

## *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*

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With competing assumptions and alternative empirical models, scholars have come to rather different conclusions about the impact of public preferences on the decisions of the U.S. Supreme Court. Some have found the justices to be attentive to mass opinion, while others have judged it to be irrelevant. Across this divide, however, one assumption is widely shared; that is, political scientists generally agree upon how best to measure the Court's outputs. In this analysis, we employ an alternative estimate of the justices' liberalism, one which we think better reflects the underlying ideological tenor of their policies. With data from 1953 to 1996, we compare time-series models using different indicators of the Supreme Court's aggregate liberalism. Our results suggest that, in addition to being motivated by their own preferences, the justices are highly responsive to public mood, as well.

Among the more vexing issues for judicial scholars is the role of public opinion in the Supreme Court. For quite some time, political scientists have debated, both theoretically and methodologically, whether and how popular preferences are translated into judicial policy. To some, appointed justices with lifetime tenure are insulated from popular pressure (Segal and Spaeth 2002). To others, the Supreme Court's dependence upon other institutions to give force to its rulings creates a need to remain attentive to the changing course of popular attitudes (Adamany and Grossman 1983). In addition to the competing expectations created by constitutional design, the evidence on this question is equally uncertain. Empirically, there is strong evidence that both corroborates and contradicts the causal link between public preferences and Supreme Court decision making (Mishler and Sheehan 1993; Northpoth and Segal 1994). Indeed, the most recent analyses conclude that, while individual justices respond to public sentiment (Flemming and Wood 1997), the extent to which the Court's policies represent popular opinion is indeterminate, at best (Stimson, MacKuen, and Erikson 1995; cf. Erikson, MacKuen, and Stimson 2002)). How does one resolve these competing perspectives?

We believe that there is good reason for the justices to be attentive to public opinion. Specifically, we posit that, since the justices do not have the institutional capacities to give their rulings full effect, they must calculate the extent to which popular decision makers will support their policy initiatives. Thus, while the Court is certainly not electorally accountable, those responsible for putting its rulings into effect frequently are. For that reason, strategic justices must gauge the prevailing winds that drive reelection-minded politicians and make decisions accordingly (Murphy 1964). That is, justices who want to see their personal preferences expressed in public policy know that the effectiveness of such policy depends upon whether it is accepted by its implementers and those to whom they are responsible. By this logic, a Court that cares about its perceived legitimacy must rationally anticipate whether its preferred outcomes will be respected and faithfully followed by relevant publics. Consequently, a Court that strays too far from the broad boundaries imposed by public mood risks having its decisions rejected. Naturally, in individual cases, the justices can and do buck the trends of public sentiment. In the aggregate, however, popular opinion should still shape the broad contours of judicial policymaking.

Proceeding along these theoretical lines, we develop time-series models of Supreme Court liberalism in three broad policy domains and uncover a substantial degree of sensitivity to public opinion, even when the ideological composition of the Court is held constant. In so doing, we rely upon a recent innovation in the measurement of Supreme Court policy. Simply stated, we place primary analytic weight upon the Supreme Court's decisions that reverse the outcomes of lower courts. As we explain, reversals, taken by themselves, are a more valid indicator of the Court's outputs; reliance upon all cases—i.e., reversals as well as affirmances—contaminates an accurate estimate of the ideological direction of the Court's policies. By analyzing Supreme Court liberalism through the lens of reversals alone, we show that the impact of public mood is far greater than previously documented.

In the following sections, we lay out our theoretical expectations regarding the role of public preferences in the Court as well as our rationale for an alternative dependent variable. We then present and discuss our results in connection with a broader theory of dynamic representation.

### Public Opinion and the Court

By constitutional design, the nexus between public opinion and public policy is more limited for the Supreme Court than it is for the President and members of Congress. Yet this institutional insularity actually belies interesting relationships that exist between the judicial branch and mass publics. Citizens, it turns out, respond to the Court and its policies in systematic ways. Among other things, research has illuminated the sources of political support for the Court, as well as how the justices' decisions have shaped opinions on specific issues (see, e.g.,

Caldeira and Gibson 1992; Franklin and Kosaki 1989; Hoekstra 2000; Marshall 1989; Mondak 1994). Thus, a good deal is known about how public opinion moves in response to the Court's outputs.

Reversing the causal arrow, scholars have likewise contemplated the impact of public preferences on judicial policy. Few dispute that public opinion is reflected in the choices of the Court. The mechanism by which it takes place, though, has been subject to considerable disagreement. One highly plausible hypothesis is that public opinion determines Supreme Court policy indirectly: elections determine the composition of Congress and the White House, whose members in turn select the justices. Presidents and Senators, who necessarily reflect majority preferences, are motivated to select justices with whom they share an ideological affinity (Segal and Spaeth 2002). As a result, the ideological orientation of the Court generally corresponds to the attitudes of the electorate (Dahl 1957; Funston 1975; see also Gates 1987).

There is considerable intuitive appeal to this explanation, inasmuch as it undergirds the most widely accepted explanation for the observed changes in Supreme Court policy. Under the precepts of the attitudinal model, the preferences of the justices are virtually the sole determinant of their voting behavior (Segal and Spaeth 2002). Barring changes in the Court's docket, any variation in the ideological direction of the Court's outputs is necessarily a function of membership change, a process that is highly likely to produce justices who serve as contemporaneous reflections of the electorate's preferences. That the Supreme Court's outcomes may comport with popular opinion is scarcely a wonder; it is merely a manifestation of selecting ideologically driven justices whose preferences roughly match those of the electorate more generally. Illustrating this view, Justice Scalia has noted that "it's a little unrealistic to talk about the Court as though it's a continuous, unchanging institution rather than to some extent necessarily a reflection of the society in which it functions. Ultimately, the justices of the Court are taken from society . . . and however impartial they may try to be, they are going to bring with them those societ[al] attitudes" (quoted in O'Brien 2000, 343). Whether this forecloses the possibility of a Supreme Court that responds more immediately to changes in popular opinion is certainly debatable. Taken on its own terms, though, there is little doubt that this indirect influence is a principal determinant of the Court's decisional outcomes.

In addition to this indirect linkage, scholars have also posited a direct causal connection between public preferences and Supreme Court policy. In this tradition, some scholars have painted with a fairly broad brush, noting the general correspondence between public opinion and judicial outcomes. So, for instance, the Court's proclivity for countermajoritarianism seems to be dependent upon popular preferences. In fact, the justices' protection of minority interests tends to occur only when public opinion supports such outcomes (Barnum 1985; see also Dahl 1957). The absence of careful control for alternative explanations, however, leaves substantial room for disagreement about the degree to which

mass opinion actually moves the Court in one direction or another (Caldeira 1991, 314).

Other scholars have proceeded with somewhat greater analytic rigor, examining whether the Court's liberalism follows the ebb and flow of public mood, after controlling for its indirect effects. Methodological sophistication, however, has hardly generated consensus. Holding constant the justices' preferences, there is evidence of a significant causal connection between mass opinion and Supreme Court policy, both in the aggregate and within individual issue areas (Link 1995; Mishler and Sheehan 1993). Indeed, part of this pathway may be attributable to public opinion actually shaping the justices' preferences over the long term (Mishler and Sheehan 1996). Telling as these results are, they do necessitate some circumspection, since the estimated effects of public opinion may be quite sensitive to modest changes in the specification of predictive models (Norpoth and Segal 1994; see also Mishler and Sheehan 1996, 176).

At the level of the individual justice, voting appears to be significantly affected by the changing patterns of public preferences over time, if only marginally so (Flemming and Wood 1997; Mishler and Sheehan 1996; cf. Norpoth and Segal 1994). That the votes of a given member of the Court are influenced by mass opinion does not demonstrate—at least not directly—that the Court's cases are decided any differently as a consequence (Flemming and Wood 1997, 472). After all, if public opinion truly matters to the Court, then the justices ought to take it into account and (their own preferences notwithstanding) actually decide cases in ways that reflect the tenor of public mood. It is this link between public preferences and substantive policy outcomes that we are keen to examine in this analysis.

On the face of it, of course, there is little reason to suspect that the justices care about public opinion at all. With agenda control, lifetime tenure, and no political constituencies that must be appeased, the justices are largely free to make decisions that accord with their personal preferences (Segal and Spaeth 2002). State judges, who must often stand for reelection are one thing (Hall 1992), but the electorally unaccountable members of the U.S. Supreme Court are quite another. Its members do not (at least as far as we know) consult the polls prior to rendering their decisions.

At the same time, governmental actors of all kinds care a good deal about maintaining their ability to craft meaningful public policies. The precise mechanisms that constrain political decision making vary across institutions, obviously. Still, in one way or another, public officials in a constitutional system require support—from legislators, from bureaucrats, from judges, and ultimately from the public—in order to achieve and sustain their objectives.

One way in which policy makers ensure that support is by conforming their behavior to fit the preferences of those whose backing they will later require. Through rational anticipation, governmental actors “sense the mood of the moment, assess its trend, and anticipate its consequences for [the] future . . .”

(Stimson, MacKuen, and Erikson 1995, 545). For some, the need to monitor the political winds is especially acute; election-minded members of Congress, for example, rapidly adjust their policies in response to the changing tastes of voters. Presidents, as well, find that the success of their policy ambitions rise and fall with the tide of public sentiment; so they, too, must forecast the effects of popular opinion.

The Supreme Court, by contrast, need not worry over the same practical concerns as elected officials. Still, it does not necessarily follow that the justices are indifferent to changes in public preferences. To the contrary, it has long been suspected that the justices are quite mindful of the imperative of maintaining societal acceptances of their powers and policies. "To a large extent," according to Justice Frankfurter, "the Supreme Court, under the guise of constitutional interpretation of words whose contents are derived from the disposition of the Justices, is the reflector of that impalpable but controlling thing, the general drift of public opinion" (1939, 197). The principal reason, as Alexander Hamilton so sagely observed, is that the Court "has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatsoever. It may truly be said to have neither force nor will but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments" ([1787–88] 1961, 465). By this reckoning, the Court is "the least dangerous" branch because it depends upon the good will of other institutions in order for its policies to have genuine force. Justices who sought to raise any reasonable degree of political capital would surely need to consider whether their preferred policies would be met with acclaim or disdain. Estimating the nature of public mood, they should temper their ambitions, as circumstances warrant.

This is, we think, a classic case of rational anticipation by policy makers. Yet we are hardly the first to posit such a relationship. At least since Walter Murphy's *Elements of Judicial Strategy*, scholars have pondered how a rational justice might behave when "the Justice anticipates that at this time a certain decision or the announcement of a policy in an opinion would stir a political reaction which would gravely threaten that policy and probably judicial power itself" (1964, 171). Notwithstanding the absence of an electoral motive, a justice who wished to maintain institutional legitimacy for the future would have substantial incentive to trim his sails and follow popular sentiment in the present.

The reasons for such behavior are not terribly mysterious. The justices may well want to see their preferences reflected in policy outcomes, but that ambition would be fairly hollow if those policies, once promulgated, had no practical effect. The Court requires the cooperation of legislative and executive officials, many of whom are themselves careful auditors of mass opinion. For that reason, the members of the Court must reflect on how well their preferred outcomes will be received and supported by implementers. By no means does this imply that the Court cares about public opinion in the same ways that elected officials do, but

we do think it entirely reasonable to assume that justices want their policies to be taken seriously by relevant publics.<sup>1</sup>

This is not just our opinion, of course. There is abundant evidence of resistance, avoidance, and downright defiance from various constituencies of the Court (Canon and Johnson 1999). It is only when popular opinion supports the Court's goals that its policies have their full effects (Rosenberg 1991). To be sure, the Constitution affords the Supreme Court institutional independence, but it in no way guarantees the prestige upon which its success is so highly dependent.

Hence, from our theoretical perspective, we see the role of rational anticipation in the Court vis-à-vis Congress and the President to be a difference of degree, rather than kind. The justices may be comparatively insulated from public pressure, but that does not guarantee that they will be oblivious to it. The mechanism that would impel the justices to follow public opinion, we hypothesize, is the Court's expectations about the future consequences of its decisions. Public mood, then, should be a barometer by which the justices estimate the extent to which their preferred policies will likely be accepted and put into effect.

### Measuring Supreme Court Outputs

Do the policies of the Supreme Court respond to public preferences? Until rather recently, scholars who were interested in this question were frustrated by the lack of time-series data on the overall preferences of the population. An innovation in the development of a broad, aggregate measure of public opinion—the index of public mood (Stimson 1999)—has ameliorated this problem. Ironically, we first visit a preliminary issue of an entirely different order, one that, at first blush, provokes no controversy: Do we have an accurate measure of the justices' policy outputs?

Virtually all quantitative analyses provide a consistent answer to this question. Almost without exception, models of Supreme Court decision making employ the ideological direction of the Court's decision as the dependent variable of choice. This measure appears in various guises; support for the individual over government is considered liberal behavior in civil liberties cases, while support for business over government is treated as conservative policy in economic cases (see, e.g., George and Epstein 1992; Hagle and Spaeth 1992). In whatever form it appears, this measure carries with it the implicit assumption that the ideological direction of any given case is a valid indicator of the directionality of the Court's outputs. In other words, using all of the justices decisions as the dependent variable—either individually or in the aggregate—captures the nature of liberalism on the Court. Naturally, coding cases as liberal or conservative poses its

<sup>1</sup> At the very least, they want to avoid the bureaucratic hassle of having to revisit the same issue repeatedly to “demand” conformance, as they did in the case of school desegregation, for example (Rosenberg 1991).

own set of problems, but our concern lies elsewhere. Rather, we raise a more fundamental question, and that is whether *all* of the Court's cases, even when appropriately coded, reflect the Court's underlying preference order.

### *An Alternative Measure*

Recent research has offered an alternative indicator of Supreme Court liberalism: the ideological direction of the Court's policies in only those cases where the justices reverse the decision of the lower court (McGuire, Smith, and Caldeira 2004). The rationale behind this measure is complex, but its general outline can be sketched here.

Parties seeking review from the Supreme Court are rational; that is, those litigants who have lost in the lower courts petition the justices only when they estimate that they will win on the merits. Thus, a party that judges its preferred position to be more proximate to the Court's ideal than the policy promulgated in the lower court will, all things being equal, ask for relief from the justices. By contrast, litigants do not turn to the Court if they calculate that they will lose.

Of course, those who do elect to seek certiorari can only estimate their likelihood of winning, and those estimates are quite often wrong. In a formal sense, an accurate estimate (i.e., a party correctly gauging that it will prevail on the merits) results in the Court reversing the decision of the lower court. An inaccurate estimate by a petitioner is represented by an affirmance (i.e., a party erroneously guessing that it would win once the Court granted its petition for review). So, parties who have lost in the lower courts turn to the justices for relief because they calculate that the Court will overturn lower court policies; when they are correct in their estimate, the Court "reverses," and when they are incorrect the Court "affirms."

Naturally, as the Court's ideology changes due to personnel replacement, the parties' estimates of their likelihood of success likewise change. Thus, litigants that might readily seek review at one point in time might not be as anxious to go before the Court at some other time. Theory and systematic research (see Mishler and Sheehan 1996; Songer, Cameron, and Segal 1994)—to say nothing of common sense—suggest that, as the Court moves in one ideological direction, it increases the likelihood that those who share the Court's policy preferences will be more likely seek certiorari. As the Court becomes liberal, liberals step up their litigation activities before the justices. When the Court moves in a conservative direction, conservative litigants are more prone to seek review.

Changes in the Court's preferences, then, affect the ideological mix of those who calculate that they will win before the justices. If the Court were, say, ideologically conservative, then more of the estimates of winning (i.e., more petitions) would naturally be made by conservative litigants. Logically, this means that, not only will more of the accurate estimates be made by conservatives, but more of the *inaccurate* estimates will be made by conservatives, as well. Thus, when the Court becomes more conservative, more of the reversals (i.e., the accu-

TABLE 1  
Correlations of Aggregate Annual Time Series by Case Outcome Type  
and Issue Area

Issue Area	All Cases with Reversals	All Cases with Affirmances	Reversals with Affirmances
Criminal Procedure	.85	.21	-.22
Civil Rights and Liberties	.85	.37	-.14
Economics	.88	.05	-.33

N = 45.

rate estimates) will be decided in a conservative direction *and* more of the 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.

Including both the accurate and inaccurate estimates should, therefore, have rather severe empirical consequences for measuring the ideological character of the Supreme Court's policymaking. One way to illustrate this empirically is by examining correlations of time series constructed from all cases, decisions to reverse, and decisions to affirm.<sup>2</sup>

We present three sets of such correlations in Table 1. The first two columns show the relationship between aggregates of all cases and each of the two sub-components. These are part-whole correlations and thus carry a positive bias. What we see in each issue area is that the correlation of the "all cases" measure with the reversals subset is very high, but imperfect. This suggests two things of import, (1) that most of the valid variance comes from decisions to reverse, and (2) that there is room to improve upon the use of the all cases, because the less than perfect correlation implies slightly different behavior for the reversals. Even with the upward bias, the correlations of the second column are quite low; the content of decisions to affirm is something different from the main line of Court decisions. If it were appropriate to test for significance in these part-whole correlations, only the Civil Rights and Liberties domain would pass muster.

To get closer to the issue of whether decisions to affirm are associated with decisions to reverse—whether, that is, we get the same or different pictures of where the Court stands—we present correlations of the reversal and affirm series in column 3. Without the part-whole bias, the clear interpretation of these correlations is that these measures share no content. With all three correlations negative (and one significantly so), the claim of McGuire, Smith, and Caldeira (2004) is supported in these data. The decisions to affirm lower court rulings, that is, not only totally fail to indicate the Court's ideology, they very weakly indicate its

<sup>2</sup>In the analysis that follows, we draw our data from the Supreme Court Judicial Database, examining all orally argued cases by docket number, in conjunction with split-votes.

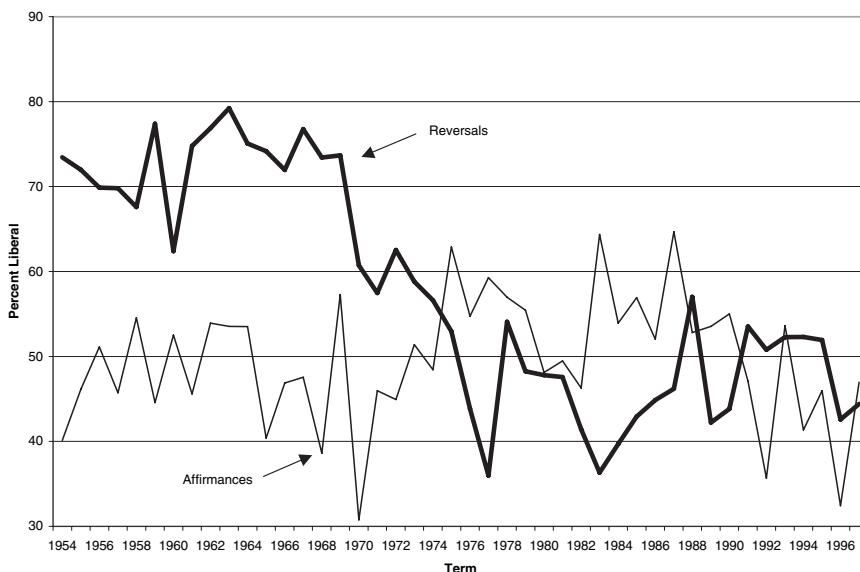
opposite, painting a conservative Court when it is liberal and a liberal Court when it is conservative.

In Figure 1 we demonstrate the point. Taking an average of each of the three substantive time series, we graph the aggregate liberalism of the Court that would be uncovered by looking only at each case type. The time line for reversals comports quite well with the history of the modern Court. According to this series, it was at its pinnacle of liberalism during the 1960s and, following the appointment of Warren Burger, began a steady move to the right. Through the 1980s, it remained largely conservative, making up some more moderate ground over the past decade. If we were to rely upon affirmances to characterize the Court, we would learn that the Warren Court was a hallmark of moderate conservatism, followed by the liberal Burger era and then a turn toward the right under Rehnquist. If the pattern for affirmances is sensible at all (and not mere noise), then it is an upside-down world where left is right and up is down. Indeed, if we were to regress this series on the Court's composition, we would learn that liberal Courts produce conservative decisions, whereas conservative Courts produce liberal decisions!

Having illustrated the problems inherent in including affirmances in a measure of aggregate liberalism, we now turn to a more direct investigation of the Court

FIGURE 1

Supreme Court Liberalism in Decisions to Reverse and Affirm across Three Case Categories (Unweighted Average)



and the Public. Our focus remains on what sorts of cases are valid indicators of the Court's ideological position, which we join to the important substantive question of whether or not the Supreme Court responds to changes in public opinion.

### Direct Public Opinion Effects on Supreme Court Outcomes Reconsidered

We now know that all published work examining direct public opinion influence on Supreme Court decisions is based upon suboptimal measures of the decisions. Where Court liberalism is measured from both decisions to reverse and decisions to affirm, the measures are an amalgam of valid and invalid variance. The invalidity introduced by decisions to affirm at best introduces noise into the measured outcomes, diluting the signal portion of the measure and attenuating all relationships. At worst it distorts the measures into something other than what they are supposed to be, introducing bias into estimated coefficients.

Thus the main line of our attack, with these preliminaries now established, is to reestimate the opinion-composition-outcomes nexus with revised and improved measures based only upon reversal decisions. Here is the essential modeling issue. As we have noted, all agree that public opinion is related to Supreme Court outcomes. It is the process by which opinion influence comes to be felt that is contentious. The Mishler and Sheehan (1993) claim is that public opinion plays a direct (albeit long-lagged) influence on the Court. The Norpoth and Segal (1994) counterclaim is that the opinion influence is entirely mediated by the Supreme Court nomination/confirmation process which shapes the Court composition to match the times. The Norpoth and Segal justices take no account of public opinion, but merely follow their own attitudes and thereby carry the influence of the presidents who nominated them and the Senates which confirmed. Stimson, MacKuen, and Erikson (1995) report an intermediate result, where the data are too weak to confirm or refute either claim. There, estimating a direct opinion influence with a control for Court composition leaves both opinion and composition short of satisfactory statistical evidence, both in the postulated direction but mutually nonsignificant in competition to explain the same outcomes.

The Stimson, MacKuen, and Erikson estimation is our starting point in this analysis. If the inclusion of the decisions to affirm weakens the measures of Court liberalism, then improving the measure offers the prospect of overturning the indecisive result. Because our point is both that public opinion matters and that the measurement issue confounds the causal question, we test our hypotheses using three different dependent series, (1) all cases as in previous analyses, (2) the more valid reversals measure, and then to demonstrate the measurement issues, (3) new series based only on decisions to affirm.

We postulate two causal paths connecting public opinion to Supreme Court outcomes. We believe, with Norpoth and Segal, that the composition of the Supreme Court carries part of the public opinion signal. Liberal presidents and Senates, products themselves of liberal public opinion, produce liberal Supreme

Court composition. If justices then vote their attitudes, the loop from opinion to outcome is closed. To model this process we employ the measure of Stimson, MacKuen, and Erikson, updated for new data. This is a measure of current Court liberalism based upon career liberalism measures from the U.S. Supreme Court Database for each of the serving justices.<sup>3</sup>

Our public opinion measure is Public Policy Mood (Stimson 1999) for the previous year. The one-year lag is dictated by the need to control time order.<sup>4</sup> A current year Mood measure would be equally appropriate from a theoretical perspective—for there is no reason to believe that Supreme Court justices are slow to sense changes in the opinion climate—but it would contaminate inferences by predicting Court actions from an opinion measured partly before and partly after the decision was rendered (cf. Flemming and Wood 1997).<sup>5</sup> The decision is wholly *a priori*; we do not formally test the predictive success of either current year Mood or of longer lags.<sup>6</sup>

Our analytic design is to build from simplicity to complexity, taking up one policy arena at a time and then joining all together for a more complicated latent variable analysis. We begin with Criminal procedure cases.

**CRIMINAL PROCEDURE.** We begin with a decision in the spirit of the earlier analysis (Stimson, MacKuen, and Erikson 1995) by dividing the content of all Supreme Court cases into four categories, Criminal Procedure, Civil Rights and Liberties, Economics, and Other (the last of which is discarded). For data, we have the Supreme Court Database for the 1953 through 1996 terms. Using the Database coding of direction of cases, we content classify the majority position in individual cases as liberal, conservative, or neither, and from that the lifetime liberalism or conservatism of individual justices is readily derived. We have chosen three major case categories, Civil Rights and Liberties, Criminal Procedure, and

<sup>3</sup>This variable is derived by calculating the simple percentage of liberal votes cast by each justice over the course of his or her career on the Court and then, for each term of the Court, calculating the average of those justices who were sitting on the Court. We prefer this measure, despite its minor circularity problem, because it is the strongest possible representation of the composition concept. We are, quite consciously, using votes to predict votes. If our goal were to establish that composition mattered, we would choose otherwise and be sure not to stack the case for the hypothesis. But we take composition as a given, treating it as an alternative to the direct opinion influence we seek to demonstrate. Thus giving it the best chance to succeed is scientifically conservative.

<sup>4</sup>Each of the regressions to come is ordinary least squares with a lagged dependent variable specification to pick up dynamics. This is our standard estimation procedure, but the decision to employ dynamics turns out not to be particularly interesting or important. Most of the dynamics terms to come are nonsignificant.

<sup>5</sup>It also bears mentioning that, to the extent that there is a contemporaneous effect of mood on the justices, our analytic approach underestimates its impact, since what would otherwise be identified as its simultaneous effect is attributed to the lagged dependent variable.

<sup>6</sup>As an empirical matter, of course, it is interesting to examine the impact of mood both contemporaneously as well as at successive lags. Although the results obviously vary across specifications, in general our data support a significant contemporaneous impact of public mood, as well as significant effects for lags of up to five years.

TABLE 2  
 Predicting the Liberal Proportion of Annual Supreme Court Votes for  
 Three Types of Criminal Procedure Cases

Variable	All Cases	Reversals	Affirmances
Criminal Procedure (t - 1)	.04 (.13)	-.04 (.12)	.15 (.16)
Public Opinion (t - 1)	.46* (.27)	.71* (.38)	-.16 <sup>w</sup> (.45)
Court Composition	.83* (.17)	1.41* (.25)	.16 (.25)
Intercept	-22.83 (15.80)	-55.03 (23.58)	33.06 (28.73)
Standard Error of Estimate	7.20	10.43	13.26
R <sup>2</sup>	.57	.60	.03

Notes: N is 43 for all analyses. \* implies  $p < .05$  (one-tailed). w marks wrong-signed coefficients.

Economics,<sup>7</sup> the number a compromise between separating matters which might in principle produce different alignments and grouping broadly enough to have sufficient cases in each for reliable annual measures.

For each measure we construct a time series which consists of the percent of all votes cast by the justices on the liberal side of the issue, whichever that is, for the year. We estimate a dynamic regression in which Court composition (average liberalism of the nine justices) and public opinion ( $Mood_{t-1}$  measured as percent liberal) compete to account for Court outcomes.

The Criminal Procedure estimations appear in the three columns of Table 2. Focusing first on all cases, the traditional measurement approach, the result supports the claim of direct opinion influence on the Court. Both Court composition (strongly) and public opinion (weakly) leave their imprint on Supreme Court outcomes.<sup>8</sup> When the model is estimated on a Criminal Procedure series consisting only of reversals (column 2), the result strengthens considerably. The effect of enhanced validity is seen particularly in the joint performance of both key variables, both of which grow by about half, even though they compete to explain the same variance. Whatever one's preferred claim, that is, the reversals series provides better evidence for it than the series based on all cases.

To see what the decisions to affirm add when they are employed, we model this subset in column 3. There we learn that if we measure Supreme Court liberalism from these cases, outcomes are not predicted from *either* public opinion

<sup>7</sup> Civil Rights and Liberties includes the categories "Civil Rights," "First Amendment," "Due Process," and "Privacy." Criminal Procedure is the "Criminal Procedure" category alone. Economics includes "Unions" and "Economics." We examine all orally argued cases decided by full opinion with docket number (in conjunction with split votes) as the unit of analysis.

<sup>8</sup> The public opinion result would not, however, survive a two-tailed test at the conventional .05 significance level. The one-tailed test is clearly indicated here, but we are aware that many political scientists adopt the convention of using two-tailed tests universally.

or Court composition. Liberal Courts are no more likely to make liberal decisions than are conservative Courts. And liberal public opinion is associated (but not significantly) with conservative decisions. With an  $R^2$  of .03, the clear verdict is that decisions to affirm lower court decisions are not predictable at all. This is about the result we would observe if we used a random number generator to produce our “dependent” variable.

**CIVIL RIGHTS AND LIBERTIES.** We follow exactly the same procedures to model the effects of composition and opinion in the domain of Civil Rights and Liberties, the Court’s recurring agenda in the protection of rights introduced in the Constitution and subsequently strengthened in law and practice. Here, in Table 3, the support for both opinion and composition linkages is unambiguous when the model is estimated on the series based on all cases. Both are reasonably strong and highly significant. But again, when the estimation employs the series based only upon reversals, the result is cleaner and stronger. Both opinion and composition estimates grow appreciably in column 2 (partly at the expense of estimated series dynamics).

When we repeat the step of modeling affirmances separately, we get the same nonresult as in the Criminal Procedure case. Neither composition nor opinion predicts decisions to affirm. Even previous levels of the Affirmance series have no ability to predict current levels. The series looks like random variation in time.

**ECONOMICS.** Analysis of the measure of voting on economic issues produces results roughly comparable to those already seen. We present these estimates in Table 4. They differ slightly in offering less support for direct public opinion influence. Here the coefficients are of slightly smaller magnitude, in the right

TABLE 3

Predicting the Liberal Proportion of Annual Supreme Court Votes for  
Three Types of Civil Rights and Liberties Cases

Variable	All Cases	Reversals	Affirmances
Civil Rights and Liberties ( $t - 1$ )	.32* (.13)	.23 (.14)	.04 (.14)
Public Opinion ( $t - 1$ )	.54* (.19)	.78* (.32)	-.10 <sup>w</sup> (.36)
Court Composition	.56* (.16)	.91* (.22)	.03 (.19)
Intercept	-20.14* (11.58)	-45.38* (19.22)	56.16* (24.29)
Standard Error of Estimate	5.47	8.15	10.00
$R^2$	.72	.70	.07

Notes: N is 43 for all analyses. \* implies  $p < .05$  (one-tailed). w marks wrong-signed coefficients.

TABLE 4

Predicting the Liberal Proportion of Annual Supreme Court Votes for  
Three Types of Economic Cases

Variable	All Cases	Reversals	Affirmances
Economic (t - 1)	-.11 (.16)	-.04 (.16)	-.09 (.16)
Public Opinion (t - 1)	.31 (.23)	.52 (.34)	-.48 <sup>w</sup> (.45)
Court Composition	.85* (.17)	1.36* (.34)	-.43 <sup>w</sup> (.26)
Intercept	1.48 (14.33)	-41.92 (21.07)	114.02 (32.14)
Standard Error of Estimate	6.78	9.76	12.99
R <sup>2</sup>	.53	.61	.11

Notes: N is 43 for all analyses. \* implies  $p < .05$  (one-tailed). w marks wrong-signed coefficients.

direction, but nonsignificant at .05. The difference, not dramatic, appears to derive from the overall poorer model fits (and larger standard errors) for the Economics series rather than any difference in kind from the earlier analyses. Again we see the pattern of strengthening both key variables when the more valid Reversals series is the prediction target. And again the Affirmance series seems at best noise. In this case the larger, but still nonsignificant, negative coefficients begin to suggest that the votes to affirm portray a Court ideology opposite of reality.

ALL ISSUE DOMAINS. There is only one Supreme Court. Although its behavior may differ as it deals with different sorts of issues, questions as basic as whether it pays heed to public opinion or not should get a single answer, not as many answers as there are issue domains. Thus there is something to be gained by an estimation that combines all the dependent series and forces a single set of coefficients to predict Supreme Court behavior, conceptualized as a latent ideology which organizes the three issue domains. We estimate such a summary model with the Kalman filter DYMIMIC setup used in Stimson, MacKuen, and Erikson (1995). This full-information maximum-likelihood technique uses the specifics of the issue dimensions to estimate simultaneously a latent ideology associated with all of the three domains and fit a set of structural coefficients to estimate latent series. Using more information, it has more statistical power than do the separate regressions, and it gives us summary answers for the Court, rather than diverse, sometimes conflicting, answers that apply only in limited domains.

If in fact the domains are truly independent, we will see evidence in the failure to predict one or more of them with the latent construct. The specific evidence to come is indicator communality estimates, squared indicator to latent dimension correlations that become validity estimates in the latent analysis. We present the estimates in the now familiar format in Table 5.

TABLE 5

Predicting the Liberal Proportion of Annual Supreme Court Votes: Three Issue Types Jointly Estimated as Latent Dependent Construct

Variable	All Cases	Reversals	Affirmances
Dynamics ( $Y_{t-1}$ )	-.38* (.12)	.08 (.18)	-.86* (.11)
Public Opinion ( $t - 1$ )	1.10* (.14)	1.25* (.33)	-1.05 <sup>w</sup> (.35)
Court Composition	1.53* (.19)	1.54* (.30)	.18 (.23)
Intercept	-77.76 (12.67)	-103.34 (24.97)	124.48 (21.82)
Log Likelihood	-7.34	-8.49	-9.05
Communalities (Squared Correlation with Latent Dependent Concept)			
Criminal Procedure	.50	.59	.22
Civil Rights and Liberties	.61	.79	.05
Economics	.51	.58	.04

Notes: N is 43 for all analyses. \*implies  $p < .05$  (one-tailed). w marks wrong-signed coefficients.

Here we see a little novelty. First the estimated power of public opinion rises relative to Court Composition. Both now are *very* strongly significant. A second novelty is that the Reversals series is only a slight improvement on “All Cases.” Here we think combining across domains eliminates much of the noise induced by the decisions to affirm and makes the “All Cases” indicator more valid when combined than for individual issue domains. But the Reversals measure is still superior, demonstrated now in the new information about indicator communalities—associations with the estimated latent ideology. These are both individually and collectively stronger for the Reversals series. An average of the three is a rough and ready validity estimate; the reversals emerge as notably more valid indicators of the Court’s position.

And there is some novelty also in the analysis of affirmances, as well. With the greater power of the estimation technique the suggestive evidence that decisions to affirm measure the opposite of Supreme Court ideology now finds statistical support. Here a significant coefficient on public opinion tells the story that increasing liberalism of opinion produces significantly more conservative Supreme Court decisions when we use only cases which affirm lower court rulings. According to McGuire, Smith, and Caldeira (2004), such a result is precisely what one should observe. Decisions to affirm, therefore, stand indicted as clearly invalid measures of Supreme Court ideology.<sup>9</sup>

<sup>9</sup> We are aware that there are other ways of measuring Supreme Court outputs at the merits. Instead of aggregating the justices’ votes within reversal and affirmances, we might instead rely upon the dichotomous case outcomes and calculate the annual percentage of cases that were decided in a liberal

## Conclusions

We set out trying to determine whether the Supreme Court responds directly to movements in public opinion and whether the data used in prior analyses undercut accurate estimation of this relationship. We have unusually clear answers to both. The decisions to affirm are unquestionably bad measures of the Supreme Court's position at best, a reversal of the state of affairs at worst. And, once that is taken into account, public opinion is a powerful influence on the decisions of the Supreme Court. Both conclusions are decisively supported by the evidence.

The net result of these findings is two-fold. First, from a methodological perspective, we have illustrated some quite significant complications that flow from inappropriate measurement of the justices' behavior. Scholars of the Supreme Court are increasingly interested in the ramifications of selection bias that stem from the justices' nonrandom agenda setting (see, e.g., Smith 2000). Our analysis highlights one such problem, and a very severe one, at that; there is systematic contamination in the most widely used measure of Supreme Court outputs. We can only speculate, of course, about its implications for others who care about statistical accounts of the Court, but we can well imagine that many empirical models would produce vastly different results and interpretations if they were to employ the more valid indicator of judicial policymaking.

Second and more substantively, we have found that the Court's policy outcomes are not only affected by public opinion, but to a degree far greater than previously documented. At the same time, we have hardly eliminated the indirect influence of mass opinion wrought by the appointment process. Reliance upon a better measure of the Court's behavior reveals the justices to be highly motivated by their personal preferences, even after the significant effect of direct public preferences are held constant.

That the justices rationally anticipate the future consequences of their actions speaks well of the system of dynamic representation. After all, a Court that requires the support of others to give life to its pronouncements must surely work within the broad boundaries of public acceptability. We certainly do not expect this analysis to be the last word on the role of public opinion in the judicial branch. Given our results, however, we do believe that a system of popular representation is alive and well in the Supreme Court.

## Acknowledgment



direction, for both reversals and affirmances. This exercise, however, reveals that this alternative yields no new information. The relevant series for votes and outcomes are correlated with one another at roughly .90 or better. Since liberal case outcomes are tied directly to the number of liberal votes, this is, after all, what one would expect.

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## References

- Adamany, David, and Joel Grossman. 1983. "Support for the Supreme Court as a National Policy Maker." *Law and Policy Quarterly* 5 (October): 405–37.
- Barnum, David G. 1985. "The Supreme Court and Public Opinion: Judicial Decision Making in the Post-New Deal Period." *Journal of Politics* 47(2): 652–65.
- Baum, Lawrence. 1997. *The Puzzle of Judicial Behavior*. Ann Arbor: University of Michigan Press.
- Caldeira, Gregory A. 1991. "Courts and Public Opinion." In *American Courts: A Critical Assessment*, ed. John B. Gates and Charles A. Johnson. Washington: Congressional Quarterly, Inc.
- Caldeira, Gregory A., and James L. Gibson. 1992. "The Etiology of Public Support for the Supreme Court." *American Journal of Political Science* 36(3): 635–64.
- Canon, Bradley C., and Charles E. Johnson. 1999. *Judicial Policies: Implementation and Impact*. Washington: Congressional Quarterly Inc.
- Dahl, Robert A. 1957. "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker." *Journal of Public Law* 6(2): 279–95.
- Erikson, Robert S., Michael B. MacKuen, and James A. Stimson. 2002. *The Macro Polity*. Cambridge: Cambridge University Press.
- Flemming, Roy B., and B. Dan Wood. 1997. "The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods." *American Journal of Political Science* 41(2): 468–98.
- Frankfurter, Felix. 1939. *Law and Politics: Occasional Papers of Felix Frankfurter*. ed. Archibald MacLeish and E. F. Prichard, Jr. New York: Harcourt, Brace and Co.
- Franklin, Charles H., and Liane Kosaki. 1989. "The Republican Schoolmaster: The Supreme Court, Public Opinion and Abortion." *American Political Science Review* 83(3): 751–72.
- Funston, Richard. 1975. "The Supreme Court and Critical Elections." *American Political Science Review* 69(3): 795–811.
- Gates, John. 1987. "Partisan Realignment, Unconstitutional State Policies, and the U.S. Supreme Court, 1837–1964." *American Journal of Political Science* 31(2): 259–80.
- George, Tracey E., and Lee Epstein. 1992. "On the Nature of Supreme Court Decision Making." *American Political Science Review* 86(2): 323–37.
- Hagle, Timothy M., and Harold J. Spaeth. 1992. "The Emergence of a New Ideology: The Business Decisions of the Burger Court." *Journal of Politics* 54(1): 120–34.
- Hall, Melinda Gann. 1992. "Electoral Politics and Strategic Voting in State Supreme Courts." *Journal of Politics* 54(2): 427–46.
- Hamilton, Alexander, James Madison, John Jay. [1787–88] 1961. *The Federalist Papers*. New York: New American Library.
- Hoekstra, Valerie J. 2000. "The Supreme Court and Local Public Opinion." *American Political Science Review* 94(1): 89–100.
- Link, Michael W. 1995. "Tracking Public Mood in the Supreme Court: Cross-Time Analyses of Criminal Procedure and Civil Rights Cases." *Political Research Quarterly* 48(1): 61–78.
- Marshall, Thomas. 1989. *Public Opinion and the Supreme Court*. New York: Longman.
- McGuire, Kevin T., Charles E. Smith, Jr., and Gregory A. Caldeira. 2004. "A Spatial Model of Supreme Court Voting." Presented at the annual meeting of the Midwest Political Science Association.
- Mishler, William, and Reginald S. Sheehan. 1996. "Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective." *Journal of Politics* 58(1): 169–200.
- Mishler, William, and Reginald S. Sheehan. 1994. "Response: Popular Influence on Supreme Court Decisions." *American Political Science Review* 88(3): 716–24.

- Mishler, William, and Reginald S. Sheehan. 1993. "The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions." *American Political Science Review* 87(1): 87–101.
- Mondak, Jeffrey. 1992. "Institutional Legitimacy, Policy Legitimacy, and the Supreme Court." *American Politics Quarterly* 20(4): 457–77.
- Murphy, Walter F. 1964. *Elements of Judicial Strategy*. Chicago: University of Chicago Press.
- Norpoth, Helmut, and Jeffrey A. Segal. 1994. "Comment: Popular Influence on Supreme Court Decisions." *American Political Science Review* 88(3): 711–16.
- O'Brien, David M. 2000. *Storm Center: The Supreme Court in American Politics*. 5th ed. New York: W.W. Norton and Company.
- Rosenberg, Gerald N. 1991. *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: University Press of Chicago.
- Segal, Jeffrey A., and Harold J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge: Cambridge University Press.
- Smith, Charles E., Jr. 2000. "An Attitudinal Model of Certiorari Voting: Toward a Solution to the Selection Bias Problem?" Presented at the annual meeting of the Midwest Political Science Association.
- Songer, Donald R., Jeffrey A. Segal, and Charles M. Cameron. 1994. "The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions." *American Journal of Political Science* 38(3): 673–96.
- Stimson, James A. 1999. *Public Opinion in America: Moods, Cycles, and Swings*. 2nd ed. Boulder: Westview Press.
- Stimson, James A., Michael B. MacKuen, and Robert S. Erikson. 1995. "Dynamic Representation." *American Political Science Review* 89(3): 543–65.

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