

# How Public Opinion Constrains The Supreme Court

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February 2, 2009

## Abstract

Although scholars increasingly acknowledge a contemporaneous relationship between public opinion and Supreme Court decisions, debate continues as to why this relationship exists. Does public opinion directly influence the Supreme Court or do justices simply respond to the same social forces that simultaneously shape the public mood? We argue that the public mood establishes a boundary that constrains—and thus directly influences—the Court’s behavior. To test this hypothesis, we examine case outcomes from the 1956-2000 terms. The results indicate that public opinion maintains a significant, direct effect on the Court’s decision making, even after controlling for the social forces that influence both public opinion and Supreme Court justices. Furthermore, we demonstrate that the influence of public opinion on Supreme Court decisions is robust to the potentially moderating effect of case salience.

A previous version of this paper was presented at the Annual Meeting of the American Political Science Association, Boston, MA, August 28–31, 2008. We would like to thank Nate Kelly for sharing his Policy Liberalism data and Jim Stimson for providing Policy Mood by Supreme Court term. We also thank Dawn Chutkow, Chris Faricy, Kevin McGuire, William Mishler, Jamie Monogan, Elliot Slotnick, and Jim Stimson for helpful comments.

*In the final analysis it is simply not clear whether the Court responds to public opinion, or shapes public opinion, or whether it responds to the same sort of factors that themselves shape public opinion.* (Gibson 1990, 290)

Beginning with Dahl (1957), scholars have documented an *indirect* relationship between public opinion and the Supreme Court. According to this “judicial replacement” hypothesis, public opinion shapes the composition of the Court through the medium of elected officials in the executive and legislative branches. As these officials nominate and confirm particular justices, the Court remains in line with the public (Barnum 1985, Casper 1972, Cook 1977, Dahl 1957, Funston 1975, Marshall 1989, Segal & Spaeth 2002).

More controversially, researchers have also documented an empirical association between public opinion and judicial decision making that exists even after controlling for the Court’s composition (Barnum 1993, Mishler & Sheehan 1993, Mishler & Sheehan 1994, Mishler & Sheehan 1996, Link 1995, Stimson, MacKuen & Erikson 1995, Flemming & Wood 1997, McGuire & Stimson 2004, Giles, Blackstone & Vining 2008). Several scholars, however, question this result on both theoretical and empirical grounds (Norpoth & Segal 1994, Segal & Spaeth 2002). Others argue that the contemporaneous relationship between public opinion and the Supreme Court only holds during certain time periods (Mishler & Sheehan 1993, Hurwitz, Mishler & Sheehan 2004). A third area of controversy involves competing explanations for *why* an empirical relationship between public opinion and Supreme Court decisions does (should) exist. We seek to address these controversies by applying new theoretical considerations and a new analytic approach to what has become an ongoing question in the judicial politics literature: Does public opinion *directly* influence Supreme Court decisions?

After reviewing existing answers to this question, we provide a theoretical account of how public opinion influences the Supreme Court. We posit that the public mood establishes a bounded, yet dynamic, zone of consensus that constrains and thus directly affects the Court’s decision-making behavior. In order to test this hypothesis, the analysis identifies and controls

for the social currents that influence both the public and the Court. The results indicate that, while social forces indeed influence Supreme Court decisions, controlling for these factors, public opinion maintains a statistically significant effect on the Court's decisions. Furthermore, these results are robust to the potentially moderating effect of issue salience, as the influence of public mood persists across both salient and non-salient cases. This finding coincides with the theoretical expectation that, even for cases perceived to be non-salient, justices risk attracting the attention of the news media, the public, and other branches of government if they repeatedly issue judgments outside the public's zone of consensus.

## The State of the Debate

The intellectual foundation for much of the current debate regarding the influence of public opinion on the Court's decisions follows the prescient, but contradictory, words of Alexander Hamilton. Hamilton's (1788 [1961], 465) observation that the Court has "no influence over either the sword or the purse," coincides with the view that the relationship between public opinion and the Supreme Court reflects the justices' strategic considerations. According to this "strategic behavior" hypothesis, the justices' tenuous position in American democratic life means that they must take into account how elected officials and the general population will react to, and interpret their decisions (Murphy 1964, Mishler & Sheehan 1996, Epstein & Knight 1998, Maltzman, Spriggs & Wahlbeck 2000, McGuire & Stimson 2004).<sup>1</sup> With little formal institutional capability to enforce its decisions and compel the elected branches or the public to respect its judgments, the Court must often act strategically in its opinion writing, adjusting to shifts in the public mood in order to ensure the efficacy of its decisions. As

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<sup>1</sup>Our use of the label "strategic behavior" follows Giles, Blackstone, and Vining (2008). Mishler and Sheehan (1996, 174) refer to the "political adjustment" hypothesis and McGuire and Stimson (2004, 1019) refer to "rational anticipation."

McGuire and Stimson (2004, 1019) note, “a Court that cares about its perceived legitimacy must rationally anticipate whether its preferred outcomes will be respected and faithfully followed by relevant publics.”

Yet, Hamilton’s words also lend credence to a second view, which holds that the institutional design of the Supreme Court insulates the justices from public opinion. Specifically, Hamilton viewed the Court as “an excellent barrier” against “the encroachments and oppressions of the representative body” that could serve “as an essential safeguard against the effects of occasional ill humors in the society” (Hamilton 1788 [1961], 433,438). According to this perspective, any relationship between public opinion and the Supreme Court appears because the justices’ preferences change in response to the same social forces that influence the public. This “attitudinal change” hypothesis corresponds with the writings of the legal realist and former Supreme Court Justice Benjamin Cardozo. In an often-cited passage, Cardozo remarked, “[t]he great tides and current which engulf the rest of men do not turn aside in their course and pass the judge by” (Cardozo 1921, 167-168). More recently, Powe (2001) expressed a similar sentiment. He writes, “Law is not just politics, but judges are aware of the political context of their decisions, and are, like everyone else, influenced by the economic, social, and intellectual currents of American society” (xiv).

Under the “attitudinal change” model, the justices’ voting behavior is largely a product of their own ideological preferences (Segal & Cover 1989, Segal & Spaeth 1993, Segal & Spaeth 2002). But these attitudes are not fixed (Ulmer 1973, Ulmer 1981, Baum 1988, Epstein, Martin, Quinn, & Segal 2007). The prevailing social forces that influence the public mood also influence the justices’ preferences. Indeed, prior literature that has shown a direct relationship between the public mood and judicial decisions has acknowledged that changing social forces may be the causal mechanism driving both (Flemming & Wood 1997, Link 1995, Mishler & Sheehan 1993, Mishler & Sheehan 1996). In other words, the observed relationship

between public opinion and the Supreme Court might be spurious. Shifting social currents influence both (Giles, Blackstone & Vining 2008, Segal & Spaeth 2002).

Resolving the debate about whether and (if so) why public opinion corresponds with Supreme Court decisions carries important theoretical and normative implications. Theoretically, the debate speaks to the efficacy of the Court's institutional design. That is, does life tenure insulate these political actors from public opinion? Normatively, the debate speaks to whether the Court is a majoritarian or counter-majoritarian force. Although the attitudinal change model allows for public opinion to correlate with judicial decisions, the lack of a causal relationship suggests that this result can vary. For example, if members of the Court sometimes respond to social forces in a way that is distinct from the mass public, we would expect divergence between Court decisions and public opinion. Indeed, this expectation is consistent with evidence that the relationship between public opinion and Supreme Court decisions only exists during certain time periods (Mishler & Sheehan 1993, Hurwitz, Mishler & Sheehan 2004).

To date, only Giles, Blackstone, and Vining (2008) have offered a test of the conflicting accounts of why Supreme Court behavior appears to correspond with public opinion. Their analysis of individual justice votes demonstrates strong support for the social forces argument. They conclude, "the direct linkage between public opinion and the voting behavior of justices...does not arise from the justices' strategic concerns over maintaining legitimacy and compliance among the public...the most likely explanation...is through the mechanism of attitude change" (303). We contend, however, that for Supreme Court decisions (as opposed to individual justice votes) the jury is still out; we have reason to believe that public opinion directly influences the Court's decisions.

# Public Opinion and the Supreme Court

In this section we develop a theory of how public opinion influences Supreme Court decisions. We start with the observation that, in general, the public displays minimal awareness of Supreme Court decisions. The U.S. public's attention to and knowledge of politics is notoriously low (Delli Carpini & Keeter 1996) and the Supreme Court is no exception (Caldeira 1991, Epstein, Segal, Spaeth & Walker 2003). Giles, Blackstone, and Vining (2008) argue that, due to the public's inattentiveness, strategic justices need only consider public opinion on salient cases. Justices face no incentive to consider the public's preferences when the mass public does not tune in to the Court. For salient cases, however, strategic justices should anticipate and follow the public's preferences in order to maintain institutional legitimacy. This formulation of the strategic behavior argument views the public as a monitor of salient judicial decisions. If the Court's decision does not follow the public's preferences, the monitorial public (and the policy makers whose electoral fortunes depend on this public) will ignore the decision and perhaps lose confidence in the Court.<sup>2</sup>

We propose an alternate conception of public opinion and its resulting influence on the Court. In contrast to the view that for salient cases, the public has a preference which the justices feel compelled to follow, we hold that for any case, a range of possible rulings exist; some that fall within a region of public acceptability and some that fall outside of this region. The notion of a region of acceptability parallels what legal scholars have referred to as a "boundary of consensus" (Gillman 2004, Klarman 1996).<sup>3</sup> This perspective also comports with McGuire and Stimson's (2004, 1019) view that, "a Court that strays too far from the boundaries imposed by public mood risks having its decisions rejected" and Mishler and

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<sup>2</sup>As previously mentioned, Giles, Blackstone, and Vining (2008) do not find evidence that individual justices employ this type of strategic consideration.

<sup>3</sup>In a similar vein, Graber (1998) refers to a "dominant national coalition."

Sheehan's (1993, 89) comment that, "the Court's concern for its authority makes it reluctant to depart too far or too long in its decisions from prevailing public sentiment."

Even for many salient cases, it is difficult to imagine that more than a few individuals have a preferred decision outcome. Yet, it is not hard to believe that individuals could notice if a decision coincided with an unpopular extreme. Consider, for example, *Griswold v. Connecticut* (1965), where the Court ruled against a state ban on the use of contraceptives by married couples. We speculate that most individuals have not thought about and could not articulate a preferred contraception policy. At the same time, we concur with Klarman (1996) that in 1965, most Americans would have opposed an outright contraception ban. In other words, even inattentive and politically uninformed individuals can identify when a decision falls outside their region of acceptability.

Focusing on legislative policies, Stimson (1991) describes the public's region of acceptability as a "zone of acquiescence." As long as policy makers act within the zone of acquiescence, the public would rather pay attention to things other than politics. If policy makers stray outside of this zone, however, the media may bring the deviation to light, igniting the public's ire. We hold that the same applies to Supreme Court decision making. Most of the time, the public is content to ignore the activities of the Court. But if the Court strays beyond the zone of acquiescence, this deviation could be newsworthy. Thus, rulings outside the zone of acquiescence increase the probability that negative news about the Court will come to the attention of the public.<sup>4</sup>

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<sup>4</sup>These theoretical considerations partially operate from the premise that "no news is good news." This view is consistent with the finding that "Diffuse support [for the Court] truly does consist of a reservoir of goodwill and commitment among the mass public" (Caldeira & Gibson 1992, 658). Yet, we also posit that negative news can erode the public's support for the Court. While this perspective receives support in the literature (Grosskopf & Mondak 1998, Hoekstra 2000), others argue that the media's deference to the Court creates a "positivity bias," which limits the corrosive influence of even controversial rulings (Gibson,

The Court, in order to preserve the legitimacy of its rulings, must ensure that its decisions largely conform to the policy boundaries established by the zone of acquiescence. This is not to say that the Court may never follow its ideal preferences irrespective of public opinion. The Court’s reservoir of diffuse support enables the justices to selectively issue judgments that might contradict prevailing public opinion but will still be respected. However, a Court that repeatedly violates the zone of acquiescence will incite negative attention, thereby jeopardizing its institutional legitimacy. Justice Thurgood Marshall’s dissenting opinion in *Milliken v. Bradley* (1974) parallels this sentiment. He wrote:

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

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

For any given case that the Court confronts, the exact boundaries of the zone can vary. Not only is the zone of acquiescence dynamic and will change over time based on shifts in the public mood, but it might also depend on the context of a given issue. For instance, the public might be less tolerant of deviant rulings in cases involving particular issues, which would create a smaller range of acceptable decisions. Similarly, the likelihood of drawing

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Caldeira & Spence 2003). Accepting the existence of positivity bias, we also accept Gibson, Caldeira, and Spence’s (2003, 555) conclusion that, “Nevertheless, no one can doubt that the loyalty towards an institution is influenced by the policy outputs of that institution, at least in the long term.”

negative attention to a judgment may also vary depending on the issue at hand. Essentially, there is an inherent uncertainty surrounding the precise location of the boundaries from case-to-case. The justices will not definitively know the exact limits of the zone in most cases. The Court must, therefore, anticipate the probable boundaries of the zone and what rulings are unlikely to draw negative attention and incite the public's ire. The justices can reasonably anticipate the general thrust of public sentiment. By continually making decisions that comport with the public's general mood, the Court will seldom issue judgments that violate the zone of acquiescence. Therefore, we expect that the Court's aggregate behavior will conform to prevailing public sentiment over time.

Although not all decisions will fall within the zone of acquiescence, we maintain that the Supreme Court faces incentives to respect the boundaries imposed by public mood in both salient *and* non-salient decisions. The likelihood that the Court's decisions will attract attention is surely greater in cases that are presumed to be more salient to the public. However, the probability of drawing attention and encountering a public that cares about a Court opinion is both greater than zero and non-trivial in cases perceived to be non-salient.

Following Bartels (2008) and Unah and Hancock (2006), we contend that the context of cases matters. Part of what might make a case politically salient is the decision outcome. A case could become salient simply because the Court issued a judgment contradicting public opinion. The heightened negative attention surrounding a deviant opinion is precisely what may cause a previously non-salient issue to become politically important to the public. As Slotnick and Segal (1998, 81) note, part of what makes a case noteworthy “may be dictated by the nature of the case's outcome.”<sup>5</sup> Thus, ruling outside the zone of acquiescence risks

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<sup>5</sup>The expectation that extreme rulings can attract attention also parallels Scherer, Bartels, and Steigerwalt's (2008) work on lower court nominations. They show that when nominees are ideologically extreme, interest groups sound a “fire alarm” bringing information to Senators and making the nomination politically

drawing negative attention to an otherwise non-salient decision.<sup>6</sup>

The Supreme Court's relationship with other branches of government also reinforces the potential influence of the zone of acquiescence. Just as the Court risks attracting negative public attention by ruling outside of the zone of acquiescence, legislators risk negative attention if they support unpopular decisions. As Hamilton noted, the Court must consider whether the elected branches, which are directly accountable to popular opinion, will faithfully execute judicial policy. For the majority of decisions that do not appear on the front page of the *New York Times*, reelection-minded legislators should still consider the ruling in the context of the public's zone of acquiescence.

Thus, for any particular case, a range of rulings will exist within the public's region of acceptability. Instead of actively considering public opinion, the Court simply needs to avoid deviant opinions. Given the potential institutional benefits and desire to preserve its esteemed legitimacy, we propose that the Supreme Court will generally strive to rule within the public's zone of acquiescence for all types of cases. In doing so, the Court's aggregate behavior should change parallel to the public's mood over time.

## **The Dynamic Implications of a Zone of Acquiescence**

Our contention that, for most cases, the public's zone of acquiescence is wide might seem to suggest that public opinion exerts a minor influence on Supreme Court decisions. Yet, when we consider the dynamic implications of this zone, the potential influence is quite large.

Public opinion moves in meaningful ways over time (Erikson, MacKuen & Stimson 2002, Page salient. Although our focus is case decisions instead of nominations, we similarly hold that the probability that a non-salient ruling gains attention increases when the ruling falls outside the public's zone of consensus.

<sup>6</sup>Baum (2006) suggests that justices might also respond to public opinion because they seek personal approval from the mass public. If this linkage exists, justices would have further reason to rule within the zone of acquiescence.

& Shapiro 1992, Stimson 1991). Consequently, even if the boundaries of consensus are wide, these boundaries shift, changing the parameters that constrain the Court. Decisions acceptable to the public during one time period may provoke public outrage during another period. As long as the Court respects these boundaries in a majority of its cases, which we contend they do, shifts in public opinion should constrain, and thus influence, Supreme Court decisions. We concur with Justice William Rehnquist (1986, 768): “This is not a case of judges ‘knuckling under’ to public opinion, and cravenly abandoning their oaths to office.” Rather, “Somewhere ‘out there’—beyond the walls of the courthouse—run currents and tides of public opinion which lap at the courthouse door.”

## **Analysis**

In this section, we seek to clarify the relationship between public opinion and Supreme Court decisions. Previous research has provided important developments toward understanding the behavior of individual justices (Giles, Blackstone & Vining 2008, Flemming & Wood 1997, Mishler & Sheehan 1996). Our focus here, however, is the Court as a whole. We have argued that considerations of institutional maintenance should keep the Court’s decisions in line with shifting public opinion. Although individual justices may (and do) deviate from public opinion, in general the Court’s rulings should track public mood. Specifically, we contend that controlling for the ideology of the justices and the social forces that influence them, the Court will issue more liberal decisions when public opinion is liberal and more conservative decisions when public opinion is conservative.

To operationalize the ideology of the Court’s decisions, we evaluate the percentage of decisions each term, among all cases that reversed the lower court’s ruling, reflecting a liberal

outcome.<sup>7</sup> We utilize only reversals because prior research shows that reversals provide the most theoretically and empirically valid measures of the Court's decisions (McGuire & Stimson 2004, McGuire, Smith & Caldeira 2004, McGuire et al. 2009). As McGuire et al. (2009, 28) argue, “*If the ideological direction of the Supreme Court's decision is taken as a proxy for the ideological content of the decision...then affirmances should be excluded because they are likely to introduce systematic bias into this particular proxy measure*” (italics in original).<sup>8</sup> It is worth noting, however, that the following results do not depend on this coding decision. The findings remain the same when we analyze all cases. The time period of analysis stems from the 1956 to 2000 term.<sup>9</sup>

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<sup>7</sup>The data come from the Supreme Court Judicial Database (Spaeth 2006). Following previous research that analyzes reversals (McGuire & Stimson 2004, McGuire, Smith & Caldeira 2004, McGuire, Vanberg, Smith & Caldeira 2009), the unit of analysis is the docket number, in conjunction with split votes (analu=0, 1, or 4), for all orally-argued cases (dec.type = 1, 5, 6, 7). A reversal indicates that the petitioning party received a favorable disposition on the merits according to Spaeth (2006) (win=1).

<sup>8</sup>McGuire and his coauthors contend that affirmances introduce bias into the measure of the ideological content of the Court's decisions based on the following considerations. First, litigants will be more likely to appeal to the Supreme Court when they believe that the Court will overturn lower court rulings. Second, in general, reversals reflect the litigant's accurate assessment of the Court's position relative to the lower court's ruling, and affirmances reflect inaccurate assessments. Third, due to litigants' strategic considerations, more liberal cases will be brought when the Court is perceived to be liberal, and more conservative cases will be brought when the Court is perceived to be conservative, leading the volume of liberal (or conservative) reversals *and* affirmances to vary according to the leanings of the Court. Thus, as McGuire and Stimson (2004, 1024-1025) note, “when the Court becomes more conservative, more of the reversals (i.e., the accurate estimates) will be decided in a conservative direction *and* more affirmances (i.e., the inaccurate estimates) will be decided in a liberal direction. In other words, the accurate estimates will reflect the prevailing ideology on the Court, while the inaccurate estimates will run counter to it.”

<sup>9</sup>Following Flemming and Wood (1997) and Giles, Blackstone, and Vining (2008), we begin our analysis with the 1956 term. These authors note the anomalously high turnover of justices between 1953 and 1955, which could affect inferences about the Court's overtime behavior. Our measure of public opinion also leads us to start in 1956. Although we have observations for mood starting in 1953, the first years in the series are

For our measure of public opinion we use Stimson's Policy Mood (Stimson 1991, Stimson 1999). By incorporating information from hundreds of public opinion survey questions asked at repeated time points from the 1950s to the present, Stimson is able to provide a longitudinal measure of the public's mood. Furthermore, because the opinion questions are all political in nature, the measure captures the public's shifting preferences along the standard liberal-conservative political dimension. Nearly all studies of the relationship between the Supreme Court and public opinion rely on Stimson's measure of mood (Giles, Blackstone & Vining 2008, Erikson, MacKuen & Stimson 2002, Flemming & Wood 1997, McGuire & Stimson 2004, Mishler & Sheehan 1993, Mishler & Sheehan 1996, Pacelle, Marshall & Curry 2007, Stimson, MacKuen & Erikson 1995).

## **Multiple Issue Domains?**

We begin the analysis by evaluating our decision to combine issue areas into a single dimension of Supreme Court liberalism. Prior research on public opinion and Supreme Court decisions has often evaluated issue areas separately (Flemming & Wood 1997, Link 1995, McGuire & Stimson 2004, Stimson, MacKuen & Erikson 1995). Consistent with this focus on separate issue areas, Epstein and Mershon (1996) document potential differences in Supreme Court behavior across issue domains. Furthermore, if justices update their preferences in response to prevailing social currents, it would not be surprising if justices updated their attitudes toward specific types of cases distinctly. For example, there is little reason to expect justices to update their civil rights attitudes consistent with their attitudes toward economic issues.

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not based on as many survey questions as the rest of the series. Thus, again consistent with prior research (Erikson, MacKuen & Stimson 2002, Stimson, MacKuen & Erikson 1995), we choose to begin the analysis in 1956. We end the analysis in 2000 because the policy liberalism series ends in this year.

Yet, our concept of public opinion follows a single, liberal–conservative dimension.<sup>10</sup> Thus, if public opinion constrains Supreme Court decisions as we predict, decisions in specific issue areas should follow similar overtime trajectories, as they reflect changes in the public’s liberalism or conservatism. For time series analysis, combining issue areas is theoretically appropriate.

To evaluate this expectation, we take the percent liberal reversals for Criminal Procedure, Civil Rights, First Amendment, Economic Activity, and Judicial Power cases.<sup>11</sup> These issue categories comprise approximately 80 percent of all the Supreme Court’s cases. To assess how closely the series “hang together,” we calculate Cronbach’s alpha. The resulting alpha of 0.79 indicates that the series do indeed share much longitudinal variance. Typically an alpha of 0.70 or higher indicates that the various indicators reliably measure a single construct. To provide a visual indication of the similarities between case types, Figure 1 plots the percentage of liberal decisions for the three most common issue areas, Criminal Procedure, Civil Rights, and Economic Activity. These three categories comprise 58 percent of all cases. Year-to-year fluctuations exist, but as expected, the overtime patterns are quite similar. Early in the series, the percentage of liberal decisions in each issue area hovers around 80 percent. Then, beginning in the late 1960s, the percent liberal begins to steadily decrease until around 1985. At that point, the percent liberal in each domain begin to slowly increase. While not a direct test of public opinion’s influence, these similarities are consistent with the notion that a single dimension of public opinion influences the Court. Furthermore, these similarities provide empirical support for the decision to aggregate across issue areas for our measure of the Court’s decisions.

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<sup>10</sup>Stimson (1991, 1999) has documented a second dimension of public mood. But, like Stimson (and all others who have analyzed mood), we only focus on the first dimension in our analysis.

<sup>11</sup>Separate analysis of other issue domains is not possible due to the small number of cases in each of these categories each year.

[FIGURE 1 ABOUT HERE]

## How Social Forces Influence the Public and Judicial Mood

The attitudinal change hypothesis contends that the same social forces that influence the mass public also influence Supreme Court justices. Thus, the dynamic relationship between public opinion and Supreme Court decisions is spurious—social forces cause both. We have argued, however, that in addition to the effect of social forces on judicial ideology, public opinion creates a shifting zone that constrains, and thus directly influences Supreme Court decisions. Here, we offer a direct test of these claims.

“Social forces” sounds like a broad, almost immeasurable, concept. But, we actually know a lot about the forces that move the public’s mood. Studies consistently show that the public’s mood shifts in response to specific political and economic variables (Durr 1993, Enns & Kellstedt 2008, Erikson, MacKuen & Stimson 2002, Stevenson 2001, Stimson 1999, Stimson 2004). The nation’s political currents are one force that moves mood. Public opinion moves counter to the direction of national government (Wlezien 1995). Figure 2, which plots mood (1991, 1999) and a measure of national policy liberalism, illustrates this pattern. The measure of policy liberalism, used by Erikson, MacKuen, and Stimson (2002) and updated by Kelly (2005), codes Mayhew’s (1991) updated list of crucial policy laws as liberal or conservative. The result is a longitudinal indicator of whether national policy is moving in a liberal or conservative direction.<sup>12</sup>

For both series in Figure 2, higher values reflect increased liberalism. Thus, the figure shows that the domestic policy liberalism of the 1960s actually *followed* the peak of public

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<sup>12</sup>Mayhew’s updated list of important laws can be found at <http://pantheon.yale.edu/~dmayhew/>. For a detailed discussion of the Policy Liberalism coding see Erikson, MacKuen, and Stimson (2002, 328-336) and Kelly (2005, 872). We would like to thank Nate Kelly for providing us with this updated series.

opinion liberalism, which occurred in 1961. The stream of prominent liberal policies in the 1960s pushed the public in a conservative direction. The increasing levels of public conservatism paved the way for Ronald Reagan's election in 1980. But the conservative Reagan policies began pushing public opinion in a liberal direction. Liberalism peaked again in the early 1990s, and then began to recede during the Clinton presidency. The only exception to this thermostatic pattern is the late 1990s, when the public mood had not yet responded to the increasing conservative policy output of the Republican-dominated Congress. The overall pattern, however, which is well-known to those familiar with Stimson's Mood and Wlezien's thermostatic model, is that public opinion moves opposite the nation's political currents.

[FIGURE 2 ABOUT HERE]

We also know that public opinion responds to the economy (Durr 1993, Enns & Kellstedt 2008, Stevenson 2001). Increases in unemployment prompt more liberal preferences as the public demands more government activity. When the unemployment rate improves, this demand weakens. Conversely, increases in inflation trigger more conservative preferences. Higher levels of inflation correspond with demand for government austerity (Erikson, MacKuen & Stimson 2002, 232).

We now evaluate the attitudinal change hypothesis by testing whether the same social forces that influence public opinion also influence Supreme Court decisions. We begin with Erikson, MacKuen, and Stimson's (2002, Table 9.3) model of public mood. However, in order to assess whether the same forces that move mood also influence Supreme Court justices, we must make several adjustments. The Supreme Court term corresponds with October of the referent year to June of the subsequent year. Thus, instead of using a measure of mood that corresponds with the calendar year, we use a measure that begins in October and follows the Supreme Court term. We also calculate our economic measures to follow the

Supreme Court term.<sup>13</sup> Erikson, MacKuen, and Stimson include a one-year lag for policy liberalism, so we choose to keep our updated measure of policy liberalism on the standard calendar, essentially creating a 10-month lag. To facilitate comparison across models, we also standardize all variables to have a mean of 0 and a standard deviation of one.

Column 1 of Table 1 reports the results of the replication of the determinants of public mood. As expected, the results suggest that increased policy liberalism produces a more conservative public mood. Economic conditions also follow expectations, with higher inflation corresponding with increased conservatism and higher unemployment corresponding with increased liberal preferences. The time period is slightly different than Erikson, MacKuen, and Stimson's analysis and the data are annual instead of biannual, but the conclusion is the same. The nation's political and economic currents constitute the primary social forces that move mood.

Equipped with measures of the social forces that move mood, we are now in a position to evaluate whether these forces also influence the Supreme Court. We use the annual percentage of liberal reversals, standardized, as our measure of the Court's behavior. We control for the Court's ideology using the Segal and Cover scores (Segal & Cover 1989, Segal, Epstein, Cameron & Spaeth 1995).<sup>14</sup> These scores, which are based on editorials about the justices during their nomination process, provide an ideal measure for this part of the analysis. Because the Segal and Cover scores measure the justices' ideology at the time of confirmation, they provide a fixed estimate of the justices' ideology. Controlling for the

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<sup>13</sup>In order to replicate the Erikson, MacKuen, and Stimson model as closely as possible, we include the actual inflation rate and the percent change in unemployment.

<sup>14</sup>For each term, we compute the mean value of the justices' Segal/Cover Scores. The Segal/Cover mean and median scores are almost identical with a correlation of  $r=0.94$ . Yet, the median series introduces a multicollinearity problem because contemporaneous values of this series correlate with the lagged value of our Supreme Court measure at  $r=.90$ . We thus elect to use the mean values which, while substantively almost identical, pose less of a statistical concern.

justices' *prior* ideology, we can estimate whether the justices were influenced by the changing social currents *after* they joined the Court. Specifically, we can evaluate whether the social currents that move mood (policy output and the economy) also influence the Supreme Court.

[TABLE 1 ABOUT HERE]

Column 2 in Table 1 presents the results of the social forces model of Supreme Court decisions. Due to evidence of autocorrelation, we estimate the model with Newey West standard errors.<sup>15</sup> The results provide direct evidence in support of the attitudinal change hypothesis. The policy environment shapes both public opinion and justice behavior. As policy output moves in a liberal (conservative) direction, the proportion of liberal Supreme Court decisions decreases (increases). Yet, we also see differences in how social forces influence public opinion and the justices. The economic conditions that influence public opinion appear to have no effect on the Court.<sup>16</sup>

Having identified that political currents influence both the public and the Supreme Court, we are now able to test whether, controlling for policy liberalism, public opinion influences the Court's decisions. We have argued that it should. In the next section, we test this hypothesis by including both public mood and policy liberalism in the model of Supreme Court decisions.

## Does Public Opinion Constrain the Court?

The previous section shows that policy liberalism influences both public opinion and Supreme Court decisions. This result is precisely what the attitudinal change model predicts. But the data also demonstrate that differences exist in terms of how social forces influence the

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<sup>15</sup>The results of a Lagrange Multiplier test ( $\chi^2=3.28$ ,  $p=.07$ ) suggests the presence of autocorrelation.

<sup>16</sup>In addition to the non-significant individual effects, a block F-test of the joint influence of the inflation rate and percent change in unemployment does not yield a significant result.

public and Supreme Court decisions. These differences suggest that environmental forces also influence the mass public differently than the justices. Here we test whether, after controlling for policy liberalism and the ideological rating of the Court, public mood influences Supreme Court decisions. A positive and statistically significant relationship will provide strong evidence of direct causation.

We estimate the subsequent models using single equation error correction models (ECM). The ECM provides a conservative empirical test of our theory and a general model that is appropriate with both stationary and non-stationary data (De Boef & Keele 2008). The ECM also allows us to differentiate between short-term and long-term causal effects. Short-term effects occur if a change in the predictor variable produces an immediate change in the dependent variable. Long-term effects, by contrast, indicate that the past value of the predictor influences current and future values of the dependent variable. Consistent with the preceding analysis, our dependent variable is the annual percentage of liberal Court decisions, for all reversals. As noted earlier, using all cases (as opposed to just reversals) does not change the results in Table 2.

In the following analysis, mood and policy liberalism follow the calendar year. Since the Court term begins in October, the measures of mood and policy slightly precede the Court related variables. Although the measures overlap in October, November, and December, mood and policy also incorporate information from the preceding 9 months. This decision stems partly from necessity; the policy liberalism variable follows the calendar year. Because we have no reason to believe that information about the public mood travels faster than information about the political environment, we match our public mood measure with the policy liberalism data. The slight lag also offers the analytic advantage of ensuring that causality indeed flows in the direction we describe.

Column 1 in Table 2 repeats the social influence model from Table 1, Column 2 as

an error correction model. The results from Column 1 confirm our previous findings that Court decisions move in the opposite direction of national policy and that the ideological composition of the Court influences its decisions. The error correction model also helps clarify the nature of these relationships. Specifically, the significant long-term effects of policy liberalism and Court ideology (and lack of short-term relationships) suggest that the effects of shifts in these variables are not immediate, but rather occur in future time periods. Overall, Column 1 reaffirms that, absent the public mood predictor, policy liberalism directly influences the Court's decisions.<sup>17</sup>

Column 2 in Table 2 estimates the previous model specification but with the addition of public mood. By including both mood and policy liberalism, which controls for the influence of social forces, we are able to test whether the public's mood directly influences Supreme Court decisions.<sup>18</sup> The results reported in Column 2 show statistically significant, long-run effects for all of the predictors in the model. Most importantly, the data illustrate that, even after controlling for the influence of policy liberalism, public mood has a significant long-run impact on the Court's behavior. As prevailing public sentiment shifts in a liberal direction, the Court responds by issuing a greater proportion of liberal judgments in subsequent time periods. Substantively, this result suggests that the proportion of liberal Supreme Court decisions follows a long-run equilibrium with public opinion. When public opinion shifts it disturbs the equilibrium. The Court, in turn, responds by shifting the balance of future decisions to correspond with public opinion, thus maintaining the equilibrium relationship. The error correction rate of 0.73 indicates the speed at which this long-term effect takes place. We expect that 73 percent of the total long-run effect of public mood will influence

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<sup>17</sup>We also estimated the error correction model with the economic variables used in Table 1. Again, the estimated coefficients for the economic variables were not statistically significant.

<sup>18</sup>Given that policy liberalism influences the public's mood, it is not surprising that these two variables correlate at a moderate  $r = -0.40$ . However, an analysis of the Variance Inflation Factor confirms that multicollinearity is not a problem.

the Court at term  $t+1$  (0.65) and an additional 73 percent of the remaining effect will transpire at term  $t+2$  (0.18). Therefore, the Court's long-term responsiveness to public mood occurs rather quickly, as 93 percent of the total effect of public opinion at term  $t$  will be manifested in the justices' behavior after just two terms.

In addition, the controls for policy liberalism and the Court's ideological rating illustrate significant negative and positive impacts on the Court's behavior, respectively. Consistent with our previous model specifications, a liberal shift in policy liberalism will lead to more conservative Court outputs, and vice versa. Likewise, the aggregate of the Court's decisions will become more liberal as the Court's ideology changes in the liberal direction. The second model demonstrates that, independent of the Court's ideology and policy liberalism, public mood influences Court decisions.

As our third model specification, we replace the Segal and Cover ideology ratings with the Martin-Quinn (2002) scores. To this point, we have relied on the Segal/Cover scores to provide a measure of the justices ideology *prior* to joining the Court. Thus, controlling for past ideology we could assess the contemporaneous effects of public opinion and policy liberalism. The Martin-Quinn scores, however, provide a contemporaneous measure of the justices' revealed preferences. Switching to a contemporaneous measure of the Court's ideology provides a more rigorous test of the hypothesis that even though justices respond to some of the same social forces that influence the public, public opinion also directly influences the justices' aggregate behavior.<sup>19</sup> We should note that the scale of the Martin-Quinn scores is opposite that of the Segal/Cover ratings. Higher values of the Martin-Quinn scores reflect more conservative preferences while lower scores represent increased liberalism. We there-

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<sup>19</sup>Thus, while we recognize that the Martin-Quinn scores introduce a problem of circularity, because we are using votes to predict votes, this measurement decision actually provides a more conservative test of our hypothesis. Accepting that the ideology of the Court influences its decision output, we are essentially stacking the deck against the presence of a relationship between public opinion and Supreme Court decisions.

fore expect this predictor to exhibit a negative relationship with the proportion of liberal reversals. Column 3 in Table 2 reports the regression results.

The results illustrate that, even after controlling for the Court's contemporaneous ideological rating, public mood exerts a statistically significant impact on the Court's behavior in both the short and long run. The significant short-term effect suggests that as prevailing public sentiment shifts in a liberal direction, the Court responds by issuing a greater proportion of liberal judgments at term  $t$ . The significant long-term effect suggests that the immediate response of the Court to public opinion is not large enough to maintain the long-run equilibrium. Thus, for each change in the public mood, the influence on the Court continues into future time points. This long-term effect will be distributed across future time periods at a rate dictated by the error correction parameter. With an error correction rate of 0.57, we expect that 57 percent of the total long-run impact of mood at term  $t$  will be absorbed by the dependent series at term  $t+1$  (0.77), an additional 57 percent of the remainder will influence the Court by term  $t+2$  (.33), and so on until the two series have reached equilibrium. Overall, the data suggest that 92 percent of the total long-term effect of a shift in public mood at term  $t$  will transpire by term  $t+3$ . Therefore, the Court output series absorbs the long-run, direct effect of public mood rather quickly.<sup>20</sup> The long-run multiplier (LRM), of 2.37, reflects the total estimated impact of a unit shift in mood (combining both the short- and long-run effects) on the Court's behavior.<sup>21</sup>

Policy liberalism, by contrast, is no longer significant in either the long or short run.

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<sup>20</sup>To ensure that these results are robust across time periods, we followed Hurwitz, Mishler, and Sheehan (2004) and estimated the model for the sub-periods, the Warren Court, the Burger/Rehnquist Court, and the pre- and post-Reagan Courts. In all cases, the relationship between mood and Court decisions remains statistically significant.

<sup>21</sup>See DeBoef and Keele (2008) for a discussion of the long-run multiplier and how it and its standard error are calculated.

Given the inclusion of a contemporaneous measure of the Court's ideology, this result is not surprising. The attitudinal change argument predicts that the social forces that influence the public mood (i.e., policy liberalism) indirectly affect the Court's behavior by influencing justice ideology. Thus, controlling for current justice ideology, policy liberalism no longer emerges as significant. Consistent with expectations, the variable accounting for the ideological rating of the median justice has a significant long-term effect on the Court's behavior. As the median justice exhibits a one-unit shift in the liberal direction, we expect the proportion of liberal reversals to increase by 9.87 points, distributed over future time periods. Importantly, public mood maintains a statistically significant influence on the Court's behavior even while controlling for the social force of policy liberalism and the ideological composition of the Court. We believe that these results are consistent with our theory that the public mood serves as an important constraint on the Court's decision making, independent of the broader social forces that influence both public mood and the Court.

[TABLE 2 ABOUT HERE]

## **Salient Cases**

In this section, we examine the extent to which political issue salience might moderate the influence of public opinion on the Court's behavior. As previous research has argued, the strategic model predicts that public opinion will only matter for salient cases; after all, these are the cases the public notices (Giles, Blackstone & Vining 2008). By contrast, we contend that judgments outside the public's zone of acquiescence can attract public attention. Furthermore, due to the generally wide zone of acquiescence, ruling within these boundaries is a low-cost endeavor. Thus, public opinion should constrain judicial decisions for both salient and non-salient cases. We utilize Epstein and Segal's (2000) measure of issue salience to distinguish between salient and non-salient cases. Therefore, salient cases are those that

appeared on the front page of the *New York Times*.<sup>22</sup>

We generate two separate time series to account for the impact of public opinion on the Court's behavior. One dependent variable measures the proportion of liberal reversals among only non-salient cases while we compute the second series using just salient cases. As our independent variables, we use public mood, policy liberalism, and the Martin-Quinn scores from previous analyses.

[TABLE 3 ABOUT HERE]

Table 3 reports the results of our analysis for both non-salient and salient cases. Overall, the data demonstrate that public mood maintains a significant influence on Court decisions regardless of the distinction between the two categories of issue salience. Column 1 reports the regression results among only salient cases. The data demonstrate that public mood has a significant, long-run effect on the Court's decisions, even after controlling for policy liberalism and the Court's revealed ideological preferences. The total long-run effect of public mood in this model is 1.89 with an error correction rate of 0.97. Public mood's effect, therefore, rapidly manifests itself on the Court's behavior, as the two series essentially reach equilibrium at term  $t+2$ .

Column 2 reports the regression results for the dependent series consisting of only non-salient cases. Much like politically salient cases, our results also show the important influence of mood in non-salient cases. Here we see that public mood exhibits a significant impact on the justices in both the long and short run. The short-term effect shows that a one-unit shift in mood in the liberal direction produces an expected 2.80-point increase in the Court's liberal behavior. Additionally, with a total long-term expected effect of 1.47 for every unit change in public mood, 56 percent of the total effect of mood will occur at term  $t+1$  (0.82),

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<sup>22</sup>We used the *Supreme Court Compendium* (Epstein, Segal, Spaeth & Walker 2007) to update Epstein and Segal's (2000) saliency data, available at <http://epstein.law.northwestern.edu/research/salience.html>.

an additional 56 percent of the remaining effect will influence the Court at term  $t+2$  (0.36), and another 56 percent of the remainder will appear at term  $t+3$  (0.16). Therefore, 91 percent of the total effect of public opinion at term  $t$  will be manifested in the justices' behavior after just three terms. The LRM, or total combined short- and long-run effects of public mood, suggests that the proportion of liberal reversals will increase by 2.63 points for every unit shift of mood in the liberal direction. Also, the expected effects of mood are not statistically different across salient and non-salient cases, lending support to our hypothesis that issue salience should not moderate the influence of public mood.

In addition to the mood predictor, the Court's revealed preferences illustrate a significant and expected long-term relationship with Court output in all models. A conservative shift in the Court predicts a smaller proportion of liberal reversals. Consistent with prior research (Bartels 2008, Unah & Hancock 2006), however, case salience moderates the relationship between the Court's ideology and its decisions. The estimated LRM for ideology in the two models is statistically different at  $p < .10$  (two-tailed test). Similar to the results in Table 2, policy liberalism does not exhibit a statistically significant influence in either the long or short run among either salient or non-salient cases. We believe that all of these results further substantiate our general theory that public opinion establishes a zone of acquiescence and constrains the Court's behavior. The justices do appear to respect the boundaries of the public mood in both salient as well as non-salient cases.

## Conclusions and Implications

Klarman (2004, 6) observes that Supreme Court justices, "rarely hold views that deviate far from dominant public opinion." Our goal has been to explain why this pattern exists. Following Stimson's (1991) work on legislative representation, we propose that the public

mood establishes a “zone of acquiescence” that the Court, on the whole, respects in order to maintain its legitimacy and to increase the likelihood that the elected branches faithfully implement its judgments. This is not to say that the Court never issues rulings that contradict public opinion. Furthermore, we do not dispute recent research suggesting that individual justices may not systematically respond to public opinion (Giles, Blackstone & Vining 2008). We do contend, however, that the Court’s aggregate behavior should conform to popular sentiment. Ruling within the zone of acquiescence is not only a low-cost endeavor for the Court, but it may also preserve the Court’s ability to serve as an effective *counter*-majoritarian force in select cases.

Indeed, our results suggest that public opinion exerts a significant influence on the Court’s decision making, independent of the broader social forces influencing public mood and the justices’ preferences. Furthermore, we show that issue salience does not moderate this effect. Overall, the data suggest that at least some justices condition their preferred behavior so that the Court’s decisions comport with the general contour of public opinion over time.

The direct impact of public opinion carries important implications for the role of the Supreme Court in American politics. First, while on the surface life tenure seemingly insulates the justices from popular opinion, the results suggest that the Court may not possess the ability to repeatedly contradict the public mood and still preserve its legitimacy to issue efficacious decisions. Even though Alexander Hamilton claimed that the Supreme Court’s institutional design affords the independence to counteract oppressive behavior by the elected branches, our study implies that, in general, the Court respects popular sentiment. Second, the data support the conclusion of Giles, Blackstone, and Vining (2008) that the Supreme Court may continue to align with public opinion even as the average justice tenure increases. Yet we would add that when examining case outcomes, this relationship is not only the result of social forces influencing both public opinion and the justices, but also a result of

the Court's consideration of the public's unique shifting preferences.

Former Chief Justice William Rehnquist (1987, 98) once remarked, "No judge worthy of his salt would ever cast a vote in a particular case simply because he thought the majority of the public wanted him to vote that way, but that is quite a different thing from saying that no judge is ever influenced by the great tides of public opinion." Rehnquist's statement underscores the importance of the public mood as a general constraint on Supreme Court decision making. Although the justices' collective policy preferences surely influence Court policy output, as the late chief justice suggested, the Court is not free to ignore the prevailing sentiment of the mass public.

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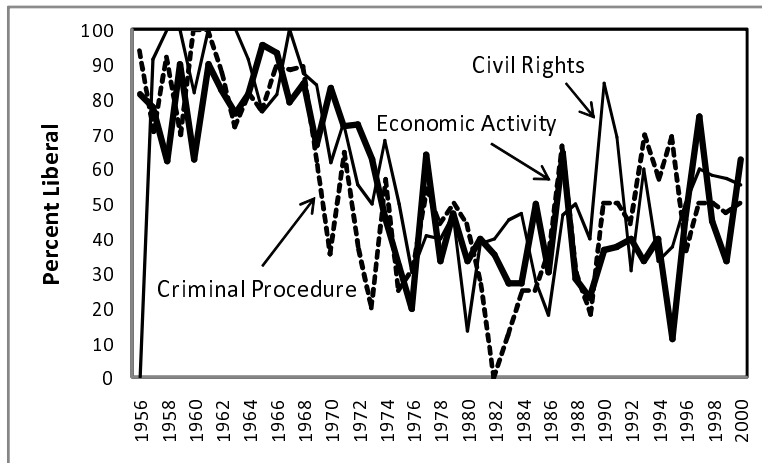


Figure 1: Percentage of Liberal Decisions Each Year, for Criminal Procedure, Civil Rights, and Economic Activity, 1956 to 2000

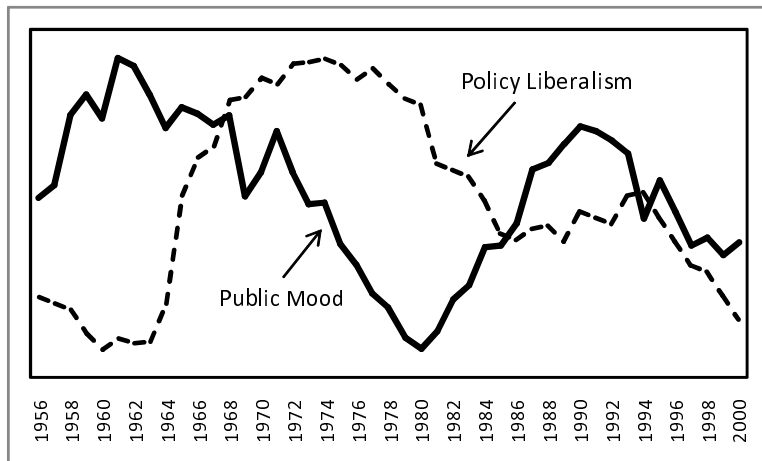


Figure 2: Public Mood and Policy Liberalism, 1956 to 2000

Table 1: The Influence of Social Factors on the Public's Mood and Supreme Court Voting, 1956-2000

	1	2
	Public Mood	Supreme Court♣
Public Mood <sub>t-1</sub>	0.62* (0.11)	–
Percent Liberal <sub>t-1</sub>	–	0.39* (0.13)
Policy Liberalism	-0.31* (0.09)	-0.17* (0.06)
Inflation Rate	-0.17* (0.10)	0.20 (0.17)
Unemployment (% Change)	0.25* (0.08)	0.08 (0.06)
Court Ideology	–	0.61* (0.24)
Constant	-0.01 (0.07)	-0.03 (0.06)
LM Test $\chi^2$	0.48	0.53
p-value	0.49	0.47
Adj. R <sup>2</sup>	.78	.83

*Note:* \*= p<.05 (one-tailed tests); Standard errors in parentheses. N=45 for all columns.

♣ Supreme Court model estimated with Newey West standard errors.

Table 2: Predicting the Change in the Liberal Proportion of Supreme Court Decisions, Reversals: 1956-2000

	1	2	3
<i>Short-Term Effects</i>			
$\Delta$ Public Mood	–	1.07 (0.83)	2.54* (0.85)
$\Delta$ Policy Liberalism	0.43 (0.44)	0.09 (0.48)	-0.19 (0.52)
$\Delta$ Court Ideology (Segal&Cover)	-1.35 (16.22)	8.13 (16.75)	–
$\Delta$ Court Ideology (Martin&Quinn)	–	–	-4.40 (4.58)
<i>Long-Term Effects</i>			
Public Mood <sub>t-1</sub>	–	0.89* (0.50)	1.35* (0.52)
Policy Liberalism <sub>t-1</sub>	-0.49* (0.14)	-0.33* (0.17)	-0.16 (0.15)
Court Ideology (Segal&Cover) <sub>t-1</sub>	19.91* (6.01)	19.08* (6.23)	–
Court Ideology (Martin&Quinn) <sub>t-1</sub>	–	–	-9.87* (3.50)
<i>Error Correction Rate</i>			
Percent Liberal <sub>t-1</sub>	-0.67* (0.13)	-0.73* (0.15)	-0.57* (0.12)
Constant	36.22* (7.46)	-13.51 (28.16)	-46.24 <sup>†</sup> (27.59)
<i>Long Run Multiplier</i>			
Public Mood	–	1.27* (0.64)	2.37* (0.74)
Policy Liberalism	-0.73* (0.19)	-0.44* (0.22)	-0.28 (0.25)
Court Ideology (Segal&Cover)	29.77* (5.54)	26.23* (5.48)	–
Court Ideology (Martin&Quinn)	–	–	-17.32* (4.92)
LM Test $\chi^2$	1.62	0.58	2.05
p-value	0.20	0.45	0.15
Adj. R <sup>2</sup>	.34	.37	.35

Note: N=45 for all columns. \* = p < .05 (one-tailed tests)  
Standard errors in parentheses.

Table 3: Predicting the Change in the Liberal Proportion of Supreme Court Decisions for Salient and Non-Salient Cases, Reversals: 1956-2000

	Salient	Non-Salient
<i>Short-Term Effects</i>		
$\Delta$ Public Mood	2.40 (2.00)	2.80* (0.82)
$\Delta$ Policy Liberalism	0.38 (1.23)	-0.35 (0.51)
$\Delta$ Court Ideology (Martin&Quinn)	-11.63 (10.96)	-3.02 (4.44)
<i>Long-Term Effects</i>		
Public Mood <sub>t-1</sub>	1.89* (1.06)	1.47* (0.51)
Policy Liberalism <sub>t-1</sub>	-0.38 (0.35)	-0.10 (0.14)
Court Ideology (Martin&Quinn) <sub>t-1</sub>	-23.69* (7.67)	-8.75* (3.30)
<i>Error Correction Rate</i>		
Percent Liberal <sub>t-1</sub>	-0.97* (0.15)	-0.56* (0.12)
Constant	-48.39 (61.14)	-54.66* (27.00)
<i>Long Run Multiplier</i>		
Public Mood	1.95* (1.03)	2.63* (0.72)
Policy Liberalism	-0.39 (0.36)	-0.18 (0.25)
Court Ideology (Martin&Quinn)	-24.42* (6.95)	-15.63* (4.86)
LM Test $\chi^2$	1.16	0.84
p-value	0.28	0.36
Adj. R <sup>2</sup>	.45	.35

*Note:* N=45 for all columns. \*= p<.05 (one-tailed tests)  
Standard errors in parentheses.