the Court's legitimacy. Other possible sources of influence for public opinion (most notably, the Justices' concern with their individual popularity)[159] are typically given no weight.[160] In this view, the Justices respond to public views because they are concerned with the Court's efficacy as a maker of legal policy. Lacking concrete sources of power, the Court depends on its public legitimacy.[161] "To the extent that the judges have had freedom to act," Barry Friedman writes, "it has been because the American people have given it to them. Judicial power exists at popular dispensation."[162] Insufficient legitimacy will lead to negative consequences, including poor implementation of the Court's decisions and attacks on the Court and its powers by the other branches of government. As a result, scholars argue, the Justices are hesitant to adopt lines of decisions that diverge sharply from public opinion or to engage in practices that conflict with public expectations of the Court.[163]

We will consider the empirical evidence that is relevant to this argument. We begin by examining public knowledge of and interest in the Supreme Court's decisions. Low levels of knowledge and interest suggest that the general public

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159. To take one well-known example, observers of the Court have discussed the interest of Justice Hugo Black in his public image and have speculated about the impact of that interest on the positions he took on the Court. *See* DAVIS, *supra* note 148, at 43; WILLIAM DOMNARSKI, IN THE OPINION OF THE COURT 67 (1996); Dennis J. Hutchinson, *Remembering Lewis F. Powell*, 2 GREEN BAG 2D 163, 167 (1999).

160. Barry Friedman recognizes both rationales, although his argument is largely moored to the legitimacy rationale. *Compare* FRIEDMAN, *supra* note 1, at 374 ("[T]hat the Justices are only human may say a lot for why responsiveness to public opinion occurs. The Justices are no less vain than the rest of us, and it is human nature to like to be liked or even applauded and admired."), *with id.* at 375 ("The most telling reason why the Justices might care about public opinion, though, is simply that they do not have much of a choice. At least, that is, if they care about preserving the Court's institutional power, about having their decisions enforced, about not being disciplined by politics.").

161. *See supra* notes 16, 71 and accompanying text (providing examples of Supreme Court Justices explicitly referencing legitimacy concerns).

162. FRIEDMAN, *supra* note 1, at 370.

163. *See supra* notes 4–6 and accompanying text.

does not closely monitor decisions and responds negatively to unpopular decisions. Still, the public may react negatively to what it does know and care about, so the Justices might have reason to act in ways that safeguard their legitimacy. Thus, we turn to the evidence directly on legitimacy. That evidence shows that the Justices have little to fear from a public that disagrees with its decisions, because its legitimacy is largely impervious to such disagreement.

Even so, the Justices might act to safeguard their legitimacy for either of two reasons. They might exaggerate the threat to the Court and thus over-respond to the public. Alternatively, the other branches of government, with their substantial power over the Court, might act on behalf of the public. If so, the Justices would have reason to take public opinion into account. These are meaningful possibilities, but we will discuss why we think they do not have substantial effects.

In considering public knowledge and interest in the Court, we can start by recognizing that, for the most part, Americans have little knowledge of politics in general. Decades of survey research have established that most citizens have only minimal knowledge of politics and public policy.[164] Indeed, more than one third are "political 'know nothings'" who "do not know the respective functions of the three branches of government, who has the power to declare war, or what institution controls monetary policy."[165]

Evidence on public knowledge of the Supreme Court is mixed. On the one hand, surveys are regularly cited for the proposition that knowledge about the Court is exceedingly thin—that far more people can name two of the Seven Dwarfs than two of the Justices, to take one example.[166] On the other hand, there is countervailing evidence that indicates widespread understanding of some basic attributes of the Court.[167]

In relation to the Court's legitimacy, awareness of decisions is more important than the names of the Justices or the Court's institutional attributes.

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164. For citations to this literature, see Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1304–14 (2004). *See generally* MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS (1996) (documenting widespread political ignorance).

165. John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 95 (2004) (quoting Stephen E. Bennett, *"Know-Nothings" Revisited: The Meaning of Political Ignorance Today*, 69 SOC. SCI. Q. 476 (1988)). Such widespread ignorance is not the result of a lack of education, a lack of smarts, or irrationality. Voters, instead, are "rationally ignorant" about politics; because of the low significance of any one vote, voters (unless they are personally interested in politics) have little incentive to invest significant time in educating themselves about policy issues or differences between political candidates or parties. *See* Ilya Somin & Neal Devins, *Can We Make the Constitution More Democratic?*, 55 DRAKE L. REV. 971, 977 (2007).

166. Jennifer Harper, *Superman Tops Supremes: Americans Know Pop Culture Better than Politics*, WASH. TIMES, Aug. 15, 2006, at A1. Along the same lines, while only one in four Americans can name more than one of the five freedoms guaranteed by the First Amendment, more than half can name at least two members of the Simpsons cartoon family. *Aye, Caramba! U.S. Fails History*, NEWSDAY, Mar. 2, 2006, at A15.

167. *See* JAMES L. GIBSON & GREGORY A. CALDEIRA, CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE 24–35 (2009).

Certainly, the great majority of Supreme Court decisions are essentially unknown to the general public.[168] These decisions receive little attention in the mass media,[169] and few people receive information about them through other channels. The Justices hardly need to worry that such decisions will precipitate a public uprising.

It is worth underlining the point that a great deal of the Court's work is essentially invisible to the public. Decisions in fields such as antitrust and patent law may be highly consequential, but it seems unlikely that there are strong public feelings about those decisions. Even if Justices seek to maintain the Court's legitimacy, they have no reason to worry that public outrage in decisions in those fields will damage this legitimacy.[170] More telling, the Rehnquist Court's federalism revival was unnoticed by most of the mass public. During the period from 1992 to 2006, the Court invalidated eleven federal statutes on federalism grounds,[171] thereby shifting the balance between the federal government and the states substantially. Nevertheless, these decisions (although prompting significant law review commentary) appeared to have low political salience.[172] Of 229 Gallup Poll questions that explicitly referenced the Supreme Court during this period, there was not a single question concerning these decisions or

168. For a summary of this data, see David Adamany & Joel B. Grossman, *Support for the Supreme Court as a National Policymaker*, 5 LAW & POL'Y Q. 405, 407 (1983); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2620–23 (2003).

169. *See* ELLIOT E. SLOTNICK & JENNIFER A. SEGAL, TELEVISION NEWS AND THE SUPREME COURT: ALL THE NEWS THAT'S FIT TO AIR? 158–88 (1998). On the link between elite (media and academic) commentary on the Supreme Court and public awareness of Court decisions, see *supra* notes 144–45.

170. In antitrust law, one indicator of limited public interest is the small proportion of survey respondents who paid attention to the Microsoft antitrust trial in 1998 and 1999, despite the unusual visibility and salience of that case. *See* PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, CLINTON LEADERSHIP POSITION ENHANCED 6 (1998), *available at* http://people-press.org/reports/pdf/75.pdf (showing only 12% of those surveyed followed the Microsoft trial "very closely"); PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, CAMPAIGN INCIDENTS HAVE LITTLE PUNCH 12 (1999), available at http://people-press.org/reports/pdf/49.pdf (showing only 11% of those surveyed followed the Microsoft trial "very closely").

Perhaps a hypothetical decision in one of those fields could be so controversial that it would attract substantial public attention. However, if that were the case, the Justices would likely have a good sense of the potential for controversy before reaching their decision. The run-of-the-mill decisions that the Court actually does reach in fields such as patents and antitrust are virtually guaranteed to escape public notice.

171. *See* Bd. of Trs. v. Garrett, 531 U.S. 356 (2001); United States v. Morrison, 529 U.S. 598 (2000); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Alden v. Maine, 527 U.S. 706 (1999); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); Printz v. United States, 521 U.S. 898 (1997); City of Boerne v. Flores, 521 U.S. 507 (1997); Seminole Tribe v. Florida, 517 U.S. 44 (1996); United States v. Lopez, 514 U.S. 549 (1995); New York v. United States, 505 U.S. 144 (1992).

172. They did, however, have salience to the elite news media. Each of the eleven federalism decisions received front-page coverage in the *New York Times*. *See* LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH & THOMAS G. WALKER, THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS 171–74 (4th ed. 2006) (providing a list of cases that were headlined in a front page story in the *New York Times* the day after the decision was handed down).

any other Supreme Court invalidations of federal statutes.[173]

There are two aspects of the Court's output on which public knowledge may be more widespread. First, a handful of decisions do receive considerable coverage in the mass media. As a result, many or even most people become aware of those decisions.[174] Likely examples include *Brown v. Board of Education*,[175] the school prayer decisions of 1962[176] and 1963,[177] *Miranda v. Arizona*,[178] *Roe v. Wade*,[179] the decisions on affirmative action in college admissions in 1978[180] and 2003,[181] and *Bush v. Gore*.[182]

Second, information garnered from the mass media may allow people to gain an impression of the tenor of the Court's decisions in a broad field of policy. In part because of well-publicized criticisms by political leaders and media elites, it is likely that a large share of the public recognized the liberalism of the late Warren Court on civil liberties issues, especially issues of criminal procedure.[183] The public might not have had as clear an impression of the Court's ideological position in more recent periods. Indeed, patterns in public evaluations of the Court suggest that there is only limited awareness of the Court's rightward shift.[184]

Even when people are aware of what the Court has done, they will not

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173. *See* Gallup Brain, http://brain.gallup.com/search/advanced.aspx (type "Supreme Court" into "This exact phrase" field, select "before January 1, 2007" and "after January 1, 1992," then click "search").

174. One study of several decisions at the end of the Supreme Court's 1988 term found that most survey respondents were aware of the Court's major decisions on abortion, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989), and flag burning, Texas v. Johnson, 491 U.S. 397 (1989), each of which received a good deal of news coverage. Charles H. Franklin & Liane C. Kosaki, *Media Knowledge and Public Evaluations of the Supreme Court*, *in* CONTEMPLATING COURTS 352, 364 (1995). However, the same study found that three other decisions that garnered attention from the news media were unknown to most of the respondents. Those decisions were on affirmative action, Martin v. Wilks, 490 U.S. 755 (1989), regulation of sexually oriented material, Sable Commc'ns v. FCC, 492 U.S. 115 (1989), and the death penalty, Stanford v. Kentucky, 492 U.S. 361 (1989). *See* Franklin & Kosaki, *supra*, at 366.

175. 347 U.S. 483 (1954).

176. Engel v. Vitale, 370 U.S. 421 (1962).

177. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963).

178. 384 U.S. 436 (1966).

179. 410 U.S. 113 (1973).

180. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

181. Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003).

182. 531 U.S. 98 (2000).

183. This awareness is suggested by surveys taken in the 1960s showing the strong relationship between attitudes toward the Supreme Court, on the one hand, and political ideology and attitudes related to ideology, on the other hand. *See* John H. Kessel, *Public Perceptions of the Supreme Court*, 10 MIDWEST J. POL. SCI. 167, 179, 185 (1966); Walter F. Murphy & Joseph Tanenhaus, *Public Opinion and the United States Supreme Court: Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, 2 L. & SOC'Y REV. 357, 371-73 (1968). For a thoroughgoing treatment of Warren Court decision making, especially the Court's path-breaking civil rights and civil liberties decisions from 1962 to 1969, see POWE, *supra* note 36, at 209–462 (discussing history of the Warren Court from the 1962 through 1968 terms).

184. *See* Marc J. Hetherington & Joseph L. Smith, *Issue Preferences and Evaluations of the U.S. Supreme Court*, 71 PUB. OPINION Q. 40 (2007); *see also* Dahlia Lithwick, *Spoonfuls of Sugar: Americans' Continued Love Affair with the John Roberts Court*, SLATE, Sept. 26, 2009, http://

necessarily have strong views about the desirability of the Court's decisions.[185] They may be ambivalent, or the issues in question may not be salient to them. Under either condition, the Justices would not seem to have much to fear from adverse public reactions to their rulings.[186]

But what about the individual decisions and decisional trends of which a large share of the public is aware and on which many people have strong feelings? To what extent does disagreement with the Court damage its legitimacy? It seems reasonable to think that outrage at Supreme Court decisions will erode public support for the Court, yet that consequence is not inevitable.

Political scientists have done considerable research on public support for the Court and the impact of the Court's decisions on that support.[187] The research involves some difficult methodological issues,[188] and the findings of different

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www.slate.com/id/2229517/ (discussing public perceptions of the Roberts Court as less conservative than it actually is).

185. There is also a broader issue concerning the overall salience of the Supreme Court to the general public. Consider, for example, the 2004 presidential election. Even though the Supreme Court had intervened in the 2000 presidential elections, the Court was a non-issue in 2004. The candidates, the press, and the voters largely ignored the fact that Chief Justice William H. Rehnquist announced—just one week before the election—that he underwent a tracheotomy in connection with a thyroid cancer diagnosis. *See* Neal Devins, *Smoke, Not Fire*, 65 MD. L. REV 197, 197 (2006). In one poll, only one percent of voters (out of 569 polled) ranked the Supreme Court as the most important factor in making their selection. Press Release, Pew Research Ctr, Moral Values: How Important? Voters Liked Campaign 2004, But Too Much 'Mud Slinging' 15 (Nov. 11, 2004), *available at* http://people-press.org/reports/pdf/233.pdf. In another poll, fewer than .5 percent (out of 900 polled) thought the Supreme Court should be President Bush's top priority. NationalJournal.com, Poll Track, Fox News/Opinion Dynamis: The Bush Administration, Supreme Court Nominations (Nov. 19, 2004), http://www.nationaljournal.com/members/polltrack/2004/todays/11/1119fox.htm.

In a sense, these findings are quite unremarkable: the public had other issues of considerable urgency to consider. But the findings do underline the relative unimportance of the Supreme Court to the general public.

186. *See* Neal Devins, *The D'Oh! of Popular Constitutionalism*, 105 MICH. L. REV. 1333, 1335 (2007) (reviewing ROSEN, *supra* note 2); Gewirtzman, *supra* note 144, at 913–24.

187. *See, e.g.*, GIBSON & CALDEIRA, *supra* note 167; Gregory A. Caldeira, *Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209 (1986); Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635 (1992); Robert H. Durr, Andrew D. Martin & Christina Wolbrecht, *Ideological Divergence and Public Support for the Supreme Court*, 44 AM. J. POL. SCI. 768 (2000); Anke Grosskopf & Jeffery J. Mondak, *Do Attitudes Toward Specific Supreme Court Decisions Matter?: The Impact of* Webster *and* Texas v. Johnson *on Public Confidence in the Supreme Court*, 51 POL. RES. Q. 633 (1998); Valerie J. Hoekstra, *The Supreme Court and Local Public Opinion*, 94 AM. POL. SCI. REV. 89 (2000); Mondak & Smithey, *supra* note 72; Murphy & Tanenhaus, *supra* note 183.

188. The key issues involve conceptualization and measurement of attitudes toward the Court. Some measures of those attitudes tap evaluations of the Court's decisional output or its current membership (sometimes labeled "specific support") instead of, or in addition to, deeper views about the Court as an institution (sometimes labeled "diffuse support"). *See* James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354, 355 (2003). Scholars have widely adopted David Easton's distinction between specific and diffuse support for political institutions. Specific support "can be closely associated with the satisfactions obtained from specific classes of output" such as public policy. DAVID EASTON, A SYSTEMS ANALYSIS OF POLITICAL LIFE 268 (1965). In contrast, diffuse support is "a reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed or the effect of which they

studies are not entirely consistent. However, the overall thrust of this research is clear. Fundamental support for the Court—support that is captured by the concept of legitimacy—is strong and robust, and it is not fragile in the sense that negative reactions to the Court's decisions threaten it. Not surprisingly, disagreement with the Court's decisions may have negative effects on "specific support" for the Court, which focuses on the Court's decisions or membership.[189] However, these effects tend to fade over time.[190] More relevant to our concerns, even strong public opposition to decisions has little potential to erode the Court's "diffuse support"—that is, its basic legitimacy.[191] Indeed, that legitimacy has proved to be quite stable and largely impervious to political polarization in the current era.[192]

The weak connection between Supreme Court outputs and the Court's legitimacy is illustrated by the aftermath of *Bush v. Gore*.[193] This was not a classic unpopular decision like some of the Court's rulings on the rights of criminal defendants and school religious observances; nearly half of the voting public could be expected to celebrate the decision, and the public's opinion of the Court might well improve as a result. But the other half of the public could be expected to react quite negatively to *Bush v. Gore*. After all, the Court had intervened to reach a decision that ensured the victory of the candidate whom those voters had opposed. Moreover, attentive Gore voters would know that the Justices who supported Governor Bush's legal claims were those who likely favored his election. These voters might well have reacted to the decision by questioning the legitimacy of the body that made it. Indeed, Justice Breyer's dissent suggested that the decision would damage the Court's public standing.[194]

Yet the evidence we have on public reactions to *Bush v. Gore* indicates that

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see as damaging to their wants." *Id.* at 273. Diffuse support is similar to, if not synonymous with, legitimacy.

The task of designing survey items that capture diffuse support is not easy. Gibson, Caldeira, and Spence argue persuasively that standard measures of confidence in the "people running" the Supreme Court and similar measures capture specific rather than diffuse support and that questions about maintaining the Court's institutional integrity and powers capture diffuse support most effectively. Gibson, Caldeira, & Spence, *supra*, at 355–65. For this reason, we give the greatest weight to their findings and those of other studies by Gibson and Caldeira that use their favored measures.

189. *See* Durr, Martin & Wolbrecht, *supra* note 187, at 772–75 (finding that reactions to specific decisions affect support for the court); Grosskopf & Mondak, *supra* note 187, at 644–52 (same); Hoekstra, *supra* note 187, at 96–98 (same).

190. *See* Mondak & Smithey, *supra* note 72, at 1134–40 (examining reasons why the Supreme Court maintains stable support over time).

191. *See* Caldeira & Gibson, *supra* note 187, at 650–55, 658–61; Gibson, Caldeira & Spence, *supra* note 188, at 358–59 (presenting data demonstrating that four out of five Americans do not think the court should be eliminated, even if there were strong public disapproval for its decisions).

192. *See* James L. Gibson, *The Legitimacy of the U.S. Supreme Court in a Polarized Polity*, 4 J. EMPIRICAL LEGAL STUD. 507, 517–23 (2007).

193. 531 U.S. 98 (2000).

194. *Id.* at 157–58 (Breyer, J., dissenting) ("[I]n this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself.").

the decision had little impact on the Court's legitimacy, even among members of the public who were unhappy with it. In the short run, approval of "the job the Supreme Court is doing"—a measure of specific support—declined considerably among Democrats and liberals.[195] Likewise, fully half of the Gore voters surveyed immediately after the decision said that the decision made them "lose confidence in the U.S. Supreme Court."[196] But comparison of a 2001 survey about attitudes toward the Court with earlier surveys strongly suggests that even in the short run, the decision did no serious damage (if, indeed, it did any damage at all) to the Court's legitimacy.[197]

Why is the Court relatively invulnerable in this sense? The authors of one study of reactions to *Bush v. Gore* suggested that there is "a bias of positivity frames when it comes to popular perceptions of courts."[198] As those authors discussed in this and a later study,[199] attentiveness to the Court tends to expose people to positive symbols attached to the Court, symbols that differentiate it from other political institutions.[200]

This does not mean that nothing can damage the Court's legitimacy. One study found evidence that the heated battle over the confirmation of Samuel Alito to the Court had negative effects on public attitudes toward the Court.[201] Under unusual circumstances, trends in the Court's decisions may evoke negative views of the Court as an institution. Thus, there is evidence that in the 1990s, African-Americans who came of age after the Warren Court era gave relatively limited diffuse support to the Court relative to African-Americans who were born between 1933 and 1953 and to whites. This low support may have reflected the relatively unfavorable policies of the Court toward the African-American community in the period since the end of the Warren Court.[202] But if this is the case, it clearly represents an exception to the rule. The American people back the power of the Court to independently interpret the

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195. Herbert M. Kritzer, *The Impact of* Bush v. Gore *on Public Perceptions and Knowledge of the Supreme Court*, 85 JUDICATURE 32, 34–36 (2001); *see also* Vincent Price & Anca Romantan, *Confidence in Institutions Before, During, and After "Indecision 2000,"* 66 J. POL. 939, 949–53 (2004) (finding a polarization of attitudes toward the Supreme Court in response to *Bush v. Gore*).

196. Jeffrey L. Yates & Andrew B. Whitford, *The Presidency and the Supreme Court After* Bush v. Gore*: Implications for Institutional Legitimacy and Effectiveness*, 13 STAN. L. & POL'Y REV. 101, 113 (2002). About 30 percent of all respondents said that they had lost confidence in the Court. *Id.*

197. *See* GIBSON & CALDEIRA, *supra* note 167, at 45–47; James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 539–45 (2003) (finding that the legitimacy of the Court was not undermined by the Court's decision). *See generally* Stephen P. Nicholson & Robert M. Howard, *Framing Support for the Supreme Court in the Aftermath of "*Bush v. Gore,*"* 65 J. POL. 676 (2003) (finding that the manner in which the Court's decision was depicted to survey respondents affected their perceptions of the Court's legitimacy).

198. Gibson, Caldeira & Spence, *supra* note 197, at 555.

199. GIBSON & CALDEIRA, *supra* note 167, at 7–12.

200. *Id.* at 7–8; Gibson, Caldeira & Spence, *supra* note 197, at 555.

201. *See* GIBSON & CALDEIRA, *supra* note 167, at 96–120.

202. *See* James L. Gibson & Gregory A. Caldeira, *Blacks and the United States Supreme Court: Models of Diffuse Support*, 54 J. POL. 1120 (1992).

Constitution; indeed, "national majorities" think that judicial independence is a "fundamental" attribute of our system of checks and balances.[203]

If Supreme Court Justices need not worry very much about damaging their legitimacy with their decisions, they still might act on this consideration because they exaggerate the threat or because they are highly risk-averse. Indeed, Justices sometimes refer to the Court's legitimacy as a consideration in decisions.[204] On the other hand, there is no reason to think that Justices often act on even an exaggerated sense of vulnerability. Social psychology, as discussed in Part II, points to the unwillingness of individuals to act against core preferences.[205] More than that, Justices who take positions that differ sharply from their preferences in important cases in the interest of protecting the Court's legitimacy pay an immediate price for an uncertain benefit in the future. Justices who regularly depart from their preferences to help keep the Court's overall ideological position in line with public opinion pay an even bigger price for the same uncertain benefit. Absent empirical evidence to the contrary, it is extremely doubtful that Justices are willing to pay that price.

However, there is a different kind of price that might be considerably more salient to the Justices: action against the Court by the other branches of the federal government. As we discussed in Part I, the threat of such action may concern the Justices and affect their choices. If Congress acts against the Court at the behest of the general public, then the public can exert indirect influence on the Court.

Undoubtedly, some anti-Court actions by the other branches are precipitated by constituents' unhappiness with the decisions in question. Indeed, one study has concluded that the volume of bills proposed to take action against the Court

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203. ROSEN, *supra* note 2, at 14. *See generally* CHARLES GARDNER GEYH, WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM (2006) (exploring the nature and extent of the federal judiciary's independence and its relationship with the Congress).

Among public officials and political activists, in recent years there have been widespread attacks on judicial independence, attacks that key on "judicial activism"; these criticisms have led to various proposals for increased congressional oversight of the federal judiciary. *See, e.g.*, MARK C. MILLER, THE VIEW OF THE COURTS FROM THE HILL: INTERACTIONS BETWEEN CONGRESS AND THE FEDERAL JUDICIARY 156–84 (2009). Despite these attacks, however, the evidence from surveys of the mass public indicates that the Supreme Court's legitimacy remains strong.

204. In addition to Justice Breyer's statement in *Bush v. Gore*, 531 U.S 98, 157–58 (2000) (Breyer, J., dissenting), examples include *Payne v. Tennessee*, 501 U.S. 808, 855 (1991) (Marshall, J., dissenting), and the well-known discussion of legitimacy considerations in the joint opinion of Justices O'Connor, Kennedy, and Souter in *Planned Parenthood v. Casey*, 505 U.S. 833, 865–69 (1992). During the time between his two periods of service on the Court, Charles Evans Hughes wrote a book in which he cited three "self-inflicted wounds"—decisions that he thought had weakened the Court's legitimacy. CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS, AND ACHIEVEMENTS: AN INTERPRETATION 50–54 (1928). *See also* FRIEDMAN, *supra* note 1, at 371 (quoting statements by Justice Rehnquist and Justice O'Connor acknowledging the Court's reliance on public support).

205. *See supra* section II.A.

is influenced by the Court's standing with the public.[206] However, this linkage between the public and the other branches should not be overstated. With growing partisan polarization in Congress, initiatives against the Court can reflect the perceived preferences of partisan constituencies more than those of the public as a whole.[207] For example, 2003–2006 efforts to strip the Court of jurisdiction on same-sex marriage, the pledge of allegiance, and other divisive social issues reflected House Republicans' efforts to strengthen ties with their social conservative base rather than the views of the general public.[208]

Even so, it seems reasonable to posit that a degree of public influence on the Court operates through Congress and the President. Because the other branches have meaningful power over the Court, this path is probably stronger than the direct path from the general public to the Court. But the path is weakened by imperfections in the linkage between the public and Congress. The path is also weakened by lawmaker acceptance of judicial independence in practice—so that there are few occasions when the Court has reason to fear retaliation. The gap between the large number of threatened congressional actions against the Court in the current era and the very few that are actually enacted is striking.[209] Thus, the powers of the other branches do not necessarily create strong incentives for the Justices to respond to public opinion.[210] The limits on the Justices' responsiveness to the other branches also weaken this path; as we have discussed, Court retreats in the face of congressional hostility are exceptional rather than regular events.[211]

B. THE IMPACT OF PUBLIC OPINION ON THE JUSTICES

There is reason to doubt that Supreme Court Justices give much attention to the general public in making their choices as decision makers. But perhaps our analysis of the Court's legitimacy as a consideration is flawed, or perhaps other motivations lead Justices to take positions on the basis of public opinion. Thus, it is worthwhile to examine the evidence on this issue.

If the Justices do respond to the views of the public, that response might be manifested in several ways,[212] but two kinds of response seem the most likely.

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206. TOM S. CLARK, THE LIMITS OF JUDICIAL INDEPENDENCE (forthcoming 2011) (manuscript at ch. 4, on file with authors).

207. *See* ROSEN, *supra* note 2, at 2–3.

208. *See generally* Devins, *supra* note 48; Rosenfeld, *supra* note 59, at 24–27.

209. *See* BAUM, *supra* note 112, at 207–9; GEYH, *supra* note 203, at 109–11; Devins, *supra* note 48, at 1337; *cf.* John Ferejohn, 72 S. CAL. L. REV. 353, 380–81 (1999) (discussing executive branch compliance with Supreme Court decision making).

210. For a strong version of this position, see Segal, *supra* note 48 (arguing that retaliation risks are too low to ever be consequential). For a weaker (and we think more accurate) version, see *supra* text accompanying note 59.

211. *See supra* note 48.

212. One commentary, for instance, argues that Justices avoid overturning precedents and deciding issues that the parties do not raise because both types of behavior are viewed as illegitimate by the public. *See* EPSTEIN & KNIGHT, *supra* note 3, at 157–77.

First, they might avoid reaching unpopular decisions on issues that are salient to the public. Second, the Justices might shift the overall ideological mix of their votes and opinions in response to shifts in public views. We consider these two kinds of response in succession. We then turn to an important line of scholarship that combines these two kinds of response to argue that the Court has stayed in tune with public opinion across its history.

1. Avoidance of Unpopular Decisions on Salient Issues

In assessing the possibility that the Justices avoid reaching unpopular decisions on salient issues, we can start by looking at the level of agreement between the Court and public on such issues. We then turn to the more difficult question of whether the level of agreement is heightened by the Justices' desire to avoid running counter to public views. Finally, we consider the same issues as they relate to the Court's response to public disapproval of its decisions.

On a minority of issues that the Supreme Court decides, relevant public opinion surveys from the time period around the decision are available. Generally, of course, these are relatively visible and salient issues. On these issues, the Court's majority and the majority of the public are on the same side around 60 percent of the time.[213] The Court is about as likely to mirror public opinion when there is a "landslide" margin in surveys as when the margin is closer.[214]

The 40 percent of cases in which the Court majority and public majority diverge include some highly visible and salient issues, and on some of those issues the divergence is sharp. Examples include flag burning (on average, about three-quarters of the public disagreed with the Court in surveys in the two months after the decision),[215] school prayer (in two surveys over the decade after the 1962 and 1963 rulings, about 70 percent disagreed),[216] and eminent domain (a survey after the decision found 81 percent disagreement).[217] Needless to say, the Court was divided in these cases—so some Justices were in sync with the public while others were not. Moreover, some Justices track the views

213. THOMAS MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 78 (1989) [hereinafter MARSHALL, SUPREME COURT] (providing evidence that from 1935 to 1986, 56 percent of decisions were consistent with public opinion, 33 percent were inconsistent, and 11 percent were unclear); MARSHALL, *supra* note 14, at 37 (providing evidence that from 1986 to 2005, 61 percent of decisions were consistent with public opinion, 35 percent were inconsistent, and 4 percent were unclear).

214. MARSHALL, *supra* note 14, at 48.

215. Peter Hanson, *Flag Burning*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 184, 187 (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008); *see also* ROBERT JUSTIN GOLDSTEIN, FLAG BURNING AND FREE SPEECH 112–13 (2000). The decisions in question were *Texas v. Johnson*, 491 U.S. 397 (1989), and *United States v. Eichman*, 496 U.S. 310 (1990).

216. Alison Gash & Angelo Gonzales, *School Prayer*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY, *supra* note 215, at 62, 69. The decisions in question were *Engel v. Vitale*, 370 U.S. 421 (1962), and *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963).

217. Janice Nadler, Shari Seidman Diamond & Matthew M. Patton, *Government Takings of Private Property*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY, *supra* note 215, at 286, 297. The decision in question was *Kelo v. City of New London*, 545 U.S. 469 (2005).

of the public more often than others.[218] In sum, Court disagreements with the public are frequent and highly visible, all Justices sometimes disagree with the public, and individual Justices differ in their propensity to agree or disagree with the public.[219]

The frequency with which the Court and the public disagree on salient decisions raises questions about public influence on the Justices. Just as important, the Court and the general public might be aligned with each other for a variety of reasons,[220] and congruence between the two does not necessarily mean that the Justices (or some subset of Justices) departed from their preferred positions to adopt the majority view among the public. As discussed in Section I, there are several other possible explanations for agreement between public opinion and Supreme Court decisions. The most prominent of these is the appointments process—so that Justices who reflect the values of an earlier regime are replaced by new Justices who tend to share majority views in the public, because Justices are appointed by popularly elected presidents.[221] Another possibility is that Justices are influenced by the same social forces that shape the views of the general public on particular issues. These forces—the civil rights movement, the women's movement, terrorist attacks, the economic downturn—are processed through an ongoing dynamic that includes the media, universities, and elected officials. A third possibility is that the Court itself shapes public opinion. Through media and other coverage of Court decisions, the Court may facilitate a national dialogue on an issue—so that agreement between the Court and the American people results from the Court's persuasive power rather than from the Court's being persuaded by the public.[222]

What we really want to know is the frequency with which the Justices take positions that they would not otherwise adopt because they seek to be on the

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218. *See* MARSHALL, SUPREME COURT, *supra* note 213, at 104–30; MARSHALL, *supra* note 14, at 77–105.

219. That a Justice agrees with the public is of only limited relevance in assessing whether or not public opinion independently influences a Justice's decision making. *See infra* notes 228–32 and accompanying text.

220. *See* MARSHALL, SUPREME COURT, *supra* note 213, at 16–26 (identifying twelve linkages between public opinion and the Court).

221. *See* Dahl, *supra* note 10, at 284–86.

222. Even though some law professors have spoken of the Court's ability to lead a nationwide conversation on divisive constitutional issues, it seems unlikely that this effect is strong. However, there is some evidence that the Court has an impact on public opinion. VALERIE J. HOEKSTRA, PUBLIC REACTION TO SUPREME COURT DECISIONS 87–114 (2003) (finding that in the geographic areas from which four cases came, opinion moved in the direction of the Court's decision on the issues in two cases); Brandon L. Bartels & Diana C. Mutz, *Explaining Processes of Institutional Opinion Leadership*, 71 J. POL. 249, 255–59 (2009) (finding that association of an issue position with the Supreme Court increased support for that position on two controversial issues).

Two studies found evidence that public opinion on issues became more polarized after the Supreme Court's initial major rulings on those issues. Charles Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751, 761–62 (1989) (abortion); Timothy R. Johnson & Andrew D. Martin, *The Public's Conditional Response to Supreme Court Decisions*, 92 AM. POL. SCI. REV. 299, 304–06 (1998) (death penalty).

same side as the public, compared with the frequency with which they adopt unpopular positions despite their recognition that they stand in opposition to the public. Perhaps the best hints about the answer to this question can be obtained from instances in which the Court rules on an issue, the Justices are confronted with evidence that their decision was unpopular among the public, and they then rule again on the same general issue.[223] Adherence to the unpopular position indicates that the Justices (or at least enough Justices to preserve a majority) are willing to stay on the wrong side from the point of view of the public. Shifting over to the popular position, in contrast, might be explained by acquiescence to public views.

We can start with instances in which the Court did shift over to the popular position. It is not difficult to find such instances, some of which were discussed in Part I. Examples include the Court's abandoning its opposition to New Deal economic policies beginning in 1937,[224] its shift away from civil liberties protections for people accused of subversive activities in the late 1950s,[225] its approval of a new set of death penalty laws in 1976 after rejecting existing laws in 1972,[226] and its softening of support for the procedural rights of criminal defendants in the 1970s.[227]

These examples illustrate that movement toward a popular position does not necessarily indicate direct public influence on the Court. The Court's abandoning its opposition to New Deal legislation likewise appears a tactical withdrawal in the face of lawmaker and elite opprobrium to Court decision making,[228] though public opinion may also have played a role.[229] The shift of the late 1950s was influenced both by the near enactment of legislation stripping power from the Court and by criticisms of the Court by bar groups and distinguished jurists. The death penalty decisions of 1976 may well have reflected acquiescence by the Court's pivotal Justices to strong public and legislative support for capital punishment, but other factors may have been important as well or

223. It is impossible to calculate the relative frequencies in a more conclusive way, for there is no way of knowing whether the Justices know about public opinion and whether that information is salient to them in a given case.

224. *Compare* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935), *and* Carter v. Carter Coal Co., 298 U.S. 238, 289–97 (1936), *with* Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937), *and* Wickard v. Filburn, 317 U.S. 111, 128–29 (1942).

225. *Compare* Yates v. United States, 354 U.S. 298, 321–22 (1957), *with* Barenblatt v. United States, 360 U.S. 109, 134 (1959), *and* Uphaus v. Wyman, 360 U.S. 72, 81–82 (1959).

226. *Compare* Furman v. Georgia, 408 U.S. 238, 239–40 (1972), *with* Gregg v. Georgia, 428 U.S. 153, 206–07 (1976).

227. *Compare* Miranda v. Arizona, 384 U.S. 436, 478–79 (1966), *with* Harris v. New York, 401 U.S. 222, 226 (1971), *and* United States v. Calandra, 414 U.S. 338, 353–55 (1974).

228. For a review of the scholarly debate on the cause for the Court's 1937 "switch in time," see *AHR Forum: The Debate Over the Constitutional Revolution of 1937*, 110 AM. HIST. REV. 1046 (2005) (presenting a series of articles representing different sides of the academic debate).

229. *See* WILLIAM G. ROSS, THE CHIEF JUSTICESHIP OF CHARLES EVANS HUGHES, 1930–1941, at 135 (2007) (acknowledging that the threat of court packing may have influenced Court decision making but arguing that public opinion was a more likely influence on the Court).

instead.[230]

Perhaps more telling, the Court's practice of moving closer to the views of the general public—as discussed in this section and in Part I—is often a byproduct of changes in the Court's membership rather than changes in the positions of individual Justices in response to public opinion. The Court's growing conservatism on issues of criminal procedure as the Warren Court became the Burger and Rehnquist Courts is one example.[231] Other examples include the Court's expansion of the states' power to regulate abortion in certain ways[232] and rulings that facilitated the termination of busing remedies for school segregation.[233] In such instances, the Court was not responding to the public but to its own members' views about issues of legal policy.

Moreover, the Court sometimes stands fast despite public disapproval. Before personnel changes contributed to the Court's reversing course on busing and the regulation of second trimester abortions, for example, the Court stood firm in the face of blistering attacks by lawmakers (whose condemnations matched public opinion polls).[234] Additionally, despite incontrovertible evidence that the Court's 1989 decision striking down a state prohibition of flag desecration[235] was highly unpopular, the five Justices in the majority ignored that disapproval as well as pressure from the other branches to strike down a similar federal law a year later.[236] School prayer is an even more dramatic illustration of this phenomenon. Not only did the Court reinforce its unpopular 1962 decision against school prayer[237] a year later,[238] but it has struck down other forms of religious observance at school since then[239] (even as its membership has become more conservative and public disapproval has continued).[240] Finally, in 2008, the Court was presented with an unusual opportunity to reconsider a

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230. For alternative explanations for the 1976 decisions, see LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY 99–115 (1992). It is also possible that the Justices simply responded to the differences between the features of the earlier death penalty and those enacted in response to its 1972 decisions.

231. *See supra* notes 39–42 and accompanying text.

232. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 899 (1992).

233. *See, e.g.*, Bd. of Educ. v. Dowell, 498 U.S. 237, 250 (1991).

234. *See* DEVINS & FISHER, *supra* note 11, at 131–39 (2004) (detailing elected government opposition to *Roe*); *id* at 159–61 (discussing elected government opposition to forced busing).

235. *See* Texas v. Johnson, 491 U.S. 397, 420 (1989); *see also supra* note 215 and accompanying text.

236. *See* United States v. Eichman, 496 U.S. 310, 318–19 (1990).

237. *See* Engel v. Vitale, 370 U.S. 421, 430–33.

238. *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 226–27 (1963).

239. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 599 (1992) (holding that a public school cannot invite clergy to offer nonsectarian prayers at official graduation ceremonies); Wallace v. Jaffree, 472 U.S. 38, 60–61 (1985) (striking down a state statute that authorized a moment of silence "for meditation or voluntary prayer" in school).

240. For evidence of continuing public disapproval, see Knowledge Networks, Field Report: Attitudes & Perceptions About the Constitution 52 (July 23, 2009) (study conducted for the Massachusetts Institute of Technology, on file with authors) (indicating 67.2% of respondents believe public schools should be permitted to start each school day with a prayer).

just-issued decision invalidating the death penalty for a person convicted of the sexual assault of a child—a ruling that ran contrary to the majority view of the public.[241] After it became clear that the Justices had not been aware of a relevant federal statute, they were asked to grant a rehearing in the case, but no member of the five-Justice majority voted to do so.[242]

No firm judgment can be reached on the basis of such examples. But the frequency with which the Court takes unpopular positions and the occasions on which it adheres to those positions despite clear evidence of their unpopularity are striking. In light of the evidence that the Justices have little to fear from public disapproval, there is good reason to be skeptical about the belief that the Justices rein themselves in to avoid running afoul of public opinion.

2. Response to Ideological Shifts in Public Opinion

As noted earlier, a second way in which the Justices might respond to public opinion is to adjust the overall ideological tenor of their decisions in response to shifts in public opinion. As the public becomes more liberal or more conservative, the Justices (or at least swing Justices with comparatively weak policy preferences) might move in the same direction in order to avoid endangering their public standing by creating the impression that they are out of step. Several studies have analyzed whether the Court is responsive to the public in this sense,[243] taking advantage of a method that has been devised to aggregate public opinion surveys into a measure of the public's ideological "mood" at a

241. *See* Kennedy v. Louisiana, 128 S. Ct. 2641, 2664 (2008). A Quinnipiac University poll a few weeks after the decision found a 55%–38% majority opposed to the Court's position. Press Release, Quinnipiac Univ. Polling Inst., American Voters Oppose Same-sex Marriage Quinnipiac University National Poll Finds, But They Don't Want Government To Ban It (July 17, 2008), http://www.quinnipiac.edu/x1284.xml?ReleaseID=1194&What=&strArea=;&strTime=24; *see also* Knowledge Networks, *supra* note 240, at 51 (indicating 68.1% of survey respondents said the government should be allowed to apply the death penalty for a person convicted of raping a child).

242. *See* Kennedy v. Louisiana, 129 S. Ct. 1, 1 (2008). The willingness of the Court to adhere to rulings at odds with public opinion is also revealed in a July 2009 M.I.T. survey of attitudes and perceptions about the Constitution. Knowledge Networks, *supra* note 240. Based on July 2009 polling data from 1700 Americans, the MIT study highlighted several instances when the Court's decision remained unpopular with the public but the Court had not acted to change its position. Prominent examples include affirmative action in university admissions (69% oppose the Court's ruling), *id*. at 49, school prayer (67% disagreement rate), *id*. at 52, access of non-citizens to courts to challenge detentions (61% disagreement rate), *id.* at 55, and eminent domain (81% disagreement rate), *id*. The MIT poll did not distinguish between the type of affirmative action plan upheld by the Supreme Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003), from the plan invalidated in *Gratz v. Bollinger*, 539 U.S. 244 (2003). Under the wording of the poll, the public agreed with *Gratz* and disagreed with *Grutter*. As a practical matter, however, *Grutter* empowers universities to make use of race preferences, *see Grutter*, 539 U.S. at 343—and, as such, the public does oppose the Court's approval of *Grutter*-like affirmative action plans.

243. *See* Flemming & Wood, *supra* note 72; Micheal W. Giles, Bethany Blackstone & Richard L. Vining, Jr., *The Supreme Court in American Democracy: Unraveling the Linkages Between Public Opinion and Judicial Decision Making*, 70 J. POL. 293 (2008); Michael W. Link, *Tracking Public Mood in the Supreme Court: Cross-time Analyses of Criminal Procedure and Civil Rights Cases,* 48 POL. RES. Q. 61 (1995); McGuire & Stimson, *supra* note 71; William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-analytic Perspective*, 58

given time.[244] These studies analyze the statistical impact of changes over time in the public mood on the mix of liberal and conservative decisions by the Court (or the mix of liberal and conservative votes by individual Justices), controlling for other influences on the Court's ideological tendencies, such as measures of the Justices' own ideological preferences.

Taken as a whole, these studies provide evidence of a tendency for decisions of the Court to move in the same ideological direction as the attitudes of the general public—but there are several caveats. One study found a substantial time lag between shifts in the public mood and shifts in the Court's mix of decisions, a lag that raises questions about the direct impact of the public.[245] The same study found a negative relationship between trends in public opinion and Court policy during the Reagan presidency.[246] The estimated effects of public opinion on the Court, although statistically significant, are not necessarily very large.[247] Further, one study separated the most salient cases from other cases to compare the statistical effects of public opinion on the Court's decisions in the two types of cases.[248] The study found that these effects were stronger in nonsalient cases than in salient cases, even though the potential danger of deviating from public views is greater in the salient cases that attract more public attention.[249]

J. POL. 169 (1996); Mishler & Sheehan, *supra* note 72; Helmut Norpoth & Jeffrey A. Segal, *Popular Influence on Supreme Court Decisions: Comment,* 88 AM. POL. SCI. REV. 711 (1994).

244. *See* JAMES A. STIMSON, PUBLIC OPINION IN AMERICA: MOODS, CYCLES, AND SWINGS 37–66 (2d ed. 1999).

245. Mishler & Sheehan, *supra* note 72, at 93–94. The implications of that lag are discussed in Norpoth & Segal, *supra* note 243, at 712–15, and Giles, Blackstone & Vining, *supra* note 243, at 302. For a provocative critique of studies that show a link between public opinion and Supreme Court decision making, see Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court?: Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. (forthcoming 2010–2011, on file with authors) (arguing that existing studies on the relationship between public opinion and Court decision making aggregate data term-by-term and do not consider important "case level" differences). Based on their case-level analysis, Epstein and Martin note that the Court operates in tandem with the mass public—so that Court decisions reflect whether the public is conservative or liberal at a particular moment in time. At the same time, they are uncertain whether the mass public exerts a direct influence on the Court or, instead, whether "the same things that influence public opinion may influence the Justices, who are, after all members of the public too." *Id.* (manuscript at 19). For additional discussion of how the Court may be shaped by societal attitudes, see *supra* notes 19–29 and accompanying text.

246. Mishler & Sheehan, *supra* note 72, at 94–95.

247. Flemming & Wood, *supra* note 72, at 484.

248. The measure of salience was one commonly used in research on the Supreme Court: whether a decision was reported on the front page of the *New York Times*. *See* Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66, 72 (2000).

249. Giles et al., *supra* note 243, at 300–03. This latter finding also raises questions about the influence of elite groups on the Court because elites as well as the general public are likely to have stronger views about cases that receive front page coverage in an elite-oriented newspaper. But elite groups with which Justices identify undoubtedly tend to have views about a broader range of cases than those that are salient to the general public.

Probing the issues addressed in this study, another study found that the influence of the public mood was about as great in salient cases as it was in other cases. Christopher J. Casillas, Peter K. Enns & Patrick C. Wohlfarth, How Public Opinion Constrains the Supreme Court 25 (Feb. 2, 2009) (unpub-

Moreover, findings that show a statistical relationship between trends in public opinion and in the Court's decisions do not necessarily demonstrate that public opinion influences the Justices. Changes that occur in the ideological mood of the public are not random; rather, they reflect events and trends in society. In other words, as we discussed in Part I, influences that may appear attributable to the mass public may instead be the influence of developments in society on both the public and the Justices themselves.[250] The public may contribute to these societal moves, but so do elites, interest groups, social movements, and elected officials.[251]

To take one example, since the 1980s the Court has tended to side with government on civil liberties issues involving illegal drugs, to the extent that Justice Thurgood Marshall once complained that "[t]here is no drug exception to the Constitution . . . ."[252] This tendency has coincided with a high level of public concern about drugs. But it seems more likely that some Justices have shared the public's concern than that they have felt pressured by the public. Another example is the Court's sharp shift toward support for women's rights in the 1970s, a shift that coincided with public opinion but that more likely reflected the Justices' own attitude changes.[253]

Furthermore, to the extent that the views of people outside the Court lead the Justices to shift their positions, it may well be the views of elite groups rather than the public at large that influence the Justices. We have discussed elements of psychological theory indicating that the Justices are likely to be more responsive to elite groups that are relevant to them than they are to the general public.[254] We will turn shortly to empirical evidence on the influence of elites.[255]

To the extent that the Court moves in the same ideological direction as the general public, in one sense it does not make a difference what the source of that correlation may be—the fact of covariation in and of itself is important. But for our understanding of the Court and the Justices, the source does make a difference. If the Justices respond frequently to what they perceive as direct pressure from the general public, then they are fundamentally similar to elected

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lished manuscript, *available at* http://www.unc.edu/polisci/aprg/pdfs/SC-Public%20Opinion%20—%202-2-09.pdf).

250. Giles et al., *supra* note 243, at 295.

251. *See supra* Part I. As discussed in section II.C, elites may influence public attitudes. If so, and if elite attitudes are more closely aligned with the Supreme Court's positions, the effect may be to move the public closer to the Court over time.

252. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 641 (1989) (Marshall, J. dissenting).

253. It is impossible to distinguish systematically in this context between the effects of changing public attitudes and the effects of changes in the Justices' own attitudes. However, in the cases of both drugs and women's rights, the strength and stability of the Court's position suggests that the Justices were acting on their own attitudes rather than responding reluctantly to public pressure. *See supra* notes 27–28 and accompanying text (describing changes in the Justices' attitudes towards women and corresponding changes in the law).

254. *See supra* section II.C.

255. *See infra* section III.C.

officials in their accountability to public opinion. If instead they move in the same direction as the public because of more subtle forces that include changes in their own thinking, then their behavior is more consistent with the expectation of judicial independence. And for the reasons that we have discussed, there is good reason to doubt that substantial direct influence by the public occurs.

3. The Court's Adherence to Public Opinion Over Time

The analyses by Barry Friedman,[256] Jeffrey Rosen,[257] and other scholars meld the two kinds of Court responses to the public that we have discussed—avoidance of unpopular decisions and a general movement in tandem with the public. In doing so, they make a sweeping and important argument that the Court historically has adhered to positions favored by the public in order to maintain its standing as an institution.

In this argument, the public sets limits on what the Justices can do. If the Court strays too far from the policy positions that the majority favors on important issues, it suffers a loss of public legitimacy and sometimes more concrete sanctions from the other branches of government.[258] Recognizing this reality, the Justices rein themselves in as necessary to avoid these negative results.[259] Rosen summarizes this line of analysis succinctly after reviewing the historical evidence: "It should be obvious by now that the Supreme Court has followed the public's views about constitutional questions throughout its history, and, on the rare occasions that it has been even modestly out of line with popular majorities, it has gotten into trouble."[260]

Because this argument is so sweeping, its validity cannot be assessed meaningfully in a limited space. Moreover, its breadth makes it inherently difficult to assess empirically. However, the empirical findings that we have cited on the relationship between public opinion and the Court's decisions raise questions about the premises that underlie it. We can build on that evidence by considering a historical period—the Warren Court era—that is especially useful for assessing the arguments by Friedman and Rosen.

On its face, the Warren Court's record seems to demonstrate the Justices' freedom to diverge from the views of the general public. Some major lines of policy appeared to enjoy at least substantial support from the public, though seldom strong majority support. But on other issues, the Court's positions appeared to be at considerable variance with the state of public opinion. This was true of most of the Court's expansions of the rights of criminal defendants, its decisions limiting religious observances in public schools, and its limits on

256. *See* FRIEDMAN, *supra* note 1.
257. *See* ROSEN, *supra* note 2.
258. *See* FRIEDMAN, *supra* note 1, at 375; ROSEN, *supra* note 2, at xii–xiii.
259. *See* FRIEDMAN, *supra* note 1, at 376.
260. *See* ROSEN, *supra* note 2, at 185.

the regulation of obscene materials.[261]

Yet some commentators have argued that the Warren Court was basically in tune with public opinion.[262] Barry Friedman, for instance, refers to the growing support for desegregation after *Brown v. Board of Education*,[263] support for the Court's decisions requiring that legislative districts have approximately equal population,[264] and the apparent popularity of *Gideon v. Wainwright*.[265] Even when the Court took highly unpopular positions, as in its decisions on internal security in the mid-1950s and its school prayer decisions, Friedman suggests that the Justices may have thought they were in accord with the general public but simply misunderstood the prevailing public opinion.[266] More broadly, Friedman concludes, the public supported an active role for the Supreme Court: "No matter what its view of particular decisions, the public in the 1960s saw the Court as playing a vital role in protecting the proper workings of American democracy and conquering the stasis of the other branches."[267]

Friedman's reference to growing support for the *Brown* decision after it was handed down is part of his broader argument about convergence between the Court and the public: "[O]ver time, as Americans have the opportunity to think through constitutional issues, Supreme Court decisions tend to converge with the considered judgment of the American people."[268] To the extent that this convergence reflects the Court's influence, of course, it suggests that the Justices are relatively free to ignore current public opinion because they can help bring it over to their side. Indeed, because Court decisions at variance with public opinion often reflect elite values,[269] there is good reason to think that media and other elites educate the public about the Court and, in so doing, help bring public opinion in line with Court decision making.[270] Alternatively, it may be that the Justices sense trends in public opinion that are moving in favor of their positions. Perhaps that has been the case with some of the Court's

261. *See supra* notes 38–39 and accompanying text (noting the divergence between the Warren Court and public opinion).

262. Jeffrey Rosen analyzes several strands of the Warren Court's constitutional jurisprudence and argues that the Court was basically in tune with public opinion in many instances, including in decisions on school segregation, contraception, religion in public schools, and criminal procedure. ROSEN, *supra* note 2, at 59, 89–90, 169. He does, however, note the conflict with Congress that was engendered by some of the Court's decisions on issues related to internal security. *Id.* at 165–66. Lucas Powe does not focus on public opinion but argues that "the Court was a functioning part of the Kennedy–Johnson liberalism of the mid and late 1960s." LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 494 (2000).

263. FRIEDMAN, *supra* note 1, at 245.

264. *Id.* at 269.

265. *Id.* at 273; *see* Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that the Sixth Amendment right to counsel is incorporated against the states through the Fourteenth Amendment).

266. FRIEDMAN, *supra* note 1, at 252–53, 264–65 (arguing that the Court miscalculated public opinion in cases on Communist activities and school prayer).

267. *Id.* at 261–62.

268. *Id.* at 14.

269. *See infra* section III.C.

270. *See supra* notes 144–45 and accompanying text.

decisions expanding civil liberties. But the tides of public opinion are uncertain and, on most issues, the Justices have no reason to be confident about the direction in which those tides are moving.[271]

Friedman makes his case very well—about as well as it can be made—and yet it is not convincing. Some of what the Warren Court did was popular, but a large portion of its most visible outputs was highly unpopular—and for the most part, the Justices could have anticipated that they were in conflict with the public's views.[272] Either the Justices who constituted the liberal majority of the Court did not think that the Court's legitimacy was endangered, or they concluded that courting danger was a tolerable cost of adopting legal policies that they thought desirable.

Social psychology is instructive in understanding Warren Court variance with public opinion. More than anything else, the Warren Court's support of civil liberties reflected the Justices' own strongly held policy preferences. Ideological agreement among Court members shifted power away from a powerful median Justice and towards intra-group dynamics among the Court's dominant coalition.[273] Further, to the extent that the Justices were responding to audiences outside the Court, the most relevant audiences were left-leaning academic and media elites that served as reference groups for the Justices—reinforcing their decision making through favorable media coverage and academic commentary.[274] By way of contrast, there was little reason for the Warren Court to treat the mass public as a reference group.

Barry Friedman, although marshalling evidence that makes the case that Court decision making tracks popular preferences, is cognizant of the broad range of factors that shape Court decision making. In his analysis of the Warren Court, as in his book as a whole, he is sensitive to the complexities of the episodes he discusses. One complexity he notes is that the Justices sometimes seem to respond to elite groups rather than—or in addition to—the general public.[275] We turn next to those groups and their potential influence on the Court.

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271. In making this point, we are not saying that Supreme Court Justices can never anticipate moves in public opinion. For the most part, however, it is guesswork to predict future public opinion. For a related discussion of whether Supreme Court Justices can assess potential public outrage to decisions that might vary from public opinion, see Cass R. Sunstein, *If People Would Be Outraged by Their Decisions, Should Judges Care?*, 60 STAN. L. REV. 155, 176 (2007).

272. The most prominent example of Warren Court decision making frustrating (easily discernible) public opinion was its constitutionalizing criminal procedure and, in so doing, "policing the police." *See* POWE, *supra* note 36, at 379–444.

273. *See generally* Devins & Federspiel, *supra* note 7 (applying social psychology model to the Warren Court); Nancy Staudt, Barry Friedman & Lee Epstein, *On the Role of Ideological Homogeneity in Generating Consequential Constitutional Decisions*, 10 U. PA. J. CONST. L. 361 (2008) (discussing "the effect of ideological diversity on the nature of the decisions Justices render" and arguing that "the greater the homogeneity of the majority, the higher the likelihood of a consequential decision").

274. On elite influence, see *infra* section III.C.

275. FRIEDMAN, *supra* note 1, at 255–58, 264.

C. THE EFFECTS OF ELITES ON THE JUSTICES' CHOICES

We have questioned both the salience of the general public to the Justices and the existence of substantial public influence on the Justices' choices. We have also argued that—consistent with social psychology theory—elite audiences are likely to play a far more influential role than public opinion in shaping the Justices' choices. In the balance of this section, we will consider evidence on the influence of elite groups in American society. We will make use of both anecdotal and systematic evidence in assessing the influence of elites.

Like mass public opinion, the opinion of elite reference groups could affect the Justices in multiple ways. We will present evidence on several forms of influence. First, information that Justices receive about the views of specific groups might affect their positions in specific cases. Second, Justices might align themselves with the views of a broader elite group—the people who share the Justices' high educational attainments. Finally, the Justices' identifications with elite groups could have a more pervasive effect on their positions, moving them systematically in one direction or another.

1. Specific Knowledge of Elite Opinion Through Amicus Curiae Briefs

The Justices can learn of the views of specific elite groups in several ways. Amicus curiae briefs are one important form of communication from elite groups to the Court. Amicus filings are a source of information for the Court in several respects.[276] Our focus here is on one sort of information that they provide and the signals that they offer the Justices and their clerks about elite views.[277] One indication of the relevance of those signals comes from a survey of seventy Supreme Court law clerks, which found that eighty-eight percent of clerks would be inclined to give "closer attention" to amicus briefs filed by academics—especially the prominent academics who teach at the nation's leading law schools (the very schools law clerks come from).[278] And while Supreme Court Justices may not follow their clerks' leads, there is anecdotal

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276. On the general influence of amicus briefs in the Supreme Court, see PAUL M. COLLINS JR., FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING 75–164 (2008) (showing several types of influence for amicus briefs); Ruth Colker, *Justice Sandra Day O'Connor's Friends*, 68 OHIO ST. L.J. 517, 521–29 (2007) (summarizing literature); Paul M. Collins Jr., *Lobbyists Before the U.S. Supreme Court: Investigating the Influence of Amicus Curiae Briefs*, 60 POL. RES. Q. 55, 63 (2007) (finding a relationship between the numbers of amicus briefs on each side and the Supreme Court's decisions); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 829–30 (2000) (noting that large disparities in total numbers of amicus briefs between parties do not increase the success rates of more supported parties); James F. Spriggs, II & Paul J. Wahlbeck, *Amicus Curiae and the Role of Information at the Supreme Court*, 50 POL. RES. Q. 365 (1997) (analyzing the Supreme Court's use of arguments from amicus briefs).

277. By focusing on the question of which elites file before the Court and whether there is a consensus among those elites, our analysis varies from existing studies of amicus briefs, *see supra* note 276.

278. Kelly Lynch, *Best Friends?: Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33, 51–52 (2004).

evidence suggesting that the Justices are influenced by prevailing elite opinion as reflected in amicus briefs. Consider, for example, the possible role of amicus filings in *Grutter v. Bollinger* (approving some affirmative action programs at the University of Michigan law school)[279] and in a string of 2004–2008 cases involving the rights of enemy combatants held at Guantanamo Bay.[280]

In *Grutter*, eighty-three of the one hundred two amicus briefs submitted backed the University of Michigan.[281] More significant (for our purposes), elite opinion uniformly supported affirmative action. Briefs filed by Fortune 500 companies and other business interests spoke of the business community's need for a racially diverse workforce in order to compete in the global economy.[282] Ninety-one colleges as well as every major educational association backed preferences, arguing that racial diversity enhanced learning and prepared students for life in a multiracial world.[283] States, federal lawmakers, and a cross-section of retired military officers also filed briefs in support of the University of Michigan.[284] In sharp contrast, opponents of affirmative action were isolated—with no meaningful support from elites or political actors.[285]

Amicus briefs filed in the 2004, 2006, and 2008 enemy combatant cases are equally revealing.[286] In particular, while elite audiences consistently opposed Bush administration claims about both presidential war-making and the rights of enemy combatants, elite opposition to the Bush administration intensified throughout this period. In 2004 filings, several prominent academics supported administration claims regarding executive branch control of the Guantanamo Bay detention facility; still, more than two out of three amicus briefs opposed the administration.[287] In 2006 and 2008, no academics filed briefs supporting the administration.[288] Combusting with uniform academic opposition to the administration, bar groups, retired federal court judges, and several hundred members of the European Union and United Kingdom parliaments filed briefs opposing the Bush administration.[289] Elite opposition to the administration was also manifest in academic commentary and newspaper editorials—all major newspapers (except the *Wall Street Journal*) formally opposed the administra-

279. 539 U.S. 306, 343 (2003).

280. Boumediene v. Bush, 553 U.S. 723 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004).

281. *See* Neal Devins, *Explaining* Grutter v. Bollinger, 152 U. PA. L. REV. 347, 366 (2003).

282. *Id.* at 369.

283. *Id.* at 368.

284. *Id.* at 367–69.

285. Though the Bush administration filed a brief arguing that the Michigan programs were unconstitutional, it "sought to steer a middle path" by acknowledging its support for racial diversity in education and supporting the use of race as a "plus factor." *Id.* at 370–72.

286. This paragraph is drawn from Neal Devins, *Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants*, 12 U. PA. J. CONST. L. 491, 499–503 (2010).

287. *Id.* at 500 (noting that academics, including John McGinnis and Abraham Sofaer, filed a brief supporting the Bush administration).

288. *Id.*

289. *Id.*

tion, as did the vast majority of academic commentary on these cases.[290]

As with other kinds of elite inputs, different Justices could be expected to respond to the amicus briefs in these enemy combatant and affirmative action cases in different ways. First, as discussed in Part II, Supreme Court Justices look both to their own reference groups and to their personal preferences when deciding cases. Justices predisposed to support the administration in the enemy combatant cases or to oppose the university in the affirmative action cases certainly would not change their position to curry favor with elite audiences that they do not identify with. For example, Justice Scalia has taken personal aim at lawyer elites[291]—so it is to be expected that he would resist these amicus filings (and that he would ally himself with elite audiences that would expect him to resist these filings). Second, for the median or swing Justice, amicus briefs are likely to hold special salience. These Justices have moderate legal policy preferences and they do not identify themselves with audiences that expect ideological conformity. These Justices, in other words, are likely to make situational judgments—and amicus briefs may prove especially useful to them in this regard.[292]

2. Evidence of Elite Opinion Contributing to Voting Shifts in Specific Cases

The example of amicus groups also highlights how difficult it is to pinpoint how much elites and other personal reference groups affect a Justice's decision making. After all, the Justices' own inclinations and those of their reference groups undoubtedly coincide in many instances, in part because people are drawn to groups with which they share values.[293] However, the difficulty of identifying this kind of influence is reduced somewhat when Justices change positions from one case to another, because something other than stable personal preferences must account for that change. Elite audiences are one potential source of such change.

Two examples involve the possible influence of academics and especially the news media. The first example involves the media themselves. In *Gannett v. DePasquale*, the Court reached a complicated decision that held that the Sixth Amendment did not guarantee public access to pretrial proceedings in criminal

290. *Id.* at 500–03. Fifteen top newspapers were surveyed. Most (including the *New York Times*, *Boston Globe*, and *Los Angeles Times*) have a liberal bent but others critical of the administration do not have a predictably liberal bent (*San Diego Union*, *Washington Times*). *See id.* at 502.

291. In *United States v. Virginia*, Justice Scalia complained in his dissenting opinion that the Court "has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the counter-majoritarian preferences of the society's law-trained elite) into our Basic Law." 518 U.S. 515, 567 (1996).

292. Indeed, Justice O'Connor's opinion for the Court in *Grutter v. Bollinger* cited briefs from the business and military communities on the value of affirmative action. 509 U.S. 306, 330–31 (2003).

293. *See* BAUM, *supra* note 7, at 46–47 (recognizing that judges often link themselves to groups that accord with their preferences, but arguing that those groups nonetheless exert independent influences on judges).

cases; the Court's logic seemed to extend to criminal trials as well.[294] One year later, after a storm of criticism in the mass media,[295] the Court held in *Richmond Newspapers, Inc. v. Virginia* that the First Amendment did protect public access to trials.[296] The two decisions can be reconciled, but the quick and dramatic shift in some of the Justices' positions on the underlying policy issue—whether the public (and thus the news media) should have access to trials—was striking.[297] One commentator saw the media criticism as decisive in producing a 7–1 majority for public access in *Richmond Newspapers*,[298] with three Justices who had voted against the Sixth Amendment claim in *Gannett* voting for the First Amendment claims in *Richmond Newspapers*.[299]

The other example involved a direct shift in the positions of three Justices. In *Minersville School District v. Gobitis* (1940),[300] the Court ruled 8–1 that public school students could be required to salute the flag. These students—all Jehovah's Witnesses—had refused to salute the flag on religious grounds.[301] Three years later, in *West Virginia State Board of Education v. Barnette*, the Court directly overturned *Gobitis*.[302] The earlier decision was heavily criticized by law journals, the press, and religious organizations. Thirty-one of thirty-nine law review pieces that discussed the decision did so critically.[303] Newspapers and magazines accused the Court of violating constitutional rights and buckling under popular hysteria.[304] This criticism may have influenced the three Justices—Hugo Black, William O. Douglas, and Frank Murphy—who shifted their posi-

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294. 443 U.S. 368, 391 (1979). Writing for the Court, Justice Stewart suggested that the Sixth Amendment did not confer a right of access to criminal trials to members of the press because this right belonged solely to the defendant. *Id.* at 385–87. In addressing pretrial hearings, specifically, the Court found the historical evidence was particularly strong in support of the conclusion that the Framers did not intend the Sixth Amendment to confer a right to the public to attend criminal pretrial proceedings, even assuming it conferred such right to criminal trials. *Id.* at 387–91. The scope of the majority's opinion on the Sixth Amendment was "clouded by concurring opinions," one of which treated the majority opinion as applicable to all criminal trials and another limiting the holding to criminal pretrial proceedings. Anthony Lewis, *A Public Right to Know About Public Institutions: The First Amendment as Sword*, 1980 SUP. CT. REV. 1, 11–12 (1980).

295. Lewis, *supra* note 294, at 13 & nn.101–03.

296. 448 U.S. 555, 580 (1980).

297. Chief Justice Warren Burger, Justice Potter Stewart, and Justice John Paul Stevens were in the majority in both cases. However, in *Gannett*, the Chief Justice had written a concurring opinion emphasizing that the case involved a pretrial proceeding and not a trial. *Gannett*, 443 U.S. at 394–97.

298. Lewis, *supra* note 294, at 2 & nn.9, 16.

299. The three Justices were Chief Justice Burger, Justice Stevens, and Justice Stewart. *See id.* at 16–18.

300. 310 U.S. 586, 599–600 (1940).

301. *Id*. at 591–92.

302. 319 U.S. 624, 642 (1943).

303. DAVID R. MANAWARING, RENDER UNTO CAESAR: THE FLAG-SALUTE CONTROVERSY 149 (1962).

304. *Id.* At 153–59 (citing the *New Republic*, *Christian Century*, *America*, *Harvard Educational Review*, *Los Angeles Times*, *St. Louis Dispatch*, and *Christian Science Monitor* among the magazines and newspapers suggesting the Court may have succumbed to popular pressure and placed constitutional rights at risk); *see also* ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 532 (1956) ("One hundred and seventy-one leading newspapers promptly condemned the decision."); JOHN T. NOONAN, JR., THE BELIEVER AND THE POWERS THAT ARE 250–51 (1987).

tions in the *Barnette* case. According to Felix Frankfurter, Douglas reported that Black had changed his view of the issue because "he ha[d] been reading the papers."[305]

These illustrations suggest the potential for elite groups—the Justices' personal circles, the mass media, or others—to pull Justices away from certain positions. Of course, such illustrations have the same limitations as anecdotal evidence with respect to the impact of mass public opinion on the Justices. For one thing, the influence of elite groups cannot easily be isolated from other forces that shape the Justices' positions. For example, the Court in *Barnette* may also have been moved by reports of hundreds of violent attacks against Jehovah's Witnesses as well as signals sent by both Congress and the Executive.[306] Furthermore, illustrative evidence does not tell us the frequency with which an influence operates. However, it seems highly plausible that the prospective and actual reactions of salient elite audiences to Justices' positions create constraints on what the Justices do.

3. Alignment of Supreme Court Decision Making and Attitudes of Highly Educated People

It would be more useful to analyze the relationship between the opinions of elite groups in sectors such as the mass media and the legal profession and the Justices' positions in large sets of cases. As we have discussed, this is the approach scholars have taken in investigating the relationship between public opinion and the behavior of Supreme Court Justices over time.[307] However, there is a significant complication in taking this approach with elite groups. We do not have survey data with which to track the opinions of elite groups in sectors such as the mass media and the legal profession. Further, Justices differ in the identities of the elite groups that are most salient to them.

Still, public opinion surveys provide extensive information on the opinions of highly educated people, the subset of the general population to which members of elite groups belong. On some legal issues, people with high levels of education differ considerably in their opinions from people with less education. In the current era, the Court's doctrines on controversial social issues are more consistent with the views of highly educated people than with the views of the

305. H.N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 152 (1981). Justice Douglas later offered a different explanation for the changed positions of Justice Black and himself. WILLIAM O. DOUGLAS, THE COURT YEARS 1939–1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS 44–45 (1980). The two Justices, along with Justice Murphy, had indicated their change of mind on *Gobitis* in a joint dissenting opinion in *Jones v. City of Opelika*, 316 U.S. 584, 623–24 (1942).

306. *See* SHAWN FRANCIS PETERS, JUDGING JEHOVAH'S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION 72–95 (2000) (discussing violent attacks after the *Gobitis* decision); DEVINS & FISHER, *supra* note 11, at 199–200 (discussing both violent attacks against Jehovah's Witnesses and efforts by Congress and the Department of Justice to disavow rigidly enforced flag salute statutes).

307. *See supra* note 187.

Table 2. Attitudes of Respondents with Post-graduate Education, Compared with Attitudes of Other Respondents, on Selected Civil Liberties Issues in the Supreme Court

			% with Positions Consistent with Supreme Court Decision[315]	
Issue	**Year of Survey**	**Decision**	**Post-graduate[316]**	**Lower Levels of Education**
School Prayer[317]	1964	*Engel v. Vitale*, *Abington v. Schempp*	41.4	14.9
Flag Burning[318]	1990	*Texas v. Johnson*	44.1	14.4
Homosexual Relations[319]	2003	*Lawrence v. Texas*	75.6	51.6
Affirmative Action[320]	2003	*Grutter v. Bollinger*	43.0	25.4
Juvenile Death Penalty[321]	2005	*Roper v. Simmons*	64.8	60.2
Rights of Enemy Combatants[322]	2008	*Boumediene v. Bush*	50.0	32.7

populace as a whole.[308] This is true of issues such as gender equality,[309] sexual orientation,[310] abortion,[311] school prayer,[312] flag burning,[313] and affirmative action,[314] on each of which people with more education are more likely than other Americans to take positions that are typically identified as liberal.

308. *See* Klarman, *supra* note 106, at 189–91 & n.245 (explaining that the higher a person's level of education, the more likely that person will hold socially liberal views, which in turn helps to explain the socially liberal decisions from the relatively conservative Burger and Rehnquist Courts).

309. *See* Serena Mayeri et al., *Gender Equality*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY, *supra* note 215, at 139, 148 tbl.6.1, 150, 156 tbl.6.2, 157, 159 app. A.

310. Patrick J. Egan, Nathaniel Persily & Kevin Wallsten, *Gay Rights*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY, *supra* note 215, at 234, 238 tbl.10.1, 246 tbl.10.2, 247–48, 257 app. A, 259 app. B.

311. *See* Samantha Luks & Michael Salamone, *Abortion*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY, at 80, 93 tbl.4.3, 97; *see also* Donald Granberg & Beth Wellman Granberg, *Abortion Attitudes, 1965–1980: Trends and Determinants*, 12 FAMILY PLANNING PERSPECTIVES 250, 254 (1980) (analyzing statistical data to conclude that "formal education is the best predictor of abortion attitudes").

312. *See* Gash & Gonzales, *supra* note 216, at 71 tbl.3.2, 73 tbl.3.3, 76; *see also* Kirk W. Elifson & C. Kirk Hadaway, *Prayer in Public Schools: When Church and State Collide*, 49 PUB. OPINION. Q. 317, 321, 324 (1985) (reproducing survey results from 1974, 1980, and 1984 indicating that the higher a person's level of education, the less likely that person will favor prayer in public school).

313. *See* Hanson, *supra* note 215, at 189 tbl.8.2, 191 tbl.8.3, 194 tbl.8.4.

314. Tomiko Brown Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1440–41 (2005); *see also* Devins, *supra* note 281, at 366–370 (noting support in amicus filings in *Grutter v. Bollinger* by various elite groups).

315. The percentages in the table were derived from public opinion poll data that were analyzed, using the SPSS statistical package, to disaggregate the data by education level. Data tables showing responses by education level are on file with the authors. Percentages are of respondents who took a position on one side of the issue.

316. In the surveys on school prayer and flag burning, "post-graduate" refers to a degree beyond an undergraduate degree. In the other surveys, "post-graduate" refers to education beyond the undergraduate degree.

The segment of the American population with education beyond an under-

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317. *See* Univ. of Mich., Survey Research Ctr., Pre-election Study 13 (Sept.–Nov. 1964) (data file available at ftp://ftp.electionstudies.org/ftp/nes/studypages/1964prepost/anes1964por.zip). The question was worded as follows:

> "Some people think it is all right for the public schools to start each day with a prayer. Others feel that religion does not belong in the public schools but should be taken care of by the family and the church." Have you been interested enough in this to favor one side over the other?

Univ. of Mich., Survey Research Ctr., Pre-election Study 13 (Sept.–Oct. 1964), *available at* http://www.electionstudies.org/studypages/1964prepost/1964prepost_qnaire_pre.pdf (last visited Feb. 25, 2010). Respondents who answered in the affirmative were then asked: "Which do you think: 1. Schools be allowed to start each day with a prayer *or* 5. Religion does not belong in the schools." *Id.*

318. *See* Univ. of Mich., Survey Research Ctr., Post-election Survey, 1990 National Election Studies 59 (Nov. 1990–Jan. 1991) (data file available at ftp://ftp.electionstudies.org/ftp/nes/studypages/1990post/anes1990por.zip). The question was worded as follows: "Should burning or destroying the American flag as a form of political protest be *legal* or should it be *against the law*?" Post-election Survey, 1990 National Election Studies 59 (1990), *available at* http://www.electionstudies.org/studypages/1990post/1990post_qnaire.pdf.

319. *See* Gallup Org., Gallup News Service Poll # 2003-37: Terrorism/Homosexual Civil Unions/Iraq/Children/College/Dangerous Drivers 10 (July 18–20, 2003) (produced by the Gallup Organization) (version distributed by The Roper Center, University of Connecticut), *available at* http://webapps.ropercenter.uconn.edu/CFIDE/cf/action/catalog/abstract.cfm?label=&keyword=USAIPOGNS2003+37&fromDate=&toDate=&organization=Any&type=&keywordOptions=1&start=1&id=&exclude=&excludeOptions=1&topic=Any&sortBy=DESC&archno=USAIPOGNS2003-37&abstract=abstract&x=21&y=16. The question was worded as follows: "Do you think homosexual relations between consenting adults should or should not be legal?" *Id.*

320. *See* NBC News & The Wall Street Journal, Hart-Teeter/NBC/WSJ Poll # 6030: 2004 Presidential Election/Bush/Economic Policy/The Economy/Iraq/North Korea 20 (Jan. 19–21, 2003) (produced by the Hart-Teeter Research Companies) (version distributed by The Roper Center, University of Connecticut), *available at* http://webapps.ropercenter.uconn.edu/CFIDE/cf/action/catalog/abstract.cfm?label=&keyword=USNBCWSJ2003+6030&fromDate=&toDate=&organization=Any&type=&keywordOptions=1&start=1&id=&exclude=&excludeOptions=1&topic=Any&sortBy=DESC&archno=USNBCWSJ2003-6030&abstract=abstract&x=32&y=11. The question was worded as follows: "As you may know, the U.S. Supreme Court will be deciding whether public universities can use race as one of the factors in admissions to increase diversity in the student body. Do you favor or oppose this practice?" *Id.*

For additional discussion, see *supra* note 242, noting that polling on affirmative action is complicated by the fact that the Supreme Court issued two somewhat competing 2003 decisions on race preferences in university admissions.

321. *See* Pew Research Ctr. for the People & the Press, Pew/PSRAI Poll # 2005-RELIG: Religion and Public Life 2005, at 12 (July 7–17, 2005) (produced by Princeton Survey Research Associates International) (version distributed by The Roper Center, University of Connecticut), *available at* http://webapps.ropercenter.uconn.edu/CFIDE/cf/action/catalog/abstract.cfm?label=&keyword=USPEW2005-RELIG&fromDate=&toDate=&organization=Any&type=&keywordOptions=1&start=1&id=&exclude=&excludeOptions=1&topic=Any&sortBy=DESC&archno=USPEW2005-RELIG&abstract=abstract&x=32&y=9. The question was worded as follows: "All in all, do you strongly favor, favor, oppose, or strongly oppose . . . [t]he death penalty for persons convicted of murder when they were under the age of 18?" *Id.*

322. *See* ABC News & The Wash. Post, ABC News/Washington Post Poll # 2008-1065: June Monthly—2008 Presidential Election/Iraq/Race Relations 9 (June 12–15, 2008) (version distributed by The Roper Center, University of Connecticut), *available at* http://webapps.ropercenter.uconn.edu/CFIDE/cf/action/catalog/abstract.cfm?label=&keyword=USABCWASH2008+1065&fromDate=&toDate=&organization=Any&type=&keywordOptions=1&start=1&id=&exclude=&excludeOptions=1&topic=Any&sortBy=DESC&archno=USABCWASH2008-1065&abstract=abstract&x=28&y=14. The question was worded as follows:

graduate degree has especially distinctive opinions. Table 2 provides evidence of this pattern by comparing the opinions of this group with those of other survey respondents on social issues that the Supreme Court has addressed since the 1960s. In each instance, by varying margins, the most highly educated group was more favorable to the Court's position around the time of the ruling than was the remainder of the population. The difference for the juvenile death penalty was small. For all the other issues, it was moderate to large.

Justice Scalia has alluded to this pattern in several opinions, including one in which he complained that the "Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected."[323] That complaint came in the context of legal rights related to sexual orientation, an issue on which the Court's alignment with elite views as distinct from the views of the public as a whole is relatively clear.[324] Whether Justice Scalia's complaint is justified, he points accurately to the Court's tendency to support elite values on social issues. That tendency is especially striking for issues on which the Court majority has continued to diverge sharply from mass public opinion even after that opinion has been clearly manifested, such as with respect to school religious observances[325] and flag burning.[326]

The Court's support for policies that are favored by elite segments of society might simply reflect the Justices' own values, but that is not necessarily the case. As Barry Friedman points out, "If a [J]ustice is in tune with his peer group, and his peers have elite views not shared by most of the country, the [J]ustice will seem to be going his own way."[327] In reality, reference groups in elite segments of society can be expected to reinforce the impact of Justices' own views, and the two influences on the Justices' positions cannot easily be separated.

Of course, the views of social elites are far from homogeneous. The personal values of Supreme Court Justices and of the elite groups with which they

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> The U.S. Supreme Court has ruled that non-citizens suspected of terrorism who are being held in Guantanamo Bay, Cuba, should be allowed to challenge their detentions in the U.S. civilian court system. . . . What's your view—do you think these detainees should or should not be able to challenge their detentions in the civilian court system?

Id.

323. Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting); *see also* Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) ("Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda . . . ."). See also *supra* note 291 for a quote from Justice Scalia's dissenting opinion in *United States v. Virginia*, specifically singling out law professionals as having exerted too great an influence on the Court.

324. Responding to *Romer v. Evans*, legal scholar Lino Graglia emphasized what he saw as the influence of "America's cultural elite" over the Court. Lino A. Graglia, Romer v. Evans*: The People Foiled Again by the Constitution*, 68 U. COLO. L. REV. 409, 409–10, 412 (1997).

325. *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

326. *See* United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989).

327. FRIEDMAN, *supra* note 1, at 378.

identify may diverge from those of highly educated people as a whole, a reality underlined by Justice Scalia's protests at the perceived bias of his colleagues. But the Court's tendency to mirror elite opinion more closely than mass opinion, a tendency that can be discerned from its policies of both past and present eras, is suggestive.[328]

4. Ideological Shift by Justices Over Time: The "Greenhouse Effect"

As is true of the influence of elite groups in specific instances, more pervasive influence is easier to ascertain when it involves changes in the Justices' positions on issues of legal policy. If Justices move closer to the positions of relevant elite groups over time, such movement suggests a pull on the part of those groups. As it happens, some conservative commentators in the current era have argued that such a pull exists and that some Supreme Court Justices respond powerfully to the views of certain elite groups.[329] Their argument directs us to a third type of evidence concerning the influence of elites on the Court—evidence on whether certain Justices change systematically in their ideological positions over time. The argument and the evidence merit consideration in some detail.

In the view of some conservative commentators, the Justices are subject to strong influence from liberal-leaning groups that may be salient to them. President Nixon was an early proponent of this thesis; Nixon concluded that Justice Potter Stewart had been "overwhelmed by the Washington-Georgetown social set"[330] and worried that his own appointees to the Court might succumb to the same influence.[331]

Two decades later, economist and political commentator Thomas Sowell coined the term "Greenhouse effect" to refer to what he saw as the influence of the liberal news media on some Supreme Court Justices.[332] The term referred to Linda Greenhouse, long-time Supreme Court reporter for the New York Times. Sowell viewed Greenhouse as "the most prominent practitioner" of reporters' efforts to sway Justices in a liberal direction.[333]

Other conservatives, some adopting the label of the Greenhouse effect, have made similar arguments. Frequently they go beyond the press, pointing to a

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328. *See* Klarman, *supra* note 106, at 190 (explaining that, historically, the Court's decisions initially represented the elite's concern with the protection of property rights before shifting to social and cultural issues).

329. This discussion draws from BAUM, *supra* note 7, at 139–55.

330. RICHARD REEVES, PRESIDENT NIXON: ALONE IN THE WHITE HOUSE 338 (2001).

331. *See* JOHN W. DEAN, THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT 171 (2001); LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 48 (2005).

332. The term was popularized by federal appeals court Judge Laurence Silberman. *See* Laurence Silberman, Circuit Judge, Speech Delivered to the Federalist Society (June 14, 1992), *in Attacking Activism, Judge Names Names*, LEGAL TIMES, June 22, 1992, at 14; *see also* Martin Tolchin, *Press is Condemned by a Federal Judge for Court Coverage*, N.Y. TIMES, June 15, 1992 at A13 (quoting Silberman). Silberman credited Sowell with the phrase; Sowell used the phrase in Thomas Sowell, *Blackmun Plays to the Crowd*, ST. LOUIS POST-DISPATCH, Mar. 4, 1994, at 7B.

333. Sowell, *supra* note 332.

broader set of liberal-leaning elite influences on the Court, including legal scholars, leaders of the legal profession, and—sharing President Nixon's concern—Washington social circles.[334]

The hypothesis of a Greenhouse effect derives most fundamentally from the disappointment of conservative commentators with the behavior of several appointees to the Court by Republican presidents. This disappointment dates back to the Eisenhower appointees of the 1950s, but it was heightened by the records of the Burger and Rehnquist Courts. Despite the string of ten appointments by Presidents Nixon, Ford, Reagan, and George H.W. Bush, the Court's policies remained more liberal on civil liberties issues than most observers of the Court would have expected and conservatives had hoped. The failure of the Court to shift further to the right reflected the relative moderation of Justices such as Lewis Powell, Sandra Day O'Connor, and Anthony Kennedy and what might be characterized as the moderate liberalism of John Paul Stevens, David Souter, and (in the later portion of his Supreme Court career) Harry Blackmun. In the view of some conservative commentators, some of these Justices—especially Blackmun[335] and Kennedy[336]—had succumbed to the Greenhouse effect.

It would be easy to dismiss the idea of a Greenhouse effect as nothing more than the product of disappointment about the Supreme Court's direction. Such a dismissal, however, is inappropriate for two reasons. First, as we have argued, it is not unreasonable to think that Justices might be influenced by elite groups that are important to them.[337] Second, there is evidence that the community of legal scholars, the leadership of the legal community, and the elite news media lean more to the left than to the right in the broad field of civil liberties.[338] Although it is implausible that the set of influences captured by the idea of a Greenhouse effect could fully account for the movement of several Justices across the ideological spectrum, it is quite plausible that these influences could be one source of such movement.

Finally, as one of us has documented in a study of Justices appointed to the Court between 1953 and 1994, there is systematic evidence that several Republican appointees to the Court have moved to the left during their Court tenure,

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334. *See, e.g.*, MAX BOOT, OUT OF ORDER: ARROGANCE, CORRUPTION, AND INCOMPETENCE ON THE BENCH 119–20 (1998); MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 150–51 (1994); MARK R. LEVIN, MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA 60–61 (2005); Michael Barone, *Why America's House of Lords Seems to Tilt to the Left*, CHI. SUN-TIMES, July 13, 2005, at 55; David P. Bryden, *Is the Rehnquist Court Conservative?*, 109 PUB. INT. 73, 83–84 (1992).

335. Sowell, *supra* note 332.

336. Terry Eastland, *The Tempting of Justice Kennedy: Is It the Greenhouse Effect That Has Turned Anthony Kennedy into the Harry Blackmun of Our Time—That Is, a Justice Who "Grew"?*, AM. SPECTATOR, Feb. 1993, at 32–37; *Justice Anthony Kennedy: Surely Reagan's Biggest Disappointment*, HUMAN EVENTS, May 31 & June 7, 1996, at 3.

337. Legal scholar Frederick Schauer has argued that it is not unreasonable to think that the Justices' interest in their reputations might move some of them to the left. Schauer, *supra* note 70, at 627–30.

338. *See supra* note 156.

based on their votes on case outcomes.[339] Focusing on civil liberties, the field in which the Greenhouse effect has been posited to operate, the study analyzed raw changes in judges' liberal–conservative voting and changes in voting with an indirect statistical control for the issue content of cases.[340] Comparing a Justice's first two terms with two sets of later terms,[341] the study found substantial shifts toward more liberal voting, by one or both measures, for Earl Warren, Potter Stewart, Harry Blackmun, Lewis Powell, Anthony Kennedy, and David Souter.[342] For instance, if the raw percentages of pro-civil liberties votes in a Justice's first two terms are compared with the seventh through tenth terms, there were increases of nine percentage points for Blackmun, thirteen percentage points for Kennedy, twenty-four percentage points for Souter, and thirty-five percentage points for Warren.[343] Notably, no such shifts occurred in cases involving economic issues.[344]

Even more relevant to our inquiry are the Justices' voting records in the cases with the greatest salience to the Court's audiences: those that received front-page coverage in the *New York Times*.[345] Changes in the Justices' voting records

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339. BAUM, *supra* note 7, at 143–49. In calling attention to this phenomenon, we are not making the broader point that the "Greenhouse effect" is the sole explanation for shifts in the Justices' positions. The leftward movement on the part of certain Republican appointees is undoubtedly the by-product of several factors. Consider, for example, the Rehnquist Court's 2000 invalidation of mid-1960s legislation that sought to override *Miranda v. Arizona*, 384 U.S. 436 (1966), signaling the Court's near-unanimous reaffirmation of *Miranda.* Dickerson v. United States, 530 U.S. 428 (2000). Rather than register its embrace of *Miranda*, *Dickerson*'s lopsided majority highlighted the interest of some conservative Justices in the Court's prerogative to interpret the Constitution. *See id.* at 437 ("Congress may not legislatively supersede our decisions interpreting and applying the Constitution."). Most notably, Chief Justice Rehnquist was hardly a fan of *Miranda* but nevertheless wrote *Dickerson* in order to highlight the deference he felt lawmakers owed to Court interpretations of the Constitution. *See* Yale Kamisar, Dickerson v. United States*: The Case That Disappointed* Miranda*'s Critics—and Then Its Supporters*, *in* THE REHNQUIST LEGACY 106, 107–12 (Craig Bradley ed., 2006) (noting Rehnquist's opposition to *Miranda*).

340. BAUM, *supra* note 7, at 143–49. The control involves adjusting the Justices' voting records for changes over time in voting patterns by the Justices as a whole, on the assumption that overall changes in those patterns reflect changes in the sets of issues that the Court hears. Thus, if most of the Justices who serve during two periods have higher rates of liberal voting in the second period, that difference is attributed to changes in case composition that make it "easier" to cast liberal votes. The statistical control is described in Lawrence Baum, *Measuring Policy Change in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 905, 906–08 (1988).

341. These were the fifth through tenth terms and the seventh through tenth terms.

342. *See id.* at 147–48.

343. *Id.* at 147.

344. *Id.* at 149.

345. On this measure, see Epstein & Segal, *supra* note 248, at 72–81. The specifics of the criteria for inclusion are shown in the notes to Table 3. On some low salience issues, certain Republican appointees have refused to sign onto the efforts of other Republican appointees to advance the conservative agenda. For example, Justices Kennedy and O'Connor—after initially backing some restrictions on habeas corpus restrictions—backed away from the efforts of Justice Scalia and other conservatives to pursue a more fundamental transformation of habeas jurisprudence. *See* William E. Hellerstein, *Book Review*, 58 BROOKLYN L. REV. 913, 925–26 (1992) (arguing that Justice Kennedy and O'Connor's refusal to sign onto a wholesale revision of habeas jurisprudence "evinced further resentment of their more conservative colleagues"). For a detailed assessment of the middle ground position carved out by Justices Kennedy and O'Connor, see James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997 (1992).

Table 3. Percentage of Liberal Votes in Civil Liberties Decisions Reported on Front Page of the *New York Times*, Selected Periods of Justices' Tenure on the Court[347]

Justice[348]	Percentage of Liberal Votes		
	Terms 1–2	Terms 5–10	Change
non-D.C. Republicans			
Warren	71.4	88.0	**+16.6**
Harlan	60.0	39.3	**−20.7**
Stewart	50.0	56.6	**+6.6**
Blackmun	35.4	50.5	**+15.1**
Powell	28.6	40.6	**+12.0**
Stevens	60.0	66.7	**+6.7**
O'Connor	20.0	34.3	**+14.3**
Kennedy	11.9	45.6	**+33.7**
Souter	56.3	76.7	**+20.4**
D.C. Republicans			
Burger	32.6	22.6	**−10.0**
Rehnquist	15.4	12.4	**−3.0**
Scalia	31.8	22.1	**−9.7**
Thomas	37.5	16.9	**−20.6**
Democrats			
Brennan	88.0	82.0	**−6.0**
White	63.2	55.9	**−7.3**
Marshall	89.2	95.9	**+6.7**
Ginsburg	77.8	87.1	**+9.3**
Breyer	76.2	80.8	**+4.6**

in civil liberties cases that meet this criterion, from the first two terms of a Justice's tenure to the fifth through tenth terms, are shown in Table 3. The data need to be interpreted with caution because the number of cases in the first two terms for some Justices is relatively small[346] and changes in the issue content of salient cases over time can distort the Justices' records. Still, the results are noteworthy. For six of the Republican appointees (Warren, Blackmun, Powell,

In understanding this leftward move of low salience issues, it is possible that the "Greenhouse effect" is in play. It is also possible, however, that Justices O'Connor and Kennedy simply supported a recalibration, not a transformation, of habeas rights. For this very reason, we think it especially instructive to look to the Court's decision making on high-visibility issues. These are the very issues that define both the public's and the elite's understanding of the Court and, as such, are highly instructive in assessing potential outside influences on Court decision making.

346. For example, there were ten cases for Justice Harlan and fourteen for Chief Justice Warren.

O'Connor, Kennedy, and Souter), the proportion of liberal votes in this subset of cases was more than ten percentage points higher in the second period than in the first. For two others (Stewart and Stevens), there was an increase of more than five percentage points. Thus it was not simply that these Justices took more liberal positions than most Republican party faithful would have preferred during their Court service; in this subset of civil liberties cases, as in that field as a whole, their voting records became more liberal over time.

The table differentiates between Republican appointees who came to Washington, D.C. upon their appointment to the Court and those who were already living in Washington. Two conservative commentators have argued that Washington newcomers are vulnerable to the liberal influences of the Capital that they face for the first time. In contrast, Republicans who were already living in Washington when they were appointed have demonstrated their lack of vulnerability to those influences.[349]

Indeed, as Table 3 shows, all the Republicans whose proportions of liberal votes increased were Washington newcomers at the time of their appointments. In contrast, the proportion of liberal votes declined for Republicans who were already in Washington. The same was true when votes in all civil liberties cases were analyzed.[350]

These findings should not be given undue weight. The pattern of voting change that conservative commentators perceived and that the study verified should not be attributed solely to one form of elite influence on the Court; undoubtedly, other factors helped to bring about this pattern.[351] For that matter,

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347. The percentages in the table were derived from a data set downloaded from the Original Supreme Court Judicial Database hosted by the University of South Carolina. *See* THE JUDICIAL RESEARCH INITIATIVE, http://www.cas.sc.edu/poli/juri/sctdata.htm (data set on file with authors). The "ALLCOURT" data set used for the analysis is no longer available on the University of South Carolina website; the Supreme Court Database has subsequently moved to a website hosted by Washington University, where newer versions of the data set can be downloaded, *see* THE SUPREME COURT DATABASE, http://scdb.wustl.edu. The data set was analyzed with a variable added for whether a case met the Epstein–Segal criteria for inclusion: orally argued cases decided with an opinion that were headlined in a front-page story in the *New York Times* on the day after the decision. *See* LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH & THOMAS G. WALKER, THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS 174 (4th ed. 2007). The cases are listed at *id.* at 154–74. The statistical output files are on file with the authors.

348. Justices are included if they were appointed in 1953 or later and if they served at least ten terms on the Court. Justice Brennan and Justice Powell were both Democrats appointed by Republican presidents; Justice Powell is categorized as a Republican because his perceived conservatism was a major factor in his appointment. *See* HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 15, 246–47 (5th ed. 2008).

Terms are counted from the beginning of a Justice's tenure, except that Justice White's brief participation in the 1961 term and Justice Kennedy's partial participation in the 1987 term are not counted.

349. *See* Eastland, *supra* note 336, at 34 n.3; David M. Wagner, *Beyond "Strange New Respect,"* WKLY STANDARD, Mar. 14, 2005, at 20.

350. *See* BAUM, *supra* note 7, at 147.

351. *See* Jon D. Hanson & Adam Benforado, *The Drifters: Why the Supreme Court Makes Justices More Liberal*, BOSTON REV. Jan./Feb. 2006, at 23 (2006) (positing that several "situational influences" affect ideological drift in judicial decision making). For additional discussion, see *supra* note 339.

it may be primarily a product of chance. It is hardly uncommon for a random pattern of behavior in politics to take what appears to be a systematic form, on which an explanation is then imposed.[352] But the findings *are* consistent with the lessons of psychological theory that we described in Part II. At the least, then, they serve as a reminder that Supreme Court Justices are subject to significant influence from elite groups that are salient to those Justices.[353]

D. SUMMARY

In this Part, we have examined evidence regarding the influence of elites and the mass public. Because of the inherent difficulty in investigating the motivations of Supreme Court Justices, it is next to impossible to make conclusive judgments about the relative influences of elites and the mass public. As detailed in this Part, the evidence—although suggestive—does not allow firm judgments about the influence of the mass public and elite groups on Justices' individual choices and on the Supreme Court's collective decisions.

But what we can surmise supports the conclusion that elites are more important to the Justices, and exert more impact on their choices, than does the public as a whole. Scholars emphasize one mechanism for public influence on the Court: the Justices' concern with the Court's legitimacy. But because the Court's legitimacy is robust, the Justices have little to fear. To the extent that congressional responses to the Court reflect public opinion, the Justices have more reason to be concerned about public attitudes—but hardly so much that they should often feel constrained.

Evidence on the statistical relationship between public opinion and Supreme Court decisions is mixed. There is some evidence of covariation between ideological trends in public opinion and ideological trends in the Court's decisions, but that evidence is inconsistent in some respects and uncertain in its implications. Occasionally pivotal Justices, and thus the Court, retreat from highly unpopular decisions. But more striking is the frequency with which the Court takes and adheres to decisions that run counter to public opinion.

The effect of elite groups on the Court is even more difficult to ascertain than

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352. *See* Carol Mock & Herbert F. Weisberg, *Political Innumeracy: Encounters with Coincidence, Improbability, and Chance*, 36 AM. J. POL. SCI. 1023 (1992); *see also* BAUM, *supra* note 8, at 151. In this instance, observers of the Court may have imposed the Washington residence explanation on the patterns of behavior they identified among the Justices. With Justice Samuel Alito showing no sign of growing moderation during his Supreme Court career so far, he would be a clear exception to the Washington residence pattern that some observers posited; Alito had been away from D.C. for eighteen years when he was appointed. Shortly after his appointment, one scholar suggested that the key variable in determining the path of Republican appointees to the Court was experience in the federal Executive Branch rather than Washington residence, imposing a new explanation that could account for the slightly different pattern in the data that Alito produced. *See* Michael C. Dorf, *Does Federal Executive Branch Experience Explain Why Some Republican Supreme Court Justices "Evolve" and Others Don't?*, 1 HARV. L. & POL'Y REV. 457 (2007).

353. One recent study has found evidence that the ideological content of Justices' voting is affected by shifts in the ideological position of their political parties, measured by the content of party platforms. *See* Yates et al., *supra* note 96, at 16–18, 21–22.

that of the general public. But it is clear that these groups are often important audiences for the Justices, and we have suggestive evidence that they shape the Justices' positions. In light of what we can surmise about the Justices' incentives, it seems reasonable to conclude that they are more susceptible to influence from elite groups than from the mass public.

CONCLUSION

Supreme Court Justices enjoy a high level of independence from their political and social environment. Neither mass public opinion, the views of relevant elite groups, nor any other segment of the world outside the Court has control over the Justices' choices. Because of that independence, the most powerful determinants of the Court's decisions are the Justices' own conceptions of good law and good policy.

Even so, to a great extent the Court is a majoritarian institution, in that its policies tend to coincide with the preferences of policy makers in the other branches of government and those of the country as a whole. This tendency results from several different processes, including the appointments of Justices, pressures on the Court from Congress and the Executive Branch, and the effects of societal developments on the Justices' thinking.

Scholars frequently identify another source of majoritarianism, the direct influence of the general public on the Justices. That influence is thought to derive primarily or solely from the Justices' concern with their legitimacy. Under this view, if the Court loses public support, acceptance of its decisions will decline and the Court's effectiveness with it. But there are good reasons to doubt that the Justices are highly responsive to public opinion. In particular, the Court's legitimacy is robust and largely immune to damage from public disagreement with Court decisions. More than that, the mass public is largely ignorant of the specific rulings issued by the Supreme Court.

The legitimacy rationale, moreover, cannot be squared with the frequency with which the Justices make and adhere to decisions that arouse widespread disagreement in the general public. Even if some Justices take public opinion into account (in part because they exaggerate the need to protect the Court's standing with the public), the Court as a whole has demonstrated considerable independence from public opinion.

In contrast, the Justices have strong incentives to maintain their standing with the elite audiences that are salient to them. Fundamentally, those incentives derive not from concern about support for the Court as an institution but from the human need for approval from individuals and groups that are important to them. Because the individuals and groups most salient to the Justices are overwhelmingly from elite segments of American society, it is the values and opinions of elites that have the greatest impact on the Justices. This is one important reason why Court decisions typically accord with the views of the most educated people better than they do with the views of the public as a whole. More to the point, the Justices advance their personal preferences by

attending both to their preferred vision of legal policy and to the reference groups that matter most to them. Consequently, although the Justices will not diverge sharply from policy positions they strongly favor, the departures they do make are more likely to reflect their personal reference groups than the popular will. This tendency to take personal reference groups into account is especially true among swing Justices, that is, Justices with comparatively weak policy positions.

If our judgment on these points is accurate, it does not require a reassessment of the role of the Supreme Court in government and society. As we have noted, there are strong majoritarian forces working on the Court even if the general public exerts no direct influence on the Justices. But if the public has only a weak effect on the Justices, then it is necessary to rethink much of what scholars have said about the hold of public opinion on the Court. The Justices enjoy considerable freedom from public control, and they exercise that freedom in striking ways. In that important sense, the Supreme Court is more independent in reality than it is in the depictions of many scholars.