Vox Populi, Vox Curiae: Public Opinion and the U.S. Supreme Court

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Dedication

To Mom and Dad, for teaching me how to learn.
I love you.

Abstract

Chapter 1: Public Opinion and Counter-Attitudinal Voting

For decades, Supreme Court scholars have asked whether the Court is responsive to public opinion. Despite the importance of this question, however, unsettled and often contradictory theory combined with several empirical barriers have prevented scholars from answering it. This paper takes both theoretical and methodological steps to resolve this debate and argues that there is a direct relationship between public opinion and the choices justices make. Specifically I examine the conditions under which justices deviate from their ideologies to cast votes in line with the majority will. I find that justice are generally constrained by public opinion. However, the level of that constraint is conditional on the political environment. In short, justices are most responsive to public opinion when specific support is critical – when they expect the probability their decision will be reversed or ignored to be high.

Chapter 2: Public Opinion and Setting the Agenda

When the U.S. Supreme Court decides which cases to hear it weighs a number of legal and policy considerations. While scholars understand a great deal about how each of these considerations factor into a justice's decision to grant a case, each term the Court faces this same set of considerations in hundreds of issue areas. Much less is understood about why the Court chooses to hear some issues and reject others. Adding to this literature, I argue that justices choose cases with public opinion in mind. Using a novel issue-specific and justice-specific measure of likely divergence from public opinion, I argue justices are forward-looking and select cases in which they are least likely to face pressure from public opinion to deviate from their ideological preferences at the merits stage. However, the relationship between public opinion and agenda setting is not direct. Rather, it is conditioned on the level of diffuse support the Court enjoys and the legal importance of the case. I also

present some of the first systematic evidence that the Court is responsive to public issue salience when deciding what to decide.

Chapter 3: Public Opinion and *Stare Decisis*

The U.S. Supreme Court, through the norm of *stare decisis* is responsible for setting the direction of the rule of law in the United States. However, to date the exploration of the Court's use of precedent in the literature has focused on internal ideological and institutional explanations, largely ignoring the potential for external constraint. Taking a step away from the traditional formulation of the Court's use of precedent, I explore the role of public opinion on the Court's treatment of its own precedent over time and in its majority opinions. I find no effect of public opinion on the decision to treat precedent even when conditioning the effect on the salience of the treated case, the Court's level of diffuse support, nor the level of threat posed by Congress. In short, while justices may be highly responsive to public opinion in the more conspicuous aspects of its decision-making, they seem to largely ignore public opinion when applying or creating legal rules.

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Chapter 1

Introduction

When Justice Lewis Powell cast his decisive vote in *Bowers vs. Hardwick* in March of 1986 he could not have anticipated how far-reaching the decision upholding a Georgia sodomy law would become or how much he would come to regret his vote in the case. In a well-documented conversation, Powell explained his decision to one of his clerks that he simply could not relate to the "gay lifestyle" and that he did not believe he had ever met a gay person. Ironically, one of Powell's clerks that very term was gay (Jeffies 1994). Perhaps unsurprisingly for the time, Powell's ambivalence about homosexuality was shared by the country. A July 1986 Gallup poll suggested that only 32% of Americans believed homosexual relations between consenting adults should be legal (Bowman, Rugg and Marisco 2013).

The decision in *Bowers* allowed sodomy laws specifically targeting homosexuals to remain on the books in at least fourteen states until the Court reversed its decision in *Lawrence vs. Texas* nearly 20 years later. There are a number of possible explanations for the Court's shift in jurisprudence from *Bowers* to *Lawrence*. Among the most compelling is that the country itself changed in the 17 years between the two decisions. By May of 2003, as many as 60% of Americans favored legalizing homosexual relations (Bowman, Rugg and Marisco 2013) and the gay rights movement had made advancements on a number of fronts from convincing state legislatures to repeal their sodomy laws in 12 states to winning the right to adopt children in 5 states, to removing an outright ban on gays and lesbians in the military with the advent of the "Don't Ask, Don't Tell" policy. Indeed, *Bowers* was

negatively cited, or at least questioned, by as many as 14 subsequent Supreme Court and federal circuit court decisions in the intervening years.

Importantly, a change in Court membership would not have predicted the Court's reversal of *Bowers*. Six of the nine justices from the original *Bowers* decision had retired, and in the chairs of Liberal Lions such as Thurgood Marshall and William Brennan sat the staunchly conservative Clarence Thomas and the dedicated moderate David Souter. Indeed, if anything the Rehnquist Court of 2003 was significantly more conservative than the Burger Court of 1986.

The liberalization of the Court on gay rights is just one notable example of when shifts in public opinion can provide a more complete explanation for judicial decision-making than individual ideology or static legal doctrine. More than that, the decision in *Lawrence* highlights a number of important normative questions that my dissertation will seek to answer. Most notably, to what extent does the Supreme Court directly follow shifts in public opinion? If the Court is as responsive to changes in the public mood as *Lawrence* seems to suggest, is the Court the "protector of liberties [for] minorities against the tyranny of the majority" or is it rather part of a "dominant national alliance" (Dahl 1957, 283)? These normative questions naturally give way to more empirical questions of whether the Court is actually responsive to public opinion or if it merely uses it as a source to justify its decisions and, if it is responsive, to what extent must there be majority consensus on an issue before the Court responds? Finally, my dissertation attempts to get closer to understanding the theoretical mechanism that drives the only unelected branch of government to be responsive to the will of the majority.

There are a number of reasons to believe that the Supreme Court should be largely insulated from public opinion. Supreme Court justices are not publicly elected nor must they be reelected, or even retained. Indeed, they serve life tenures and, at least in the modern era, have little desire for career advancement beyond the Supreme Court. Their decisions are rarely overturned or ignored by Congress or the Executive (but see Spiller and Tiller 1996; Clark and McGuire 1996; Clark 2009; Spriggs and Uribe Forthcoming). Finally, Supreme Court justices exist within an elite Washington community which might make them increasingly unaware of broader public sentiment (Baum and Devins 2010); this is especially true given fewer and fewer justices in recent year ever served as elected

public officials.

Despite these reasons to the contrary, however, there is a fair amount of evidence in the political science literature to suggest that the Court is generally responsive to public opinion, at least in the aggregate (see Mishler and Sheehan 1993; Norpoth and Segal 1994; Link 1995; Stimson, Mackuen and Erikson 1995; McGuire and Stimson 2004; Clark 2009; Casillas, Enns and Wohlfarth 2011; Hall Forthcoming). However, these studies do not agree on the exact empirical nature of that relationship. For example Mishler and Sheehan (1993) and Norpoth and Segal (1994) disagree over whether there is a relationship at all between public opinion and the the Court's policy outputs, McGuire and Stimson (2004), Hall (Forthcoming), and Casillas, Enns and Wohlfarth (2011) disagree about the types of cases that should be most influenced by public opinion and whether social factors should moderate that relationship and Giles, Blackstone and Vining (2008) add that public opinion may not influence the Court's ideological output but rather influences the liberalism of specific justices.

Moreover, the existing literature on public opinion and Supreme Court responsiveness also lacks consensus on a theoretical mechanism. Even if the literature could agree that public opinion did directly affect Court decision-making, it does not agree on why. Indeed, Marshall (2008), in one of the most comprehensive theoretical works to date, outlines as many as 15 different possible linkages between the Court and public opinion. These linkages range from the "Interest Group Model" which argues that interest groups should take positions with broad national support and justices are, in turn, influenced by interest groups through amicus curiae participation, to the "Appointment Process" model in which justices follow public opinion because they share the beliefs of the presidents who appointed them and who are popularly elected[1] to the "Length of Tenure" model which predicts that the longer a justice serves on the bench, the more disconnected from the mass public she will become and the further she will stray from publicly popular decisions.

[1]See Norpoth and Segal (1994) for empirical support for this model. Importantly, Norpoth and Segal conclude that the relationship between public opinion and Supreme Court decision-making is *entirely* mediated by the confirmation process and there is no direct relationship between changes in public opinion and the decisions justices make.

In his largely descriptive and anecdotal analysis of the decision-making of the Rehnquist Court, Marshall finds support for several of these models. Most notably, he found initial support for models that consider the strength of public opinion, the relationship between public opinion and the elected branches, and the consistency between a justice's own ideology and public opinion; Marshall's inductive approach provided scholars with the outline of what would become the dominant explanation for the theoretical mechanism linking public opinion and the Court. Baum (2006, 63) describes what I will call the "Constraint Model" as

> . . . instrumental but not narrowly self-interested: the justices seek to maximize the Court's effectiveness as a policymaker. Approval for the Court within the mass public leads to better implementation of its decisions, reduces the chance that other branches will limit or reverse those decisions, and deters action by the legislature and executive against the Court itself.

In other words, the constraint model argues that justices follow public opinion because they fear that not doing so will harm their legitimacy, make backlash from the elected branches more likely, and decrease the efficacy of their decisions. Most scholars who have examined the linkages between public opinion and the Court rely on some variant of the Constraint Model (see Mishler and Sheehan 1993; Stimson, Mackuen and Erikson 1995; McGuire and Stimson 2004; Casillas, Enns and Wohlfarth 2011; Hall Forthcoming).

My theory relies on the constraint model as a starting place. However, I argue that the implications of this model lead to more nuanced predictions than scholars have previously explored. The constraint model posits that justices are actually incentivized to follow public opinion in the pursuit of two related but separate goals: diffuse and specific support. Diffuse support refers to the legitimacy of the Court as an institution. The American people, Gibson and Caldeira (1992) argue, have a positivity bias toward the Court. "[P]reexisting institutional loyalty [to the Supreme Court] shapes [public] perceptions of and judgements about court decisions and events" (Gibson and Caldeira 2009*b*). In essence, the higher the level of diffuse support the Court enjoys, the more the public is willing to accept the Court's

decisions, even those decisions with which it disagrees. Thus, the traditional argument goes, "in order to protect the Court's esteemed legitimacy, strategic justices (through their collective decisions) should avoid repeatedly issuing deviant rulings that have the potential to incite negative reactions from the media and mass public" (see Casillas, Enns and Wohlfarth 2011, 76).

In a related vein, justices also seek specific support, or public approval of individual decisions. In the pursuit of specific support, the link between public opinion and decision making is much more direct: justices follow public opinion in specific cases to ensure compliance with those decisions. As the Court can neither fund nor enforce its decisions, it must rely on the publicly elected branches to see its policies enacted into law. Thus, when the Court issues unpopular decisions, it risks those decisions being either reversed by the elected branches or merely ignored by the American people; the Court relies on specific support for its decisions to be implemented.

While the utility of these goals suggests a relatively straightforward mechanism for the relationship between public opinion and judicial decision-making, it also suggests that the relationship should not be static over time and across all cases. Following public opinion is not without costs to the justices who have ideological goals that are often distinct from the majority view. Justices then, should be most inclined to follow public opinion when garnering either diffuse or specific support is particularly important. In other words, the effect of public opinion on decision-making is conditioned on the political environment in which the Court finds itself. As I outline in the chapters to come, justices respond to the salience of the case and the issue they face, the signals they receive from the elected branches, and their own existing level of institutional legitimacy when deciding how majoritarian their decisions need to be.

In addition to advancing and adding clarity to the theoretical mechanism driving the

relationship between public opinion and decision-making I also push past the literature's empirical investigations of this relationship. Specifically, to date scholars have focused exclusively on the role public opinion place in the direction of the Court's ideological outcomes on the merits; is the Court more likely to issue victories to liberal parties as the Court becomes more liberal? But this focus ignores some of the most interesting aspects of the Court's process and some of its most important powers. To this end, my dissertation also explores the role public opinion plays in two other, as of yet, unexplored choices: the decision to grant a case, and the treatment of past precedent in the Court's majority opinions.

In the next chapter I begin by more fully fleshing out my theoretical argument and describing the novel data I constructed to test it. These data consist of an issue-specific measure of policy mood that accounts for the reality that public opinion is often different across issue areas over time. I then use these data to test my theory on the most straightforward component of the Court's decision-making: justices' final votes on the merits. Specifically I examine the conditions under which justices deviate from their ideologies to cast votes in line with public opinion. I find, consistent with my theoretical argument, justices are most responsive to public opinion when diffuse support is low or when specific support is critical.

Chapter Three extends the scope of the theoretical argument to answer another pressing question in the judicial politics literature: why the Court chooses to hear some issues and reject others. In this chapter I argue justices choose cases with public opinion in mind and select cases in which they are least likely to face pressure from public opinion to deviate from their ideological preferences at the merits stage. However, this relationship too is conditioned on the political environment and the Court's institutional obligations to grant legally salient cases and resolve lower court disputes.

My final empirical chapter pushes past the more visible decisions the Court makes (which cases to hear and how to decide them) and questions whether the actual content of the law is affected by public opinion. Adherents of the strategic model of judicial decision-making argue almost universally that understanding the content of opinions, rather than the mere disposition of cases, is the most interesting subject of analysis (see Maltzman, Spriggs and Wahlbeck 2000). To this end, I examine the role of public opinion on the Court's treatment of its own precedent over time and in its majority opinions. I find no effect of public opinion on the decision to treat precedent even when conditioning on the political environment. In short, while justices may be highly responsive to public opinion in the more conspicuous aspects of its decision-making, they seem to largely ignore public opinion when applying or creating legal rules.

Taken together, the findings I present in the pages to follow paint a picture of a Court that is cognizant of its role in a democratic society. The justices understand that while they do not answer to the American people in the same capacity as members of Congress or the president, checks and balances still creates the majority as a constraint on justices' pursuit of their ideological goals. The Court requires trust for acceptance of its decision and acceptance of its decisions for their implementation. Thus, when the Court makes publicly visible decisions, it has to keep the American people in mind. However, the justifications the Court uses and the legal rules it establishes are largely unconstrained. In short, as is so often the case in American politics, the public can only affect what it pays attention to.

Chapter 2

Public Opinion and Counter-Attitudinal Voting

Introduction

One of the foundational questions in American politics is the extent to which the Supreme Court, which sits at the top of the nation's only unelected branch of government, is responsive to the will of the majority.[1] This question is not without normative importance. On one hand, a high court that is regularly out of line with the general will of the public seems inconsistent with a healthy democracy. By siding with the majority, a court overcomes the "counter-majoritarian difficulty." Bickel (1962) argues that judicial review can only be legitimate if a court's decisions are made in line with the expressed desires of the American people. On the other hand, the institutional structure of the Supreme

[1] A previous version of this paper was prepared for the 2012 annual meeting of the Midwest Political Science Association with Christopher D. Kromphardt of the University of Alabama.

Court was designed to resist what Hamilton called the "occasional ill humors [of] society." Indeed, many founders believed that the Court's freedom from electoral pressure would allow it to be a champion of minority voices.

Since Dahl's (1957) and Bickel's (1962), pathbreaking works, scholars have extensively explored potential linkages between public opinion and Supreme Court decision-making. However, despite more than 50 years of scholarship, there remains tension in the literature about the extent to which the public's will acts as a constraint on the Supreme Court. Central to the tension is the mechanism driving observed adherence to public opinion.

In what follows, I make at least two contributions to this important debate. First, I add clarity to the theoretical understanding of *why* justices follow public opinion. Taking a step away from the traditional view, I observe that justices are frequently motivated by more than concern for the institutional legitimacy of the Court. Rather, the decision to rely on public opinion is a complex strategic calculation on the part of the justice. The potential for counter-majoritarian decisions to affect trust in, and support for, the Court is just one of several factors in this calculation. Rather, I argue justices read the political environment and follow public opinion primarily to ensure compliance with individual decisions. This is especially true when they expect the probability their decision will be reversed or ignored to be the highest. My second contribution arises from this approach. I use a novel research design that focuses on when justices have seemingly abandoned their ideological preferences in favor of public opinion.

In the next section, I explore the theoretical explanations for the relationship between public opinion and Supreme Court decision-making, focusing on what would motivate a justice to feel constrained by public opinion and how these motivations can be distinguished and tested empirically. In section three, I turn to overcoming several barriers that have limited the ability of past research to establish a direct relationship between these variables.

Section four explains my data and methods and the final two sections present and discuss my findings.

Public Opinion and the Mechanism of Influence

That the Supreme Court would be responsive to public opinion at all is surprising given that justices are not publicly elected nor must they be reelected, or even retained. Indeed, they serve life tenure and, at least in the modern era, have little desire for career advancement beyond the Supreme Court. Further, justices were socialized as lawyers, not as politicians, whose political survival depends on following the polls (Murphy 1964; Baum 2006). It is increasingly rare for a justice to have experience as an elected official (indeed that last justice to serve in elected office was Sandra Day O'Connor) and the socialization of lawyers emphasizes the gravity of an independent judiciary (Friedman 2006).

Despite these reasons to expect justices to care little about public opinion, more than 50 years of scholarship suggests that there is a meaningful relationship between the ideological output of the Court and prevailing public sentiment. (see e.g. Mishler and Sheehan 1993; Norpoth and Segal 1994; Flemming, Bohte and Wood 1997; McGuire and Stimson 2004; Durr, Martin and Wolbrecht 2000; Epstein and Martin 2010; Giles, Blackstone and Vining 2008; Casillas, Enns and Wohlfarth 2011; Hall Forthcoming). In fact, the lion's share of the literature, especially in the past 25 years, seems to answer the question of whether the Supreme Court is a majoritarian body with a resounding "yes." However, while there is agreement that the Court does appear to follow the majority's wishes, there remains uncertainty as to why. This important question requires an answer if we are to label the Court as a truly majoritarian entity. I argue that the answer lies in the Court's relationship to the public. When the Court stands to gain (or retain) something by acquiescing to the will of the people, it will do so.

Until recently, most scholars who have examined the linkages between public opinion and the Court have argued that justices follow public opinion to bolster their institutional legitimacy, or "diffuse support" (see Mishler and Sheehan 1993; Stimson, Mackuen and Erikson 1995; McGuire and Stimson 2004; Casillas, Enns and Wohlfarth 2011). A court's concern for diffuse support may cause it to behave strategically. Not all courts enjoy high levels of diffuse support (Gibson, Caldeira and Baird 1998), and those that do not are constrained in their efforts to secure compliance, especially when these decisions reflect divergence from the preferences of other actors. Indeed, diffuse support is believed to be necessary for the exercise of judicial review (Vanberg 2005). Consequently, the argument goes, not having to worry about institutional support means a court is freer to behave sincerely, in pursuit of its preferences. Thus Supreme Court justices who want to see their decisions broadly applied might be attentive to public opinion so as to maintain sufficient levels of this judicial public good.

However, much less scholarly attention has been paid to the justices' desire to gain specific support, or public approval of individual decisions. This view argues that the link between public opinion and decision making is much more direct: justices follow specific public opinion in specific cases because support for those decisions is more critical.

Public Opinion and Specific Support

There are two related reasons for justices to be motivated by specific support. First, justices who want to see their decisions enacted have an incentive to ensure those decisions are in line with the preferences of the American people. Starting from the near-axiomatic premise that justices seek to have their policy preferences etched into law, I argue there are real costs to deviating from public opinion. When the Court issues unpopular decisions, the public is liable to respond to those decisions and attempt to affect change in their

outcome.

The public has a number of avenues through which they can respond to unpopular decisions by the Court. First, it can mobilize interest groups and Congress to reverse the decision. In a series of studies, Meernik and Ignagni demonstrate that Congress is more likely to act against Supreme Court decisions when those decision are politically unpopular (Ignagni and Meernik 1994; Meernik and Ignagni 1995; Ignagni and Meernik 1997; Ignagni, Meernik and King 1998). When this happens, justices lose utility for the case at hand and suffer the marginal institutional costs and embarrassment associated with being reversed (Baum 2006; Murphy 1964). Second, the public or Congress can simply turn a blind eye to the Court's decisions. Less scholarly attention has been paid to this phenomenon because it is hard to study implicit non-compliance systematically, but there is a fair amount of anecdotal evidence of unpopular decisions being simply ignored. Take, for example, the infamous non-compliance with *Brown vs. Board of Education* (1954) in the South (Rosenberg 1991) or the continued practice of organized prayer before high school football games even after the Court's decision in *Santa Fe ISD vs.Doe* (2000) forbade the practice.

Indeed, Hall (2013, Forthcoming) finds that while the Court is fairly successful achieving compliance with decisions that are "judicial" in nature (decisions that rely primarily on the lower courts for implementation), compliance from the elected branches is highly dependent upon the popularity of the decision. In short, the Court's ability to set law often relies on positive public opinion, and the Court responds strategically to this reality. While legitimacy might be a public good for judges, compliance has a bearing on justices' individual utility. If the public reverses or ignores the Court's decisions, justices will not see their policy preferences enacted. To this end, I argue justices respond to public opinion strategically to ensure compliance with their decisions. Concern for specific support, then, posits a direct relationship between public opinion and a justice's vote on the merits.

However, if concern for specific support directly influences the justices' votes, we should expect to observe occasional or even frequent divergence from their sincere preferences. In other words, following public opinion is not without costs. We should expect justices to do it only when the likelihood of non-compliance is high. While Hall (Forthcoming) argues that justices assess the risk of non-compliance on an issue level, being attentive to public opinion when dealing with issues where the implementation of the decisions is more likely to be the responsibility of Congress than the judiciary, I take a more holistic approach and argue that justices evaluate the probability of noncompliance across issue areas by taking stock of the political environment. In short, I argue that certain factors make the probability of noncompliance (whether it be by Congress, the lower courts, or the American people directly) more or less likely and thus should moderate the relationship between public opinion and votes.

First, as I argue above, the public can only hold the Court accountable for decisions of which it is aware and understands. While knowledge of decisions tends to be low across the board, I expect knowledge to be higher in cases that have been extensively covered by the media. It is also more likely that the public will mobilize to overrule or ignore decisions with which it disagrees in salient cases, and "the more important the decision, the more likely it is to arouse Congressional rebuke" (Hall Forthcoming, 2-3) Thus, I expect:

> ***Salience Hypothesis***: Justices should be most responsive to public opinion in salient cases.

By contrast, justices should be free to ignore public opinion in non-salient cases because there is little threat of retaliation against decisions that never make it into the public's consciousness. Salience as a moderating factor is also important insofar as it suggests there is case-level variation to how constrained justices feel by public opinion.

I expect a similar effect for threats lodged at the Court by Congress. If justices follow

public opinion to specifically avoid retaliation, they should be especially responsive to signals from Congress that retaliation is more likely. Clark (2011) argues that Congressional threats to the Court (in the form of legislation intended to curb the Court's power) can serve as a signal of public disapproval of the Court. If justices are concerned with maintaining specific support for their decisions, they should respond to these signals as signs that decisions that further alienate the Court from the country are those most in danger of being overruled. As such, I expect:

> ***Congressional Threat Hypothesis***: The effect of public opinion should be strongest when the Court faces threats from Congress.

Threats of nonimplementation from Congress may motivate justices even when these threats are rarely put into practices. Hall (Forthcoming, 3) writes, "Frequent non implementation of the Court's rulings might reduce its power and degrade its legitimacy over time. Accordingly, fear of nonimplementation may motivate justices... even when override and sanctions are unlikely." Moreover, Clark (2011) finds that the Court responds to Congressional threats to curb the Court's power because these threats serve as an indication that the Court is out of line with public opinion and that its legitimacy is at risk. In other words, the Court is averse to threatening behavior because it is a signal of public disapproval.

Although fear of nonimplementation is an important motivating factor for the justices to be concerned with public opinion on individual decision, it is not the only factor. Equally important, I argue maintaining specific support is one of the most direct ways justices can bolster diffuse support.

While the canonical understanding of diffuse support suggests that a reservoir of good will for the Court exists regardless of agreement with individual decisions, more recent scholarship suggesting that there may be a political valence to diffuse support posits that

diffuse support and specific support are mutually reinforcing. Building off the finding that *perceptions* of the Court's ideological position, rather than its actual position, matter for how people view the Court (Hetherington and Smith 2007), Bartels and Johnston (2013) show that diffuse support may be colored by political beliefs, where one's perceived political congruence with the Court affects perceptions of its legitimacy.

Positivity Theory (Gibson and Caldeira 2009*a*) also suggests specific support may eventually crystalize into diffuse support. Exposure to the legitimizing symbols associated with the Court may lead over time to greater belief in the Court as a non-political institution that is worthy of respect. Empirically Durr, Martin and Wolbrecht (2000) find a link between the two forms of support: the closer the aggregate ideological output of the Court adheres to public mood, the more trust the public gives to the Court. The relationship between diffuse and specific support creates an incentive for justices to cultivate specific support by following public opinion.

This is incentive especially strong when diffuse support for the Court is low. Apprehension over diffuse support may heighten the importance of specific support. If the literature tells us legitimacy matters at all, it matters because low levels of legitimacy can signal that the public is more willing to mobilize against the Court. Indeed, Zink, Spriggs and Scott (2009) find that individuals who have a higher trust in the Court are more likely to accept ideologically distasteful decisions. In other words, the mutually reinforcing relationship between diffuse and specific support suggests a moderating relationship. When diffuse support is low, justices seek specific support by following public opinion to heighten diffuse support because diffuse support frees the Court from having to follow public opinion. Thus I posit,

> ***Diffuse Support Hypothesis***: Justices should be more responsive to public opinion when diffuse support for the Court is low.

As with the other two moderating hypotheses, I expect that high support can actually serve as a buffer, protecting justices' abilities to pursue their own ideological objectives at the expense of the general will.

Concern for diffuse support as the motivating factor for specific support has an unexpected implication: even justices who do not support the Court's disposition have an incentive to abandon their ideological preferences to ensure compliance. Under this view, all justices pay some price for harms to specific support because noncompliance harms future policy-making abilities of the Court (Clark 2011, 75-80). While the costs paid by minority coalition members may be lower, dissenters should still prefer general compliance with the Court's decision to broad noncompliance (see Hausegger and Baum 1999; Cross and Nelson 2001; Rogers 2001; Hall Forthcoming) Thus my analysis examines a justices' propensity to vote in line with public opinion even if she disagrees with the majority disposition.[2]

Barriers to Establishing a Direct Relationship

The primary question I seek to answer is when, and under what conditions, there is a relationship between the zeitgeist and the choices justices make. However, the literature to date has struggled to answer the even more fundamental question of *whether* there is a direct link between public opinion and judicial decision-making. There are two chief barriers to establishing this direct connection: the difficulty of measuring public opinion, and the potential for endogeneity between public opinion and a justice's own preferences. In this section, I discuss the steps I take to overcome both of these barriers.

[2]I note, however, that the results I present below are robust to only including majority coalition votes. See Appendix Table A.1.

Vote-Level Influence

With a few exceptions (see e.g. Epstein and Martin 2010; Uribe 2012; Enns and Wohlfarth 2013; Hall Forthcoming) most studies of the interplay between public mood and the Supreme Court look at how the two move together in the aggregate. Traditionally, the dependent variable is the percent of liberal outcomes – or, in some cases, the percent of liberal votes (Giles, Blackstone and Vining 2008; Flemming, Bohte and Wood 1997) – in a term, and the chief independent variable of interest is Stimson's policy mood measure (Stimson 1999). While these studies have contributed tremendously to our understanding of the Court as a majoritarian institution, they make a more limited contribution to the question of whether public opinion exerts a *direct* influence on votes.

There are several reasons a vote-level approach is advisable. First, term-level studies cannot control for important case-level factors that influence outcomes. Past research has shown, for example, that amicus support (Collins 2008) and support from the Solicitor General (Black and Owens 2013) both increase the probability a party will be successful before the Court. It is entirely possible that when the mood of the country is more liberal, interest groups and the executive will be more supportive of liberal positions. Indeed, the opposite could also be true; interest group and executive mobilization for liberal causes could move the country to be more liberal. In any event, both of these important case-level controls could influence the chief independent variable of interest (public opinion) and the dependent variable (ideological outcome) but it would be impossible to uncover this spurious relationship when cases are aggregated within a term.

Aggregate level analyses likewise face challenges controlling for the most likely alternative explanation for the ideological direction of policy outputs: the ideological composition of the Court. Most studies simply use the ideology of the median justice as a proxy, but a spate of recent studies suggest that the term median (defined by the median Martin and

Quinn (2002) score in a term) is not the best approximation of opinion control but rather the true median varies by coalition (Bonneau et al. 2007; Clark and Lauderdale 2010) or by case (Clark and Lauderdale 2012). Aggregating to the term level not only (perhaps incorrectly) assumes that the term median always controls case outcome but also assumes that the term median is always in the majority coalition. However, Enns and Wohlfarth (2013) make the argument that far beyond varying from case to case,[3] the identity of the median justice is related to case factors that also influence votes. Indeed, one of the chief implications of their results is that strategic considerations affecting decision-making are different based on the ideological position of the justice. They conclude, "if we want to fully understand the Court's policy outputs it is not enough to analyze how justices, on average, make decisions" (2013, 15).

The second concern with term-level aggregation is that it assumes the Court is a single strategic actor. While this assumption is often useful, it is usually tenuous. "The Court" does not make decisions as a single strategic body with unified preferences. Rather, policy outputs are a compilation of the preferences of individual justices (Maltzman, Spriggs and Wahlbeck 2000; Bonneau et al. 2007; Clark and Lauderdale 2010). While all justices should value specific support for their decisions, and should therefore take actions to preserve that support, the ideological sacrifices each justice must make to ensure that support are varied. Not all justices' preferences are equally distant from the public and therefore justices face different levels of constraint in the quest for compliance. While one justice might agree wholeheartedly with public opinion, and thus be able to pursue her own policy preferences while maintaining majoritarian consistency, a more ideologically distant justice has to weigh her desire to maintain specific support against pursuing her own policy objectives. It is

[3]According to their analysis the Martin-Quinn term median is not the swing vote in 23% of all cases and 45% of all 5-4 decisions.

impossible to disentangle this effect when aggregating to the term level, which not only treats all justices as the same but also treats their strategic considerations as the same.[4]

Finally, an aggregate-level analysis is simply ill-suited for testing my theoretical argument that posits justices should be constrained in certain types of cases more than others, such as salient cases. By necessity, a term-level approach assumes that constraint only varies by term and not from case-to-case. It therefore cannot test the argument that justices follow public opinion to maintain support for, and acceptance of, their individual decisions. Thus, a vote-level approach is preferable.

Public Opinion, Ideology, and Observational Equivalence

As I allude to above, the other key challenge to to establishing that public opinion directly constrains justices' decisions is disentangling the effect of justices' sincere preferences from the preferences of the mass public. Stated differently, the behavior that we would observe if justices voted their own preferences are often identical to the behavior we would observe if justices were voting while constrained by public opinion. As Casillas, Enns and Wohlfarth (2011, 75) write, one possibility is that "the social forces that shape public opinion also influence justices' preferences." Epstein and Martin continue, "it is equally plausible... justices are simply social beings... [and] the same things that influence public opinion may influence the Justices, who are, after all, members of the public too" (2010, 281, internal quotations omitted).

I take a different approach to overcoming observational equivalence and look for the

[4]Giles, Blackstone and Vining (2008) and Flemming, Bohte and Wood (1997) recognize this problem and examine the relationship between public opinion and individual justices, but both studies still aggregate these votes across a term.

influence of public opinion on individual votes. Fundamentally, "influence" may be understood as a force acting on a justice to make a decision she would not have made absent that force. Because it is often not possible to determine whether public opinion and a justice's preferences are already aligned (and therefore a justice is merely voting based on her own ideology) my model analyzes specific instances when justices deviate from ideology. Rather than examining whether a liberal country can explain a liberal vote, I examine whether public opinion can help me explain the votes that ideology cannot explain. Thus, my dependent variable is whether a justice casts a "counter-attitudinal" vote, taking on a value of 1 when a liberal justice casts a conservative vote or when a conservative justice casts a liberal vote. In short, I argue that the strongest test of influence is whether countervailing public opinion can induce a justice to abandon her ideological preferences.

Measuring Public Opinion

To date, scholars have generally eschewed a vote-level approach because of the lack of a sufficiently refined measure of public opinion. Indeed, one of the greatest challenges in the literature is measurement of public opinion as it relates to the issues that are immediately before the Court. I address previous approaches to this challenge before introducing an approach that is neither too narrow nor too broad and could plausibly guide the justices' attempts to align their votes with public opinion.

A few studies, which I call "congruence studies" (see e.g. Marshall 1989, 2008) have sought to overcome this barrier by locating polling questions that specifically map onto cases the Court decides. For example, a congruence study might rely on a question along the lines of "The Supreme Court has recently decided X. Do you support this decision?" and examine whether the Court's decision was in the same direction as the majority response.

However, this strategy has a number of potential limitations. First, these questions are

often *ex post*. There is no way of telling whether respondents support the decision because they merely trust the Court's judgement (Franklin and Kosaki 1989; Johnson and Martin 1998) or if the question taps into actual attitudes about the issue in the case. Indeed, this question type could be tapping into a host of other attitudes, from the respondent's diffuse support for the Court, to her ignorance (or knowledge) of the case, to her beliefs about the Court's partisan affiliation as it relates to her own.

These issues aside, the biggest problem is that direct polling data are only available on a small number of issues and cases, generally the most highly salient. This means that congruence studies are confined to examine only the effect of public opinion on landmark cases. Of course, there are a number of reasons to suggest landmark cases are at best very different from most of the cases the Court decides and, at worst, anecdotal outliers which buck "true" empirical trends. Further, if congruence data are limited to landmark cases, they cannot be used to examine how salience conditions the effect of public opinion. In short, congruence studies provide too narrow a scope through which to examine true influence.

While congruence studies might be too narrow, the general approach taken by scholars who utilize the Stimson (1999) mood measure might be too broad. Stimson's measure, which factor analyzes thousands of polling questions over the last 65 years, estimates a single quarterly or yearly number for the mood of the country ranging from 0 (highly conservative) to 100 (highly liberal).

The primary concern with treating public opinion as a time-varying unidimensional mood is that it treats all issues and cases in a given quarter the same. Thus, even studies that model individual votes (Uribe 2012; Enns and Wohlfarth 2013) or case outcomes (Epstein and Martin 2010; Hall Forthcoming) do not allow for variation in public opinion across cases decided in a given quarter. This may be especially troubling for studies that

argue the relationship between public opinion and decision making is issue dependent (see Hall Forthcoming).

Models that use the Stimson mood assume the public equally desires a liberal outcome in a criminal rights case, a tax policy case, and a free speech case decided in the same quarter. There are good intuitive reasons to believe this is not the case, and as I explain below, there are also good empirical reasons to reject this assumption. Indeed, while Stimson and his colleagues have argued thermostatic unidimensional mood is useful (see especially Ura 2014), more recent work acknowledges that there are important differences in mood across different issue areas. For example, Coggins et al. (ND) find that certain issues behave systematically differently over time. While some issues respond directly to party cues, some behave episodically, others, such as certain civil liberties issues, trend over time, and still others are thermostatic. To this end, Stimson and his colleagues have partnered with the Policy Agendas Project to facilitate the construction of policy-specific mood using user-selected issue areas.[5]

As the literature has taken a turn toward a more case-based approach, it is increasingly vital that scholars pin down the mechanism by which the justices are influenced by public opinion. The aggregated public mood would be too blunt a tool to provide much specific guidance for justices' decision making in individual cases. As unlikely as it is that justices are reading specific polling data for every case, it seems equally unlikely that justices can discern how generally liberal or conservative the mood of the nation is in order to apply that information to specific issues present in a case that is before them. While justices exist within the political system and media environment, and some appear to be active observers of changes in the national ideological landscape (Clark 2011, 79), they are probably not reading polling data on every issue that comes before the Court. Rather,

[5]See http://www.policyagendas.org/moodapp.

justices, as engaged members of their political environment, are more likely to be aware of broad categories of opinion; for instance, they are more likely to be aware of how the public feels about civil liberties in general than to be aware of public opinion on free speech in schools. Indeed, there is reason to believe individuals in the mass public do not even have stable opinions on narrow policy issues (Zaller 1992; Goren 2012).

This problem is exacerbated when, as I show below, issue categories diverge from the overall mood. The trick to solving the problems that arise from using the general mood measure as an independent variable when studying case votes is to construct a measure that is narrow enough to capture important issue-level variation and yet broad enough to have reliable data. In order to be part of a plausible theoretical mechanism the measure also needs to be broad enough that we could reasonably expect justices to be aware of changes in public opinion.

Here I adopt a middling approach, using issue categories within the public mood. To this end I construct a new issue-specific measure of public opinion using Stimson's original dataset of more than 8000 domestic policy questions. Specifically, I use Stimson's WCALC algorithm to estimate a unique mood series for seven issue areas: civil liberties, criminal rights, defense, economics, the environment, government power, and societal welfare.[6]

[6]I inductively created these issue areas based on the types of questions in Stimson's data and the issue distinctions that are typically relevant in the judicial politics literature. However, it is worth noting that my results are robust to using the 20 broad issue areas of the Policy Agendas Project (Jones and Baumgartner 2013) (see Table A.2). However, I use my seven issue organization throughout the dissertation because I believe justices are more likely to be cognizant of public opinion on these issues than they would be cognizant of public opinion on transportation or education (which both appear in the Policy Agendas issues). Further, as Stimson (1999, chapter 4) cautions, policy specific moods can be

To construct these series, I first coded each of the more than 400 unique questions that comprise Stimson's data into these seven categories and estimated an annual mood series for each issue using only those items. Then to map these estimates onto Supreme Court cases, I coded each of the more than 250 narrow issue categories used by the Supreme Court Database (Spaeth et al. 2013) into the same seven dimensions.

The estimates for each series are presented in Figure 2.1. The dashed lines are the issue-specific moods while the solid lines are Stimson's general mood. Like with the traditional Stimson measure, my estimates range from 0 (very conservative) to 100 (very liberal) though in the course of my analysis (1953 to 2010) mood was never more conservative than 20 across any issue area and was never more liberal than 80. It is also important to note the values of mood do not have a concrete substantive interpretation on their own (for instance, a change from 75 to 80 does *not* mean a change from 75% of the country being liberal to 80%) but rather must be interpreted as changes relative to other values of mood; 80 simply means slightly more liberal than 75.

Several general trends in Figure 2.1 are worth highlighting. First, there is a fair amount of face validity to my estimates. Take, for example, the mood for civil rights which is depicted in the top row second panel from the right. The country's mood on civil rights issues was highly volatile in the 1960's and 70's, when the country was experiencing a great deal of social turmoil at the height of the Counter-Culture Revolution, but has been growing steadily more liberal since the mid-1970's. Compare this to the nation's feelings

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difficult to construct because the mood algorithm requires a lot of data to be estimated accurately. In my issue areas, the average number of items used to construct a series is 817 and no series is constructed with fewer than 144 items. By contrast, the Policy Agendas issues average 367 items per series and are estimated with as few as 67 items. Thus I argue my seven issue series produces a more reliable estimate of mood.

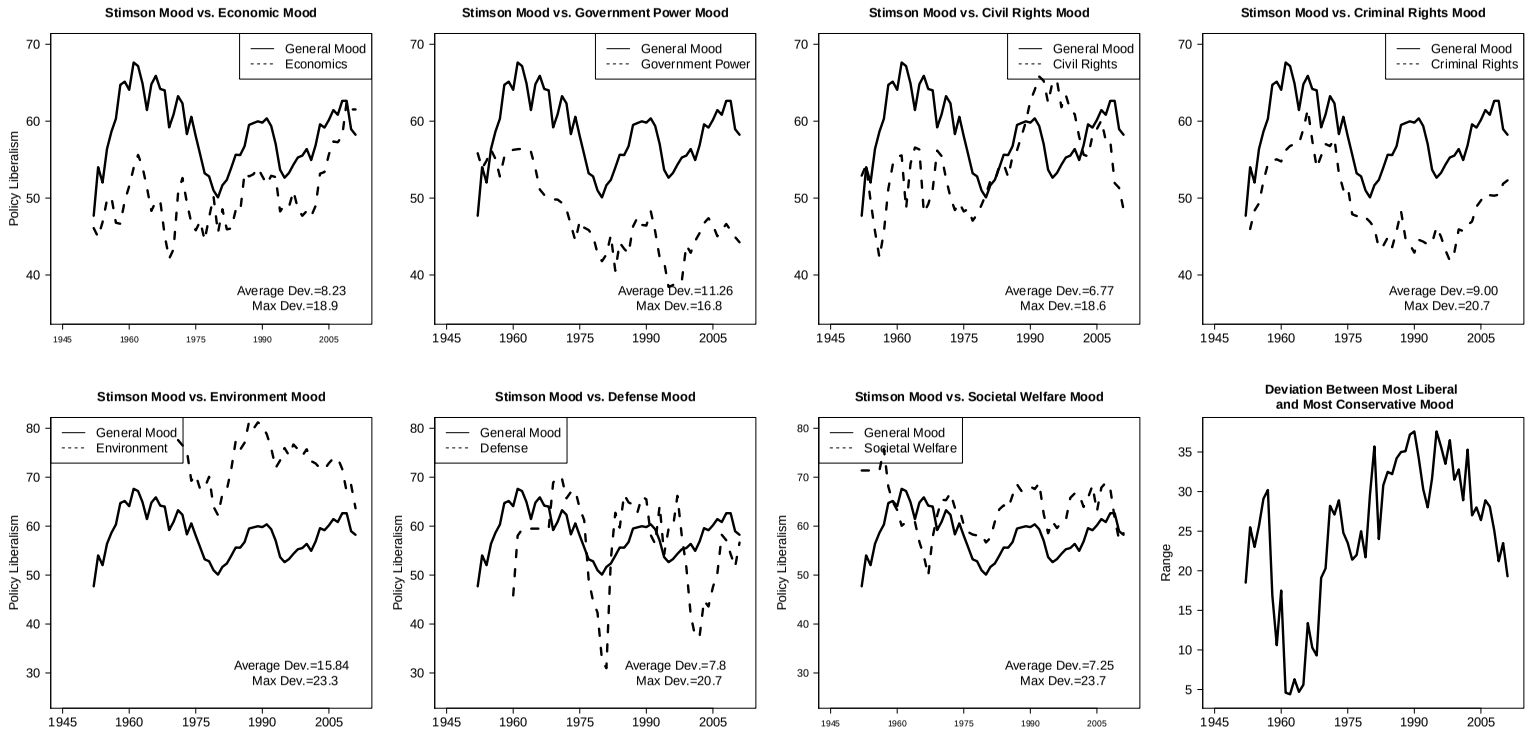

Figure 2.1: Predicted public mood in each issue area (dashed lines) compared to the general Stimson (1991) mood measure (solid lines) by year. Bottom right-most panel depicts the difference between the country's most liberal mood minus its most conservative mood.

on criminal rights (on the far right of the top row). The apex of national liberalism on criminal rights was during the mid-1960's, which is intuitive considering that the Warren Court is noted for making some of the most liberal advancements in criminal rights during this time period. The country reached its most conservative on this issue in the late 1980's and early 1990's when the nation was in the full throws of the War on Drugs and crime rates in the United States were at its highest in three decades (Drews 2003). Mood on crime has gotten steadily more liberal since the mid-1990's, perhaps related to the steady decrease in crime the nation as a whole has experienced in the last 25 years.

Even the wide variation in defense mood (depicted on the bottom row, second panel from the left) seems intuitive.[7] In the late 1970's and early 1980's at the height of the Cold War and on the cusp of the Iranian Hostage crisis and the USSR's invasion of Afghanistan, the country was very conservative on defense. Mood got progressively more liberal in the late 1980's and early 90's as the Berlin Wall fell, the USSR disbanded, and for the first time in the 20th century, the United States did not face a major-power enemy. The country became more conservative in the immediate aftermath of the 9/11/2001 attacks and then again more liberal as public sentiment turned against the War in Iraq in the late 2000's.

The second important feature of Figure 2.1 is the difference in public mood across issue areas in a given year. Take, for example, 1981. While the general mood suggested that the country was fairly ideologically ambivalent (≈ 52)[8], the country was in reality

[7]It is worth keeping in mind here that Stimson's data focuses on domestic policy issues so defense mood primarily assesses feelings on defense spending; more conservative can be interpreted as support for higher spending and more liberal as supporting spending cuts.

[8]There is some question as to the substantive interpretation of more moderate values of mood – scores closer to 50. On the one hand, 50 could indicate a relatively moderate country that prefers a position that is neither too liberal nor too conservative. On the other hand, 50 could indicate a highly polarized nation whose preferences are bimodally

at its most conservative on defense ($\approx$ 30) while being fairly liberal on the environment, just two years after the Three Mile Island nuclear disaster. In 1992, when the country had settled into a fairly liberal stance on civil liberties, it was extremely conservative on crime.

The bottom right-most panel of Figure 2.1 plots the range of moods across the issue area by year. That is, the difference between the country's most liberal mood minus its most conservative mood. On average, this range is 25.1 points and is as high as 37.6. Given that the standard deviation of the general mood measure is 5.5, these differences are strong and meaningful. The takeaway point here is that there is good empirical reason to reject the assumption that the public equally prefers a liberal outcome in all cases decided by the Court in a given year.

Of course, this is only a problem if the general mood measure cannot accurately capture the variation in mood across issue areas. Another look at Figure 2.1, however, suggests that general mood only loosely maps onto issue-specific moods. The bottom right corner of each panel reports the average difference between the policy specific mood and the unidimensional mood as well as the maximum deviation. Note that the general mood maps best onto civil liberties, societal welfare, and economics. However, these averages are still about 1.5 times the standard deviation of mood. By contrast, Stimson's measure does a relatively poor job approximating the county's feelings on criminal rights and government power where the maximum deviation is 3-4 times the standard deviation of mood.

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distributed at the ideological extremes. In either case, however, the signal to the justices is the same: constraint from the public is low. If public opinion is highly polarized, justices should have little fear of legislative retaliation against their decisions because consensus is unlikely. If the country is, as a majority, fairly moderate, the signal to the justice about a preferred ideological direction is weak. Thus, I remain agnostic between these two possible interpretations and refer to 50 as ideological ambivalence.

Armed with this new measure, which allows me to test the influence of issue-specific policy mood on individual votes, I turn now to the exact data and methods I use to test my hypotheses about the conditional relationship between public opinion and decision-making.

Data and Methods

Recall my dependent variable is whether a justice casts a counter-attitudinal vote in a case. In order to construct this variable, it is first necessary to define a justice dichotomously as either a liberal or a conservative. While judicial scholars have a wealth of ideology measures at their disposal, dichotomizing them can be something of a challenge. One option is to use zero as a cut point for either the Judicial Common Space (JCS) score (Epstein et al. 2007) or the Martin-Quinn (MQ) scores (Martin and Quinn 2002) where negative values define a justice as liberal and positive values make a justice a conservative. However, zero is not itself a meaningful cardinal value in Bayesian ideal points like the JCS and MQ scores. Perhaps more problematic for my purposes, these scores are unidimensional. In the same way I expect the public to have varied preferences over different issues, I likewise expect justices to have varied preferences in different cases. Indeed, a spate of recent literature suggests that not only do these issue variations exist, but they are meaningful (see Clark and Lauderdale 2012, Forthcoming).[9]

With these considerations in mind, I use the ideology ranks created by Clark and Lauderdale (2012) to code whether a justice was expected to be in the left wing (and is therefore coded as a liberal) or the right wing (and is therefore coded as a conservative) in each case. Using multiple indices of case similarity (such number of years between two decisions, the overlap in issues and issue areas, and shared citation variation) they use a

[9]My results are robust to using the directionality of the standard JCS scores to define a justice as a liberal or conservative. See Appendix Table A.3.

kernel-weighted optimal classification estimator to estimate the ideological position of each justice from most liberal to most conservative.[10] The dependent variable, then, equals 1 if a liberal justice voted conservatively (according to the Supreme Court Database) or a conservative justice voted liberally.

Following Casillas, Enns and Wohlfarth (2011) and others (McGuire and Stimson 2004; McGuire et al. 2009) I only analyze votes for reversal. Enns and Wohlfarth (2013, 8) note the problem of the Court's "affirmation bias" (McGuire and Stimson 2004) when trying to explain the the ideological output of the Court's decisions, "the ideological direction of the Court's affirmances will be disproportionately more liberal (conservative) as the Court itself becomes more conservative (liberal)." However, I note that with a couple of exceptions my results remain largely unchanged if I include all votes in my analysis.

The chief independent variable is countervailing public opinion. In other words, I am interested in the force of public opinion and the extent to which it disagrees with a justice's preferences. Thus, using my issue-specific mood estimates, countervailing public opinion is coded from most conservative (low values) to most liberal (high values) for conservative and from most liberal to most conservative for liberal justices. Importantly, this measurement

[10]These ranks exclude unanimous cases because there is no meaningful ideological variation in these cases. Also, my analysis excludes the vote of median justice in each case because she cannot be defined as either a liberal or a conservative. While my results are robust to including the median as either always liberal or always conservative, excluding the median justice allows me to make an additional contribution to the literature. Enns and Wohlfarth (2013) find that the median is uniquely responsive to public opinion. Thus, that I find evidence of strategic responsiveness to public opinion in the wings of the Court is an even stronger test of influence as I am only examining the justices who are least likely to respond to public opinion.

strategy means that low values of countervailing public opinion can be interpreted as public opinion that is more in line with a justices' preference and higher values can be interpreted as more opposed. I therefore expect the effect of this variable to be positive. Justices should be more likely to deviate from their own preference as the force of public opinion grows increasingly against those preferences.[11]

My hypotheses suggest that the effect of public opinion should be conditioned by three factors: threat from Congress, case salience, and diffuse support. Following Clark (2011), I measure Congressional threat as the logistic transformation of the number of pieces of court-curbing legislation introduced in the past year. While the mere introduction of a bill does not have a tangible impact on the Court, and is not even necessarily noticed by the justices, Clark shows that bill introduction serves as a proxy for general disapproval of the Court by Congress and the American people. Therefore, court curbing legislation indicates an increased willingness of those bodies to sanction unpopular decisions. Indeed, Clark (2011) finds that the Court is highly responsive to this signal.

My measure of salience requires a media based approach as our argument is about salience to the public, not necessarily salience to the justices. While public case salience is usually measured using Epstein and Segal's (2000) measure of appearance on the front page

[11]My argument suggests that justices should be responsive to contemporaneous public opinion. Justices should be cognizant of, and strategically responsive to, where the public is when the decision is issued because the contemporaneous public will be the one who decides whether to accept or reject the Court's decision. However, I acknowledge that there is a debate in the literature on the amount of time it takes for justices to be aware of changes in public opinion and whether the Court should be more likely to respond to short-term whims or long term trends. As such, I note that the results I present below are robust to a single-year lag of public opinion as well as a 5-year rolling average.

of the *New York Times*, I employ a more nuanced measure developed by Collins and Cooper (2011) which uses four newspapers and examines stories from all parts of the paper and during all parts of the decision-making process, from the day the Court grants *certiorari* to the date of the opinion announcement. This measure is an advancement because it is "... contemporaneous, replicable, transportable, nondichotomous, and free from systematic biases..." (Collins and Cooper 2011, 6).

Finally, I measure diffuse support following the strategy taken by Durr, Martin and Wolbrecht (2000). Taking Stimson's algorithm as their starting point, they argue that many individual public opinion questions reflect a component of trust in the Court. Each of these individual question series probably has its own dynamic but their shared movement indicates general support. To this end, I update and revise their data. This involves identifying as many questions as possible that tap into trust in, support for, or approval of the Court as institution that are asked at least twice and use Stimson's mood algorithm to factor analyze them for shared variation. This allowed me to extend Durr et al.'s data back to 1956 and forward to 2005 (the years of my analysis) and construct a quarterly measure of diffuse support.[12]

To test for the conditional relationships posited by my hypotheses, I interact each of these variables individually with my measure of public opinion. In addition, I control for a number of other factors that might influence a justices' decision to deviate from her preferences. First, I note the potential influence of organized interests (Collins 2008) and the Solicitor General (Black and Owens 2013) have on decision-making and thus include

[12]See Durr, Martin and Wolbrecht (2000, 769, footnote 5) for more precise measurement details. Because justices are likely slow to respond to changes in support, and to ensure the measurement is truly exogenous, I use a two-quarter rolling average but note that the results are robust to a 1-quarter lag and a contemporaneous measure.

controls for the pressure exerted by both: the number of counter attitudinal amicus briefs files and whether the Solicitor General appeared as an amicus against a justice's ideological preference. Finally, a wealth of evidence in the literature suggests that justices often vote against their policy preferences to be in the majority and either write or assign the majority opinion (Johnson, Spriggs and Wahlbeck 2005). For example, Ringsmuth, Bryan and Johnson (2013) find that justices are significantly more likely to change their minds from their initial inclination on a case in order to be in the majority coalition. Further, justices may join the majority coalition despite their ideological disagreement with it to simply avoid the time and resource costs of writing separately (Maltzman, Spriggs and Wahlbeck 2000). Thus I control for whether a justices' vote puts her in the majority coalition.

Results

Because my dependent variable is dichotomous, I employ a logistic regression. Following the intuition of Enns and Wohlfarth (2013) that there are important differences in the decision-making considerations of justices in different ideological positions on the Court (the justices closest to the median should rely on a different set of considerations than justices far in the ideological wings of the Court), I include random intercepts for each rank position. I operationalize rank position as how far from the median Clark and Lauderdale estimate a justice to be. In other words, the most conservative (or liberal) justice would have an ideological extremity of 4, the justice closest to the median on either side would have a rank of 1.[13]

Recall that I am interested in the conditional effect of public opinion given three different moderating variables, thus I begin by examining the direct relationship between

[13]These results are robust to including random effects for each justice and controlling for rank position (see Uribe 2012, 10).

	Model 1	Model 2	Model 3	Model 4	Model 5
Solicitor General Pressure	0.978*	0.992*	0.973*	1.038*	1.045*
	(0.687)	(0.069)	(0.069)	(0.070)	(0.070)
Amicus Brief Pressure	-0.042*	-0.040*	-0.034*	-0.028*	-0.018
	(0.009)	(0.009)	(0.010)	(0.009)	(0.010)
Majority Coalition	0.996*	0.054*	0.995*	0.997*	1.000*
	(0.054)	(0.995)	(0.054)	(0.056)	(0.056)
Countervailing Public Opinion	0.026*	-0.012	0.013*	0.348*	0.276*
	(0.003)	(0.009)	(0.005)	(0.056)	(0.050)
Congressional Threat		-4.451*			0.064*
		(1.083)			(0.026)
Public Opinion x Congressional Threat		0.098*			-0.346*
		(0.022)			(0.066)
Case Salience			-0.267*		-0.345*
			(0.063)		(0.066)
Public Opinion x Salience			0.005*		0.006*
			(0.001)		(0.001)
Diffuse Support				0.129*	0.117*
				(0.017)	(0.019)
Public Opinion x Diffuse Support				-0.003*	-0.003*
				(0.0003)	(0.0004)
Constant	-3.047*	-1.331*	-2.260*	-17.814*	-14.268
	(0.222)	(0.474)	(0.291)	(2.024)	(2.421)
Wald Chi-Squared	593.84*	620.16*	621.25*	645.13*	687.16*
Observations	14,470	14,470	14,436	13,844	13,810

Table 2.1: Logistic regression of justice's decision to vote counter to her preferences. Random effects by ideological position. Standard errors reported in parentheses. * denotes $p < 0.05$ (two-tailed test).

public opinion and attitudinal voting (Model 1 of Table 2.1), then examine the results of each potential moderator individually (Models 2-4) and, finally, the effect of public opinion when conditioned by all three constraining variables (Model 5).

I note at the outset that the controls perform largely as expected in each model: justices are more likely to deviate from their preferences when the Solicitor General appears as an amicus for the other side, and are more likely to cast a counter attitudinal vote in order to be in the majority coalition. Only amicus participation is insignificant in the full

model.[14]

As the table makes clear, I find robust support for each of my hypotheses. While, in general, countervailing public opinion has a slightly positive effect on the probability of a counter-attitudinal vote, this relationship is highly conditioned on Congressional threat, case salience, and diffuse support. On their own, each variable significantly moderates the effect of public opinion. When considered in combination, as they are in Model 5, each interaction is still statistically significant, indicating that the effects of each constraint exert a unique influence on the effect of public opinion.

For ease of interpretation, Figure 2.2 explore the substantive effect of each of these moderating variables in the full model. The figure plots the predicted probability of a counter-attitudinal vote across the range of public opinion pressure when constraint on the justices is highest (salience and Congressional threat are set at their maximum values and diffuse support is set at its lowest) in the solid line and when constraint is at its lowest (dashed lines). All other variables are set at their means and modes, as appropriate.

Recall that low values of countervailing public opinion pressure indicate that a justice and the country are aligned while high values indicate a divergence between the two. It should be kept in mind throughout the discussion of the results that the low probability of casting a counter-attitudinal vote when the public and the justice are aligned (the left

[14]One possible concern is that some issues, specifically the issues most prominent on the Court's agenda, may be driving these results. To ensure that no single issue was responsible for the results we observe, I ran the full model seven times, excluding one issue in each iteration. My results remained consistent with the exception of excluding criminal rights cases where I lose statistical significance on the Congressional threat moderator. This is unsurprising, however, given that criminal rights cases make up the largest portion of my data.

side of the x-axis) is also indicative of public opinion exerting a constraining influence. On this side of the graph, a justice is voting in line with public opinion when she votes her preference. However, these points are observationally equivalent; it is impossible to precisely disentangle the effect of public opinion from the effect of ideological preference on the left side. High probabilities of a counter-attitudinal vote on the right side of the graph are the strongest evidence in support of my hypotheses. Here, deviation from public opinion is explainable by a misalignment between the public and the voting justice.

The far right panel of Figure 2.2 depicts the effect of countervailing public opinion when Congressional threat is high and low. Note that justices are largely unconstrained by public opinion when Congressional threat is low. Indeed, public opinion does not have a statistically significant effect on a justice's decision to deviate from her preferred outcome when threat is low. When threat is at its lowest, justices are equally likely (a probability of about .28) to deviate from their ideology across the range of values of public opinion pressure. It is only at higher values of Congressional threat where public opinion begins to act as a constraint. Here, a justice who is aligned with public opinion has a .18 probability of casting a counter-attitudinal vote. This is significant, given that the baseline probability of a vote against ideology is about .31. By the time she is the most at odds with public opinion, on the far right extreme of the x-axis, the probability of following public opinion and casting a counter-attitudinal vote is .54 – a 75% increase over the baseline and more than double the probability of her deviating from a position that is both true to her ideological preferences and to the preferences of the American people. Note, however, that Congressional threat is the least influential of the three considerations.

I see a similar pattern emerge for case salience in the center panel. In low salience cases, public opinion has no effect on a justice's vote. However, when the Court is the limelight in high salience cases, the effect of public opinion is dramatic. A justice is almost

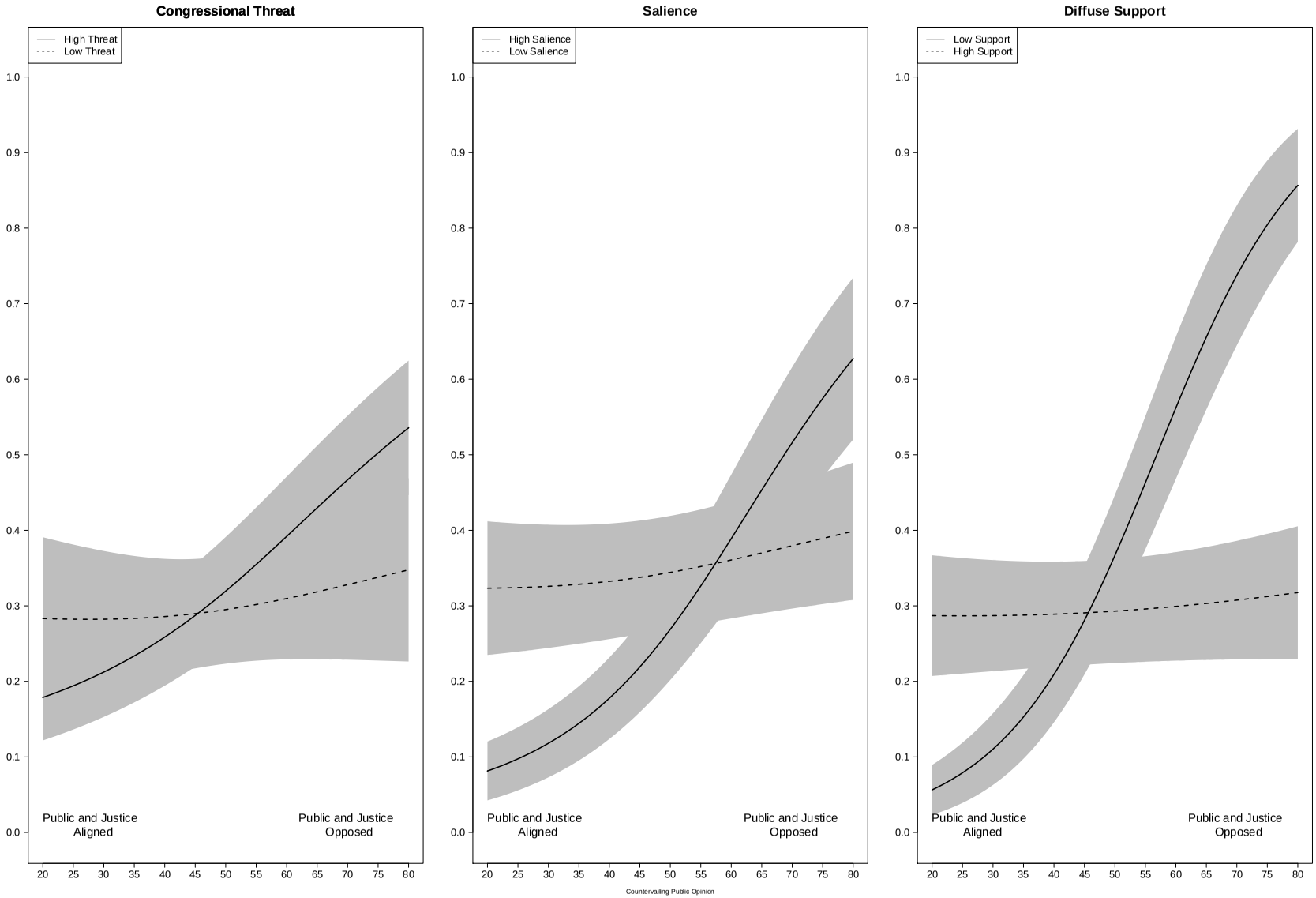

Figure 2.2: The predicted probability of a counter-attitudinal vote when the Court faces high and low Congressional threat (left panel), a high or low salience case (middle panel), or high or low diffuse support (right panel). All other variables set at their means or modes as appropriate. The grey shaded region depicts the 95% confidence intervals.

certain to vote in line with her preferences when she has the backing of public opinion (p $\approx$ .08). As she is increasingly misaligned with the preferences of the public, the probability of a counter-attitudinal vote increases dramatically. Indeed, a justice is seven times more likely to deviate from her ideology when countervailing public opinion is at its maximum value.

Turn finally to the far right panel of Figure 2.2 which plots the effect of countervailing public opinion when diffuse support is high and low. When justices enjoy high levels of support, the effect of public opinion is statistically indistinguishable from zero. Compare this to the solid line depicting the effect when diffuse support for the Court is low. Here again the probability of deviating from a position held by both the justice and the country is about 1 in 20. That probability approaches near certainty when public opinion exerts its strongest influence (p $\approx$ .87). This represents a rather astonishing 135-fold increase, suggesting that even though the Court is thought to enjoy continuous, high levels of diffuse support, fluctuations in the supply have major ramifications on voting behavior.

The full effect of these results might be best understood when contrasting two real world examples. Consider first, Justice Stewart's liberal vote in *New York Times vs. United States* (1971). While Stewart was a relatively consistent conservative voice on the Court, by 1971 public opinion on civil liberties cases (such as free speech, which was at issue in the Pentagon Papers case) had taken a turn for the liberal direction. Combine this with the high salience of the case, an extremely high threat from Congress (court curbing had reached on of its highest points in history in 1970) and diffuse support for the Court was near an all-time low. Stewart, who was already the closest conservative member to the median, was therefore highly responsive to public opinion. The marginal effect of public opinion on his decision to cast a counter-attitudinal vote in this case was .11; about 3 times stronger than the baseline marginal effect of .03.

Compare Justice Stewart's behavior to Justice White's vote in a little known gender discrimination case *Johnson vs. Transportation Authority of Santa Clara County* (1987). Like Stewart, White was the most moderate member of the conservative coalition in this case. Also like in *New York Times vs. United States*, the country was fairly liberal on civil rights in 1987. However, this case was not salient and Justice White had the political cover to vote in line with his conservative preferences that Stewart did not: low Congressional threat and high diffuse support. Indeed, the marginal effect of public opinion for White in this case was statistically indistinguishable from zero. The takeaway point is that justices follow public opinion, but only when they have a concrete strategic incentive to do so.

Conclusion

Judicial scholars have long debated if, and to what extent, the public constrains the decisions justices make. The nature of this constraint and even whether it exists are foundational questions in the field, and yet these questions remain without firm answers. The results presented above do much to clarify our understanding of the complex relationship between the preferences of the American people and the nation's only unelected branch of government.

First, I present one of the most nuanced tests to date to uncover a relationship between public opinion and judicial decision-making. Not only do justices cast majoritarian votes, but they deviate from their own preference to do so. Moreover, justices are cognizant of, and sensitive to, changes in public opinion across issue areas. It is difficult to know how the justices would be able to know and apply something as general as public mood within the context of the facts and issues present in individual cases, much less to do so with the conviction that such concerns should trump ideological preferences. Rather, my results support a more plausible mechanism: the justices, as engaged members of their political

environment, respond to and are aware of broad categories of public opinion.

Second, the conditional nature of my results lend strong support of the strategic behavior hypothesis. Not only do justices follow public opinion, but they do so in a way that helps them maximize a fundamental goal: specific support for their decisions. Justices are only incentivized to abandon their ideological goals when the probability that they will face non-compliance with unpopular decisions is high. In essence, these results point not only to a direct relationship between public opinion and decision-making but help to disentangle the strategic goals justices have in mind when they follow popular sentiment and therefore the mechanism by which public opinion influences votes.

Finally, I argue my unique research design will help future scholars examine questions plagued by observational equivalence in a new way. For example, scholars face some of the same difficulties when they explore whether the Court is constrained by the separation of powers, whether panel effects exist on the courts of appeals, and whether members of Congress are responsive to pressure from constituents. By shifting the focus away from looking at the simple ideological direction of a vote and towards examining explaining votes ideology cannot explain we can open a new pathway to examine some of the most important questions in American institutions. What is more, the decision to vote contrary to one's ideology is itself worthy of future exploration. Some of the largest debates in judicial politics, and in political science more generally, have to do with how elites make decisions and what factors influence those decisions. In the judicial politics literature alone, analyzing counter-attitudinal voting can shed light on the difference between the attitudinal and strategic models of decision-making and the ways in which justices are much more than ideologues in robes.

Of course, these results are not without their limitations. The model presented here cannot account for all competing explanations for counter-attitudinal voting. One reason

this may be troubling here is that past precedents can and do influence public opinion on an issue (Franklin and Kosaki 1989; Johnson and Martin 1998). Future work should examine the feedback loop between legal precedent and public opinion that runs contrary to it.

Further, while this piece attempts to take steps toward establishing a causal link between public opinion and votes, this link is still not a direct one. What all studies in this area lack is direct evidence of intentionality on the part of the justice. We can only infer intention from conditional relationships; the true test is whether justices note public opinion, follow it, and cite it as a justification for the decisions they make. The best evidence of intentionality, as yet unexplored by judicial scholars, might be found in justices private deliberations – from the memos they write to themselves before hearing a case, to personal notes take at oral argument and conference, to the memos exchanged between the justices during the opinion writing process – or their public writings. While the search for intentionality might have to be a largely descriptive and qualitative endeavor, it beckons to be explored using the rich trove of data now available to the students of the Court.

These limitations aside, the results raise some interesting and important normative questions. From its conception, citizens and elected officials have worried that the unelected Court has the ability to make policy decisions with little to no accountability. These results indicate that the checks and balances, which form the cornerstone of our democracy, work exactly as they should. Congress' ability and willingness to overrule the Court and the Court's lack of a purse or sword induces majoritarian compliance, especially on the issues about which the majority most cares. Moreover, these checks seem to work preemptively; Congress does not have to act on all unpopular Court decisions because the mere threat of non-compliance induces majoritarian outcomes. That said, these results probably also advise caution for those who view the Court a watchdog for minority rights. Only when

the Court feels safe from legislative and public backlash, can it hope to be the last best hope for minority voices.

Chapter 3

Public Opinion and Setting the Agenda

Introduction

Whether and why the U.S. Supreme Court acts as a majoritarian institution has been a cornerstone question in American politics for decades. However, to date, literature in political science has sought to answer this question exclusively at the merits stage – does the Supreme Court follow public opinion when deciding *how* to decide – while ignoring the impact of public opinion on the other stages of the Court's decision-making process, most notably whether the Supreme Court follows public opinion when it decides *whether* to decide.

Understanding whether the Court's agenda is responsive to the will of the American people has normative as well as empirical importance. While legal scholar Robert Post once described Constitutional law as an "expression of the deepest beliefs and convictions of the American Nation" (quoted in Schauer 2005, 10), this can only be true if the High

Court, as the last voice on Constitutional disputes, is answering the questions that are most important to the American people. Constitutional law can only accurately reflect the values of the American people if, as journalist Tim O'Brien wrote, "there is no greater barometer of what is on the minds of the US population than the docket of the US Supreme Court" (quoted in Johnson and Goldman 2009, 39).

Moreover, while Schauer (2005) persuasively argues that much of what the Court decides on a day-to-day basis is not politically relevant to most Americans, that the Court does act as the final arbiter on the nation's most important political controversies indicates not only that the Court does face situations where public opinion is relevant but also that the relevance of public opinion is likely not static across all cases. Rather, the importance of public opinion to the Court should ebb and flow with the importance of the cases it decides to decide. As such, understanding the role of public opinion at the agenda setting stage is vital to understanding it later in the process.

The Court's responsiveness to public opinion at the agenda setting stage may also therefore have meaningful implications for our understanding of the relationship between public opinion and justices' votes on the merits. There is more than a decade's worth of evidence to suggest that the Court largely decides in the ideological direction of the public's mood. If, as I argue below, justices consider the pressure of public opinion as early as when they are deciding which cases to grant, the congruence we observe between case outcomes and public opinion may result as much from strategic selection as it does from the justices bending to the general will. What is more, the political irrelevance of the majority of the Court's docket that Schauer (2005) points to could itself be an indication of judicial responsiveness to public opinion; the justices choose to avoid potential conflicts with the public by avoiding important cases.

To take a step toward answering these important questions, I take one of the first

large-scale empirical looks at the role of public opinion on justices' agenda setting votes. I argue and find that justices are forward-looking in their agenda setting votes and avoid granting cases where their merits votes will put them out of step with the American people. However, this strategic concern is conditioned by the Court's reservoir of judicial legitimacy and justices' obligation to legal clarity and legal accuracy. By way of preview, I find that justices are less likely to vote to grant a case as they become increasingly estranged from public opinion but that public opinion only becomes a consideration when a case is not overwhelmingly certworthy on legal grounds or when the Court faces low institutional legitimacy.

In the next section, I draw together the extant literature on the Court's agenda setting process and the literature on public opinion and the Supreme Court to develop a theoretical connection between the two. Section three outlines my data and methods and sections four and five present and discuss my results.

Agenda Setting and External Constraint

The U.S. Supreme Court is unique among federal institutions in that it sits atop the only branch of government that cannot build its own agenda.[1] The judiciary is not a self-starting institution. Rather, judges and justices must wait for cases to be brought to them by litigants. Unlike Congress and the president, the Court cannot use its agenda to directly shore up support or pursue particular policy objectives. That said, since 1925 the Court has possessed almost sole discretion over which cases it hears. In essence, while the

[1]Cox and McCubbins (2005) make the distinction between agenda setting and agenda building. Agenda setting is the power to prioritize and include or exclude items from the agenda while agenda building is the power to create new items to place on the agenda. The Court has the former power, but not the latter.

Court cannot build its own agenda, it has the power to set it. Choosing which cases to hear or not hear and when to hear them.

The canonical view in the literature on agenda setting and the Supreme Court has been that while justices may be strategic in later stages of the process, the Court is generally focused on the law when deciding which cases to hear. Decades of scholarship on the determinants of the Court's agenda have suggested that justices pay attention almost exclusively to institutional and legal case factors when voting on certiorari. Legal conflict in the lower courts (Ulmer 1978; Perry 1991; Black and Owens 2009), the involvement of the Solicitor General and interest groups (Caldeira and Wright 1988; Caldeira, Wright and Zorn ND), signals from the lower courts such as dissents on the panel, the use of lower court judicial review, or *en banc* review (Black and Owens 2009; Owens 2010) all influence the Court's decision to grant a case. Indeed, the influence of these variables has been so validated over so many different studies that the case-level determinants of a grant of certiorari are arguably the best understood part of the Court's decision-making process.

The strategic model of decision making posits that justices pursue their policy goals within the internal constraints of their colleagues' preferences and the external constraints of the preferences of other political actors. At the agenda setting stage there is, at present, limited evidence that justices consider either type of constraint when casting agenda setting votes.

For example, a formalized strategic account of a justice's vote to grant suggests she should look forward to her ideological preferences on the merits and strategically grant cases when she is closer to the projected merits outcome (usually measured as some variant of the median justice) and strategically deny cases when she prefers the legal status quo (or the decision of the lower court) (Hammond, Bonneau and Sheehan 2005). However, anecdotal evidence (Perry 1991) and more recent empirical scholarship (Benesh, Brenner and Spaeth

2002) suggest there are limits to this intuition. Epstein, Martin and Segal (2012) add that if justices are free to pursue policy goals, it is only in cases where the "certworthiness" of a case is borderline. Most notably, Black and Owens (2009) find that while justices are forward-looking at the certiorari stage, their ideological preferences take a back seat when legal or institutional factors strongly counsel a grant. In short, internal constraints matter only when legal signals are weak.

There is even less evidence that justices respond to external constraint at the agenda setting stage. Epstein, Segal and Victor (2002) find limited support for a relationship between the long-term dynamics of the Court's agenda and congressional preferences; the Court grants fewer statutory cases when it is more out of step with Congress. However, even Epstein and her colleagues note that their results are limited to explaining broad aggregate trends in the data. When Owens (2010) examined all existing spatial models positing a separation of powers constraint on the Court's agenda, he found no evidence that justices respond to the preferences of Congress at all when deciding what to decide. Even the well-documented evidence of the influence of the Solicitor General at the cert. stage is more likely a result of a signal of case importance than it is the result of the strategic influence of the executive (Caldeira, Wright and Zorn ND; Black and Owens 2009).

It provides important context to note, however, that the evidence of a separation of powers effect at the merits stage is also mixed. Segal (1997), Sala and Spriggs (2004), and Spriggs and Hansford (2001) all suggest that justices merely vote their sincere preferences at the merits stage and, occasionally, those preferences align with the will of the elected branches and thus any apparent relationship between the two is congruence rather than constraint. Indeed, even scholars who find there is a separation of powers effect at the merits stage suggest that the effect is mediated through some other source. For instance, Clark (2009) finds the Court is less likely to invalidate a piece of federal legislation when

there is a higher rate of bills introduced in Congress to curb the Court's power. Clark argues that rather than directly responding to the threat of Court curbing, justices take increased negative attention by members of Congress as a signal it is out of step with the American people and its legitimacy may be in danger. In short, Clark finds that the Court responds to Congressional threat out of its concern for the preferences of the American people.

Clark's findings highlight a salient tension in the judicial politics literature. While there is little concrete evidence of a separation of powers effect either at the agenda setting stage or at the merits stage, there is a wealth of literature to suggest justices respond to public opinion.

While some studies suggest justices are merely influenced by the same prevailing winds of ideological change that effects public opinion McGuire and Stimson (2004); Giles, Blackstone and Vining (2008) and others suggest justices are directly constrained by public opinion (Casillas, Enns and Wohlfarth 2011; Hall Forthcoming), nearly every study that has examined the relationship between public opinion and the ideological direction of the Court's decisions has found that the Court is largely a majoritarian institution.

That there is a strong demonstrated effect of public opinion as a constraint on the Court at the merits but not a strong effect of the separation of powers has important implications for justices' considerations of the constraints of public opinion at the agenda setting stage. I turn now to exploring that implication and developing a series of expectations concerning when and how justices should respond to public opinion when choosing which cases to hear.

Public Opinion and Agenda Setting

My theoretical argument starts from the familiar premise that justices pursue their policy goals within the bounds of certain internal and external constraints (Murphy 1964; Epstein and Knight 1998; Hammond, Bonneau and Sheehan 2005). At the agenda setting stage, this means justices look forward to the likely merits disposition when deciding whether to grant a case. However, as I outline above, the ideological preferences of a justice's colleagues are not the only potential constraint that may affect the ideological direction of the merits; justices must also consider the pressure put on the Court by public opinion.

While justices have a number of incentives to consider public opinion, these incentives can generally be categorized as concern for diffuse support and concern for specific support. Diffuse support is the Court's legitimacy and the public's trust in the Court as an institution. The American people, Gibson and Caldeira (1992) argue, have a positivity bias toward the Court. "[P]reexisting institutional loyalty [to the Supreme Court] shapes [public] perceptions of and judgements about court decisions and events" (Gibson and Caldeira 2009*b*). In essence, the higher the level of diffuse support the Court enjoys, the more the public is willing to accept the Court's decisions, even those decisions with which it disagrees. Thus, justices have an incentive to shore up diffuse support (see Casillas, Enns and Wohlfarth 2011).

Alternatively, justices may also respond to public opinion to garner specific support, or public approval for individual decisions (see Hall Forthcoming). The Supreme Court has no power to implement its decisions and relies on the elected branches (who are theoretically acting as agents of their constituents) to do so. Thus, when the Court issues unpopular decisions, it risks those decisions being either reversed by the elected branches or merely ignored by the American people. Justices, then, pay a direct cost when there is a loss of

specific support. Moreover, more recent work (Bartels and Johnston 2013) suggests that specific support can crystalize into diffuse support. The more the Court's decisions align with the preferences of the American people, the more the American people put their faith in the Court (Durr, Martin and Wolbrecht 2000), and thus, the more incentive the Court has to issue majoritarian decisions (Casillas, Enns and Wohlfarth 2011).

If justices are forward-looking at the agenda setting stage, as the literature suggests they might be, justices should avoid granting cases where their preferences over the merits would be at odds with the American people. This is especially true given that my findings in Chapter 2 suggest that justices actually vote counter to their ideological preferences in response to the pressure of public opinion in order to shore up diffuse support for their decisions. Thus, justices should seek to grant cases where their preferences are aligned with public opinion, which allows them to simultaneously pursue their ideological goals and garner high levels of diffuse and specific public support. Thus, I hypothesize:

> ***General Hypothesis***: Justices should be less likely to vote to grant a case where their preferences are at odds with public opinion.

In essence, my overarching hypothesis suggests that the justices engage in defensive agenda setting, avoiding those cases that will force a conflict between the Court and public opinion and seeking cases they can use to bolster support for the Court without forcing them to deviate too much from their own ideological preferences.

However, the importance of diffuse and specific support is not static over time. Rather, it changes with the the level of support the Court currently enjoys. If levels of diffuse support are high, justices have less of a need to issue popular decisions because its preexisting institutional legitimacy tends to shield it from backlash against unpopular decisions (Gibson and Caldeira 1992, 2009*b*).

Additionally, justices pay an ideological cost when they deny a case. Reversing a

distasteful lower court decision moves the policy away from the lower court's ideal point and towards the justices'. Affirming a favorable lower court ruling expands the jurisdiction of the policy nationally. Justices, then, get utility from both. As such, justices should only be responsive to the need to deny cases to avoid conflict with the public when that conflict would be most costly. In other words:

> ***Diffuse Support Hypothesis***: Justices should be most responsive to public opinion when diffuse support is low.

Further, my theory suggests justices' responsiveness of public opinion is fundamentally about the pursuit of policy goals. Justices seek out cases that will allow them to pursue their policy goals and avoid cases where they will face external constraint. Because public opinion acts as a constraint on policy goals, I expect justices to face the same limitations on their pursuit. This means following public opinion should be a secondary goal for justices at the agenda setting stage, activated only when justices are not faced with overwhelming legal factors in a case counseling a grant. This expectation follows Epstein, Martin and Segal (2012) who argue that justices are only free to pursue policy goals when other factors do not warrant a clear grant or clear denial, and Black and Owens (2009) who add that justices are less likely to cast policy-seeking votes at the agenda setting stage when faced with strong jurisprudential signals. Thus, I expect:

> ***Legal Constraint Hypothesis***: Justices should be the least responsive to public opinion when legal factors strongly recommend a grant.

This hypothesis suggests a moderating relationship. Empirically, I expect a stronger effect of public opinion on the decision to grant when legal factors favoring a grant are absent but little to no effect of public opinion when these factors are present and, thus, in cases where the Court is always more likely to grant.

Finally, while justices can bolster diffuse support by issuing majoritarian decisions, they pay a cost to diffuse support when they dodge important issues. Justices, then, understand that deciding some issues may be so important that they would pay a larger price for avoiding them than the ideological cost they will pay for deciding against their own policy preferences in favor of public opinion on the merits. Moreover, Baum (2006) emphasizes justices pursue multiple goals. Often the goal to achieve legal clarity is more important than their own policy goals. Highly salient issues heighten the importance of the former goal, thereby diminishing the importance of the latter goal. In other words, issue salience can overwhelm a justice's ideologically defensive strategy at cert. More formally:

> ***Issue Salience Hypothesis***: Justices should be more likely to grant a case as the public salience of the issue increases.

It is worth noting that this hypothesis posits a direct effect of issue salience rather than a moderating effect. Justices should always be more likely to grant highly salient issues regardless of how far their preferences are from prevailing public opinion.

Data and Methods

To test my hypotheses, I rely on Owens' (2010) data of 542 cert. petitions that made the Supreme Court's discuss list from the 1953 to 1993 terms. [2] The important features of these data are that they cover an extended time period and can therefore capture the

[2]These data are limited to cases emanating out of the federal courts of appeals and only include cases where the Court was being asked to interpret or invalidate a piece of federal legislation. The potential drawback to these data is the concern that justices should be especially responsive to public opinion when interpreting federal statutes (see Clark 2009). However, that Owens (2010) finds no evidence of a separation of powers effect indicates that justices are not uniquely concerned with a fear of legislative reversal in these cases

Court's response to variation in public opinion over time, and they include denied petitions. The dependent variable equals one when a justice votes to grant a case.

One of the key challenges in the study of public opinion at the individual case or vote level is developing an issue-specific measure of public opinion. Most previous studies use the measure of public mood developed by Stimson (1999) which estimates a unidimensional mood of the nation on a 0 to 100 (very conservative to very liberal) scale. However, this measure is ill-suited for my question as it treats public opinion as the same across issue areas and thus across cases in a given term. In other words, it assumes that the country would equally prefer a grant in all liberal decisions in a term – from economics, to civil liberties, to defense. However, recent work (see Coggins et al. ND; Rice Forthcoming) finds that there is actual meaningful variation in American public opinion between issues. In a given term, the country might be relatively conservative on, for example, civil rights but quite liberal on economics. Thus a liberal justice should feel comparatively more comfortable granting an economics case and should be more likely to defensively deny a civil rights case. To account for this important variation, I utilize the re-estimated issue-specific mood outlined in Chapter 2. This measure disaggregates Stimson's policy mood into seven unique issue areas: civil rights, criminal rights, defense, economics, the environment, societal welfare issues, and governmental power. I argue these issue areas are narrow enough to encompass

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– thus they should not uniquely be concerned with specific support. This is especially true given that cases involving landmark pieces of Congressional legislation are no more or less likely to be granted by the Court. Moreover, these cases run the gamut of issues from environmental legislation to government regulation, to civil and criminal rights. In other words, because the topics of federal legislation vary so widely there is little reason to believe the public would be more interested in or more concerned about these cases than cases that implicate state law.

issue-level variations in public opinion but broad enough that justices could be reasonably expected to be generally aware of public opinion.

The chief independent variable of interest for these two hypotheses asks whether justices are likely to disagree with prevailing public opinion. Thus, it also requires a measure of the likely ideological position of the justice in that issue area. Like public opinion, the standard measure of judicial ideology (Martin and Quinn 2002) is unidimensional. As with the public, one could reasonably expect justices to desire different outcomes on an economics case than on a civil rights case. Thus, to predict a justices likely ideological preference on those issues, I again rely on Clark and Lauderdale (2012) case-specific ideology ranks, which code whether a justice was expected to be in the left wing (and is therefore coded as a liberal) or the right wing (and is therefore coded as a conservative) in each case. Using multiple indices of case similarity (such as number of years between two decisions, the overlap in issues and issue areas, and shared citation variation) they use a kernel-weighted optimal classification estimator to estimate the ideological position of each justice from most liberal to most conservative. Of course, I cannot use the ideological rank for that case because the ranks were only constructed for granted cases and most cases in my data set were denied. Rather, I calculate which wing the justice was more likely to be in in the previous term. For instance, if Clark and Lauderdale estimated that a justice would be in the left wing in 6 of 8 civil liberties cases in the past term and in the right wing in two case, I coded the justice as a liberal. This measure has the dual advantage of being issue-specific and not being based directly on contemporaneous votes.[3]

[3]This approach is not without its limitations, of course. Chiefly, my measure must dichotomize a justice as preferring a liberal or conservative outcome. Like almost all dummied proxy variables, I lose important variation in how frequently a justice was predicted to be a liberal or conservative in the past term. In other words, a justice who fell in the

My measure of public opinion, then, actually measures the strength of countervailing public opinion. In other words, I am interested in the force of public opinion and the extent to which it disagrees with a justices preferences. Thus, using my issue-specific mood estimates, countervailing public opinion is coded from most conservative (low values) to most liberal (high values) for conservative and from most liberal to most conservative for liberal justices. This measurement strategy means that low values of countervailing public opinion can be interpreted as public opinion that is more in line with a justices' preference and higher values can be interpreted as more opposed. I therefore expect the effect of this variable to be negative.

To measure diffuse support I again follow the strategy taken by Durr, Martin and Wolbrecht (2000). Taking Stimsons algorithm as their starting point, they argue that many individual public opinion questions tap the same latent concept of trust in the Court as an institution. The shared movement in the dynamics of the individual question series, then, can be measured to tap into public opinion in the same way Stimson measures

liberal wing in 51% of cases in the previous term is treated the same as a justice who was predicted to be a liberal in 91% of cases. Also, justices who were ranked on either side of the median are treated as liberal or conservative as justices who are predicted to be in the tails of their respective wings. In short, my measurement strategy does not account for ideological extremity. That said, the results I present below are largely robust to using the directionality of a justices' Judicial Common Space Score as the definition of liberal or conservative. It is also worth noting that interacting a justices' average extremity in the issue area from the past term (i.e. how many ranks away a justice was, on average, from the median) is not significant. In other words, a justices' ideological extremity does not appear to affect her responsiveness to public opinion. The results of both of these models can be found in the Appendix (see Tables A.4 and A.5).

the shared movement in mood. To this end, I update and revise the Durr, Martin and Wohlbrecht (2000) data and identify as many questions as possible that tap into trust in, support for, or approval of the Court as an institution that are asked at least twice and use Stimsons WCALC algorithm to factor analyze them for shared variation and construct a yearly measure of diffuse support.[4] Because I expect the relationship between diffuse support and public opinion pressure to be conditional, I interact the variables.

To measure issue salience, I rely on the Policy Agendas Projects dataset of yearly averages of the Gallup "Most Important Problem" index. After recoding the Policy Agendas Project's broad issues into my 7 issue categories, I use for the measure of public opinion and judicial ideology, the variable simply represents the proportion of respondents who labeled that issue as the most important facing America. While this number could theoretically range between zero and one, in my sample the maximum is .5. Perhaps unsurprisingly, defense was, on average, the nation's most important issue. That being said, there is a fair amount of variation across the salience of the issue areas over time. Even issues as seemingly obscure as government power or the environment had years where as many as 4 or 5% of Americans listed them as the most important problem facing the United States. The highest level of salience any issue received was Civil Rights, where nearly half of those polled in 1955 and again in 1963 listed it as the most important issue.

I also control for the host of factors the literature suggests influence cert. votes (following the measurement and coding in Owens [2010]) whether there was a dissent on the lower court panel, the involvement of the Solicitor General, the extent of interest group involvement measured as the number of amicus briefs filed.

[4]Because justices are likely slow to respond to changes in support, and to ensure the measurement is truly exogenous, I use a one year lagged measure of this variable but note that the results are robust to a 2 year lag and a contemporaneous measure.

I follow Black and Owens (2009) and define the chief legal constraints the Court faces as whether the court of appeals exercised judicial review, the existence of lower court conflict, and whether the case implicated a landmark piece of legislation (which I use here as a proxy for legal salience given that their proxy, coverage in *U.S. Law Week* is not available for all the years in my analysis). I then factor analyzed these variables using principle components analysis to create a single index of Legal Constraint, standardized the variable to range from zero to one, and interacted this index with countervailing public opinion.[5]

Finally, I control for the ideological preferences of the justices. Following past work (Black and Owens 2009; Owens 2010) I conceptualize a justice's sincere preference in relation to the median on the Court (the expected policy location if a case is granted) and the legal status quo, or the median on the lower court panel (the expected policy location if a case is denied). To construct this variable, I took the absolute value of the difference between a justice's Judicial Common Space (JCS) score and the term median on the Supreme Court and the absolute value of the difference between the voting justice's JCS score and the median on the lower court panel. I then differenced these distances to construct a comparative distance variable. In short, higher values on the ideological distance variable indicate a justice was ideologically closer to the status quo than to the median and would therefore be more likely to prefer a denial.[6] While this variable would

[5]The results I present below are substantively similar if I instead include each of these variable individually and interact them. While the judicial review and landmark legislation variable fall out of significance, the conflict variable resembles the relationship I present with the factor index. The results for the other variables remain unchanged. I present these results in the Appendix at Table A.6.

[6]These results are robust to a dummy variable specification where for whether the justice's sincere preference would be for a grant. This value takes on a 1 if a justice's judicial

ideally also be issue specific, comparable preference estimates for the Supreme Court and courts of appeals are not available beyond the unidimensional JCS scores.

Because public opinion is the same within an issue area in a given term (and thus all cases implicating that issue in a given term take on the same value of public opinion) and because the case level controls do not vary within a case across the individual votes, I expect the errors to be clustered at the term-issue level and at the individual case level. I therefore employ a three-level mixed effects logistic regression model with votes nested in cases nested in term-issues.

Results

The results of the model above are presented in Table 3.1. I note at the outset that a likelihood ratio chi-square indicates that the multilevel model performs better than the naive model. I also note, consistent with past work, that the controls perform as expected. Justices are significantly more likely to vote to grant certiorari when there is dissent in the lower courts, and when more amicus briefs are present and less likely to vote to grant when the Solicitor General files a brief opposing certiorari. I also find, consistent with Black and Owens (2009) that justices are more likely to vote to grant as their preferences get closer to the term median than to the median of the lower court panel.

The heart of my argument suggests that as justices face increasing public pressure, they should be more risk averse and thus be more likely to vote to deny a case. As Table 3.1 demonstrates, this is exactly what the data suggest. However, consistent with my hypotheses this relationship is not direct. Rather, the Court's level of diffuse support and the certworthiness of the case condition the impact of public opinion on a justice's vote.

common space (JCS) score (Epstein et al. 2007) was closer to the median justice than to legal status quo.

	Coefficient	*Standard Error*
Ideological Preference for Grant	-1.533*	0.226
Amicus Briefs	0.455*	0.137
Lower Court Dissent	0.895*	0.267
SG Opposes Grant	-0.735*	0.278
Public Issue Salience	9.751*	2.751
Public Opinion Pressure	-0.509*	0.144
Certworthiness	1.749	2.042
Diffuse Support	-0.215*	0.0646
Pressure x Diffuse Support	0.004*	0.001
Pressure x Certworthiness	0.092*	0.040
Constant	23.273*	7.510
Observations	3303	
Log Likelihood	-1531.488	
Random Effects Parameters	*Estimate*	*Standard Error*
Groups in First Level (Term Issues)	.460*	.225
Groups in Second Level (Cases)	2.050*	.135
Random Effects LR Test Chi Square	727.57*	

Table 3.1: Mixed effects multi-level logistic model of a justices' vote to grant certiorari.* indicates $p < .05$

Because logistic regressions are non-linear, the substantive interpretation of interactions are best understood graphically.

Consider first, Figure 3.1. The top panel depicts the probability that a justice will vote to grant certiorari when trust in the Court is low (the solid line) and when trust in the Court is high (the dashed line).[7] Recall that low values of public opinion pressure indicate that the public and the justice are relatively aligned (a conservative justice backed by a relatively conservative nation or a liberal justice on an issue with liberal public opinion) and as the values increase the public and justice become increasingly misaligned. When diffuse support is one standard deviation below the mean, justices are highly responsive

[7]Values are plotted at one standard deviation above and below the mean level of diffuse support. All other values are held at their means or modes, as appropriate.

to public opinion. When they have the backing of the public (and thus are likely to cast a majoritarian vote on the merits) all else equal they have a .76 probability of voting to grant the case. This is the best case scenario for justices; they can vote in line with their preferences and the preferences of the public and, in so doing, hope to avoid any further damage to the Court's institutional legitimacy and perhaps even help to buttress it. However, the probability of a grant decreases rapidly as the justice and the country become increasingly misaligned. That same justice, when faced with extreme public pressure has a probability of voting to grant a case of a little over .1, representing a notable 88% decrease.

Compare this to the dashed line, depicting the probability of a vote to grant when the Court enjoys high levels of diffuse support. Here, the effect of public opinion is substantively nominal and statistically insignificant. In other words, justices who seek to bolster the institutional legitimacy of the Court by voting to grant cases where they believe they will vote in line with public opinion on the merits are only compelled to do so when diffuse support is low. When the Court enjoys high levels of diffuse support, public opinion is functionally irrelevant.

The bottom panel of the figure plots the differences in the marginal effect of public opinion when diffuse support is high and when it is low and the grey shaded region depicts the 95% confidence interval around the difference.[8] Note that for all values of public opinion, the difference in slopes are statistically significant. While the most pronounced differences occur when the public and the justice are highly aligned – in a sense indicating that justices are more willing to seek out cases when they agree with public opinion than they are to avoid cases when they disagree with it – the difference is still significant when

[8]Differences calculated for each value of a one-unit change in pubic pressure. To present the most stringent test of the significance of the interaction, the difference are taken at the minimum and maximum values of diffuse support.

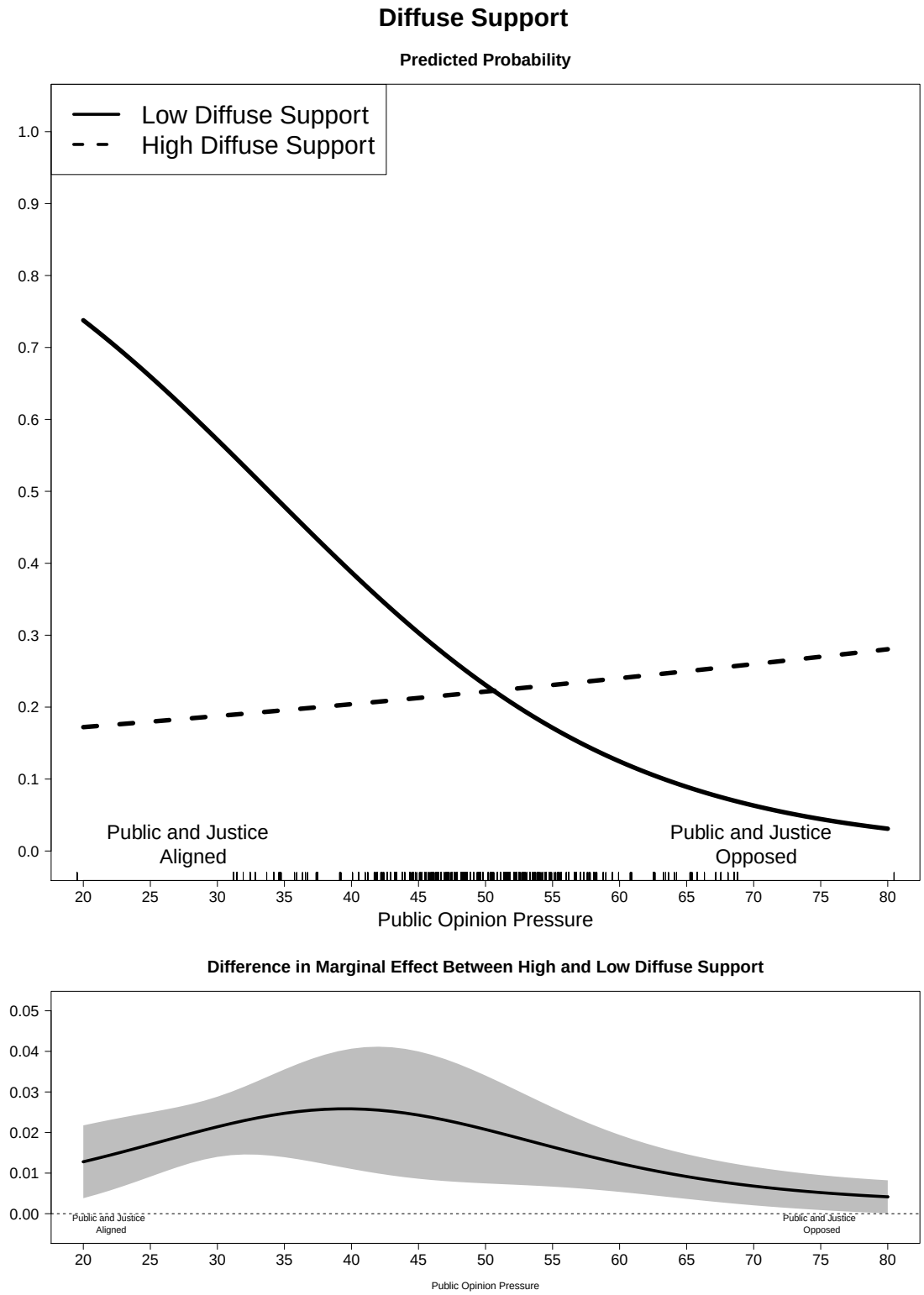

Figure 3.1: Top panel: Predicted probability justice votes to grant certiorari when the Court experiences high (dashed line) and low (solid line) levels of diffuse support. The rug plot along the bottom of the figure depicts the distribution of public opinion pressure in the data. Bottom panel: Difference in the marginal effect of public opinion at high and low diffuse support. Grey shaded region indicates 95% confidence interval around the difference.

the public and the justice are opposed.

Taken together, the results of Figure 3.1 indicate not only that justices are forward-looking and responsive to public opinion at the agenda setting stage but they also point to one motivating force behind that responsiveness: the need to maintain diffuse support for the Court. Justices, my results suggest, understand the opportunity cost of defensive case selection and are most willing to pay those costs when the Court's institutional legitimacy is in danger.

However, Figure 3.2 indicates that strategic institutional and ideological goals are often secondary to legal goals. Here again, the top panel depicts the predicted probability of a vote to grant in a highly legally certworthy case (the dashed line) and a case where no legal factors compel a grant (the solid line).[9] While this result is less pronounced than the results for diffuse support, the figure clearly demonstrates that certworthiness conditions the effect of public opinion.

When a number of legal factors (such as legal conflict in the lower courts, the use of judicial review by the lower courts, or the consideration of a landmark piece of congressional legislation) compel a grant, a justice is always more likely to vote to grant the case, despite the pull of public opinion. This supports Epstein, Martin, and Segal's (2012) intuition and Black and Owens (2009) findings that not only are justices primarily motivated by the legal factors in a case when deciding whether to grant it, but that secondary goals, including ideological and institutional goals, are only relevant when legal factors do not give the Court clear direction. The effect of public opinion is both statistically and substantively insignificant in highly certworthy cases. That being said, the dashed line in the top panel

[9]Values are plotted at the minimum value and one standard deviation above and below the mean level of certworthiness. All other values are held at their means or modes, as appropriate.

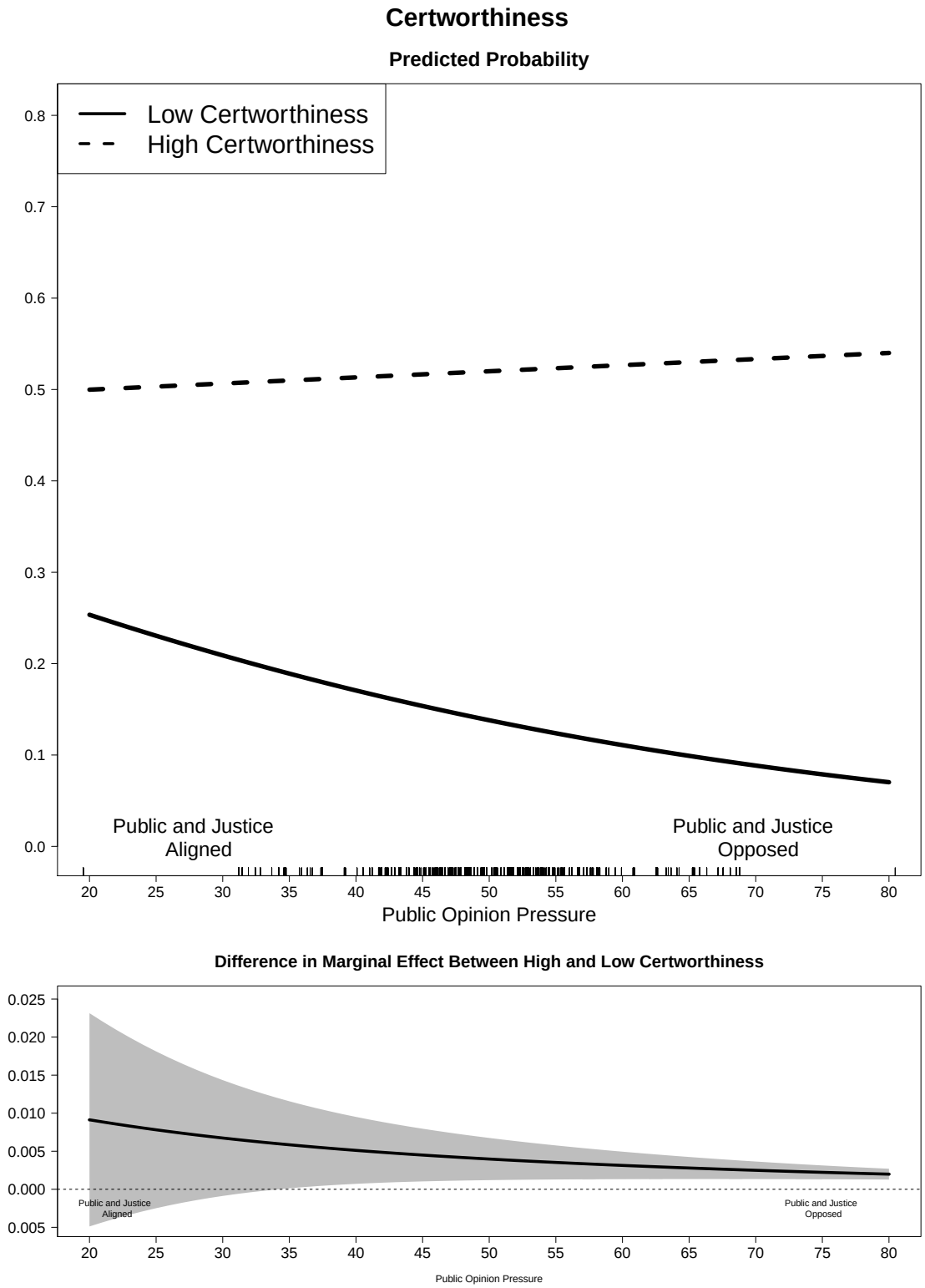

Figure 3.2: Top panel: Predicted probability justice votes to grant certiorari with a legally important case (dashed line) and legally unimportant case (solid line). The rug plot along the bottom of the figure depicts the distribution of public opinion pressure in the data. Bottom panel: Difference in the marginal effect of public opinion at high and low certworthiness. Grey shaded region indicates 95% confidence interval around the difference.

of Figure 3.2 indicates that when the law does not force a justice's hand, justices are strategically responsive to public opinion. When the public and the justice are aligned in a legally unimportant case, justices still have a .35 probability of voting to grant, even though the case lacks good legal reason for them to do so. This effect diminishes substantially as the justice faces high levels of pressure from public opinion. In a case where a justice is likely to vote against strong public opinion on the merits, the model predicts the justice has less than a .1 probability to vote to grant a legally insignificant case – a 74% decrease. The bottom panel of the figure demonstrates,[10] however, that the difference in marginal effects only become significant when the public and justice become increasingly opposed.

Two conclusions can be drawn from Figure 3.2. First, consistent with decades worth of research on Supreme Court decision making, legal importance is the single most important predictor of a justice's vote at the agenda setting factors and the law has the power to overwhelm strategic considerations. That said, justices make strategic calculations when the law does not provide clear direction – strategically seeking out cases where their ideology would lend itself to a majoritarian decision on the merits and avoiding cases that are likely to produce conflict with the American people.

Consider finally, Figure 3.3, which plots the effect of public issue salience on a justice's decision to grant a case. Despite Schauer's (2005) assertion that the Court deals with issues that are only tangentially related to public awareness, and thus is less politically relevant, justices are highly responsive to issue salience when deciding which cases to grant. Cases dealing with issues that few if any Americans would consider the most important issue facing the United States (which make up the majority of both the Court's docket and the cases the Court is asked to hear) have an approximately .14 probability of receiving a grant vote from a justice. As salience increases, and a greater proportion of Americans

[10]Again, depicting the difference at the minimum and maximum levels of certworthiness

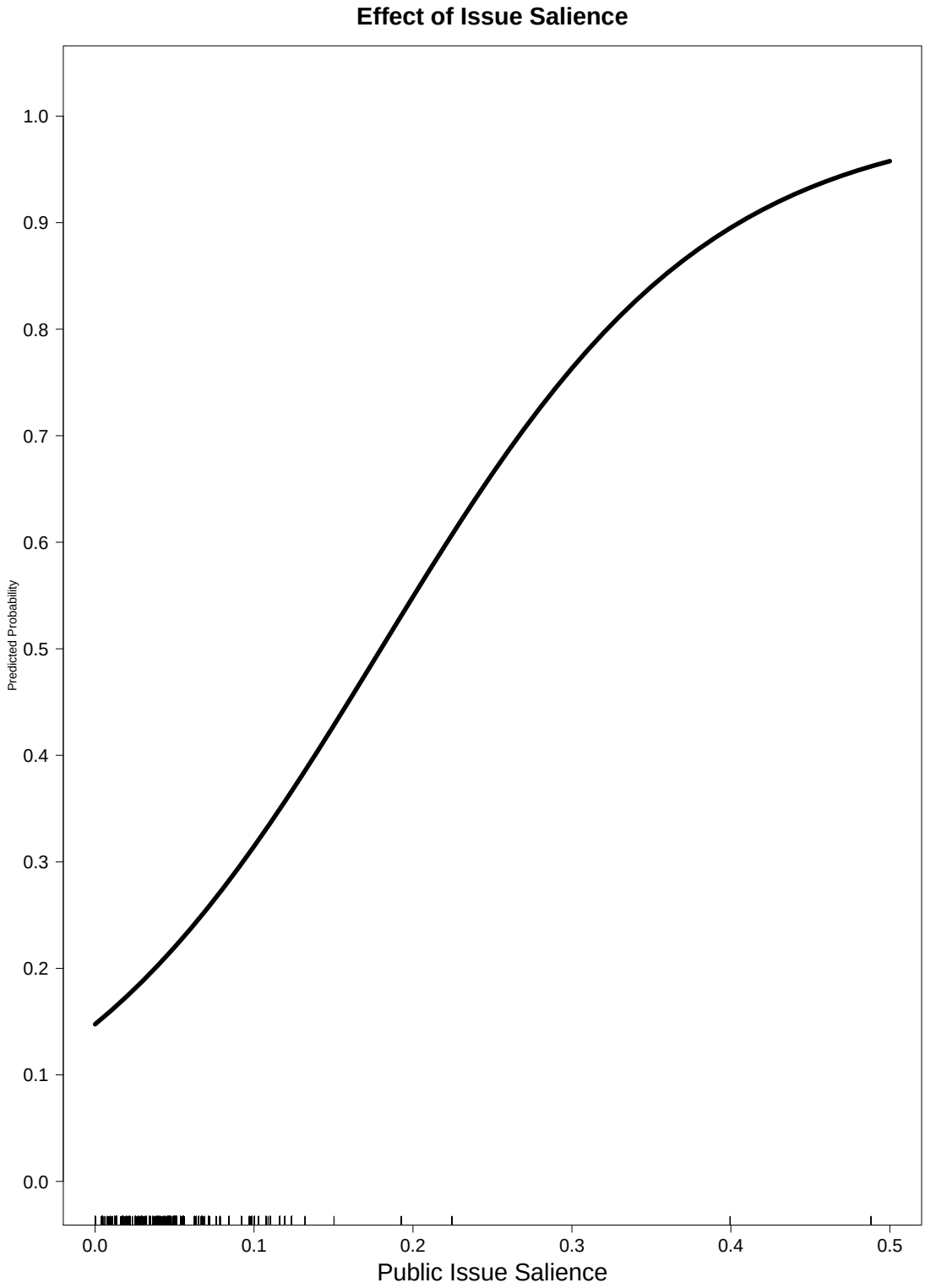

Figure 3.3: Predicted probability of a vote to grant as the public salience of the issue increases. The rug plot along the bottom depicts the distribution of public issue salience in the data.

report they are deeply concerned by the issue, the probability of a vote to grant increases substantially – more than 3-fold from the minimum to maximum value of issue salience. It is perhaps particularly noteworthy that this effect is not conditioned on public opinion.[11] Justices respond to the public's signals that an issue is important to them despite the probability that a justice might disagree with public opinion on the merits. This suggests justices largely ascribe to Justice Brandeis' famous quip that, in important issues, "it is usually more important that the rule of law be settled, than that it be settled right" (dissenting opinion, *DiSanto vs. Pennsylvania* [1927]).

Conclusion

The results above take some of the first steps toward expanding our understanding of the effect of public opinion on judicial decision-making. On the whole, the results suggest that not only are justices cognizant of public opinion on the merits of a decision, but that understanding the constraints they may face from public opinion at the latter stages of the decision-making process, justices strategically consider public opinion when deciding which cases to decide.

Of course, like any piece of research, the findings I present above are not without their limitations. While my theory suggests that justices act out of concern for both diffuse and specific support, they cannot disentangle the effects of these motivations nor can they explain the relative importance of each. Rather, they merely serve to suggest that when diffuse support for the Court is low, justices respond by granting cases where they are more likely to issue decisions that will be more likely to enjoy specific support.

Moreover, the model only considers the choice of individual justices. It therefore

[11] Because I hypothesize that the effect of issue salience should be direct, I do not interact it with public pressure. However, I note that when included, this interaction is insignificant.

assumes that justices will vote their sincere preferences on the merits and be forward-looking to those preference. However, we know from past research that justices understand that the majority disposition will likely fall to the median justice. Thus it is possible that when justices consider the constraint of public opinion they do not consider public opinion in relation to their own preference but rather public opinion in relation to the median justice. My model does not consider this possibility and it is a fruitful avenue of future research.

These limitations aside, these findings could have important implications for future work. Chief among them, the results suggest the potential for a selection effect in our understanding of the effect of public opinion at the merits stage. It is possible that rather than the Court directly responding to public opinion, observed congruence between public mood and the ideological disposition of the case is a result of strategic docket control – justices choose to grant cases where their preferences align with public opinion. As Kastellec and Lax (2008, 408) write,

> [t]he precise selection strategy employed by the Justices will effect the set of Supreme Court cases we observe... Legal scholars and others have long been concerned [that]... the cases the Justices hear are not representative... Accordingly, the Court's selection process raises the potential for selection bias in the inferences we draw from its cases.

They advise that the first step toward recognizing this selection bias is to understand the process the Court employs during the selection stage. Thus, this research takes important steps to understanding the relationship between public opinion and the Court's outputs.

Chapter 4

Public Opinion and *Stare Decisis*

Introduction

The U.S. Supreme Court, as the nations highest court and the court of last resort, plays a role far more important than merely deciding individual cases. It is responsible for the direction of the rule of law in the United States. Much more than adjudicating individual conflicts, the Courts norm of *stare decisis* allows it to set legal rules and legal policy for the entire federal judiciary and often for state courts as well.

In essence, *stare decisis*, which translates from Latin to "to stand by things decided" allows the Supreme Court to set precedent for future cases. The legal rules that are applied from case to case rely on interpretation and reinterpretation of past cases. Thus, understanding when and why the justices choose to apply precedent is vital to our broader understanding of the Court's policy-making power and American legal development.

However, the norm of *stare decisis*, is just that: a norm. The decision of how, or even whether, a past case applied to a present case is entirely discretionary on the part of the justices. As such, the exploration of the Court's use of precedent in the literature has

focused on internal ideological and institutional explanations, largely ignoring the potential for external constraint. To this end, I explore the role of public opinion on the Court's treatment of its own precedent over time. Fundamentally I ask if the Court is more prone to positively (negatively) treat cases as those decisions become more (less) popular.

Whether justices consider public opinion when deciding which precedents to consider and apply has important implications for our understanding of the role of external constraint on the development of jurisprudence. Perhaps more importantly, however, it sheds light on justices' motivations for considering public opinion in the first place.

Because citation to precedent is largely unobserved by anyone but legal scholars and lower court judges, finding evidence of public opinion as a constraint on this aspect of the Court's decision-making process would suggest that the justices respond public opinion for more than strategic purposes. It would provide evidence that justices view consistency with public opinion as a valuable end in itself rather than, or at least in addition to, a mere strategic consideration. Alternatively, if external factors play a role in the Court's more public decisions, as I have demonstrated elsewhere in this dissertation, but not in the content of the Court's opinions, it indicates that justices follow public opinion to be noticed. In the same way that theory would dictate that justices should be more likely to follow public opinion in salient cases because those are the cases the public is most likely to be aware of, we may also expect justices to have little need to care about public opinion in the treatment of precedent because decisions are rarely read or understood by the public.

Indeed, by way of preview that is exactly what I find. The Court is neither directly influenced by public opinion when deciding how to treat precedent nor does public opinion conditionally influence it. I find no effect of public opinion on the decision to treat precedent even when conditioning the effect on the salience of the treated case, the Court's level of diffuse support, nor the level of threat posed by Congress. In short, while justices may be

highly responsive to public opinion in the more conspicuous aspects of its decision-making, they seem to largely ignore public opinion when applying or creating legal rules.

In the next section I draw on previous literature on the Court's application of precedent and the influence of public opinion on the Court to theorize, and derive specific hypotheses about the relationship between the two. In section three I describe the data and methods I employ to test these hypotheses, and sections four and five present and discuss my findings.

The Politics of Precedent and Public Opinion

The Court's norm of *stare decisis* is one of the most important and most persevering institutions in the American legal system. Fundamentally, *stare decisis* ensures there is consistency in the law over time. It elevates the decisions justices make in individual cases to rules rather than mere dispute resolutions.

Moreover, *stare decisis* symbolizes that the Court speaks with one voice and that its decisions transcend the opinions of any individual justice or court. Indeed, it is the institution of *stare decisis*, and the symbols it projects, that serve to ordain the Court as a natural and just arbiter above the fray of politics and ideology (see Gibson and Caldeira 2009*a*,*b*; Gibson 2010); *stare decisis* is often seen as the foundation of the Court's legitimacy (Hibbing and Theiss-Morse 2001; Baum 2006).

That being said, despite the importance of *stare decisis*, justices can and do deviate from precedent (Landes and Posner 1976; Segal and Spaeth 2002; Spriggs and Hansford 2001, 2002; Hansford and Spriggs 2006).[1] In a famous dissent in *Hertz vs. Woodman* (1932) Justice Brandeis wrote, "the rule of *stare decisis*... is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the Court."

[1]For a relatively exhaustive history of the justices view of stare decisis over time, and the role of stare decisis in the modern Court, see Strandler (2009).

Brandeis furthered, in a dissent in *Burnet vs. Colorado Oil and Gas* (1932) that "*stare decisis* is not, like the rule of *res judicata*, a universal inexorable command." This quote alone has been cited by the Court more than a dozen times in the years since Brandeis first wrote it as explanation for deviating from past precedent in a number of salient issues from abortion (*Planned Parenthood vs. Casey* [1992]), to gay rights (*Lawrence vs. Texas* [2003]), to the Establishment Clause (*Agostini vs. Felton* [1997]) (Strandler 2009, 25). True to Brandeis' notion, the decision to cite a case at all, much less how to cite a case, is completely discretionary (Hansford and Spriggs 2006; Black 2011; Spriggs and Hansford 2002).

The canonical view of the decision to cite past precedent states that justices largely respect the norm of *stare decisis* but do so because they recognize it as a constraint in the pursuit of their ideological goals. In other words, while the decision to cite a case and how to cite a case is ideological in nature (justices positively cite that with which they agree, and ignore or disparage decisions with which they disagree) they recognize that some cases are so jurisprudentially or legally important that they must be followed despite ideological predilections. Empirically, this relationship has been operationalized as an interaction between a justice's ideological distance from a past case and the vitality of the precedent, or "the extent to which [the precedent] maintains legal authority" (Hansford and Spriggs 2006, 23).

Under this view, precedent functions both as a tool and a constraint – justices aligned with a past case can work to strengthen the subsequent legal rule it created through further citation, while justices opposed to a precedent can work to subtly weaken it. The cornerstone of this line of research relies on the notion that positive citation strengthens a precedent, making it more vital, while negative citation weakens it; the more justices deviate from a legal rule, the weaker the rule becomes.

Because of the highly discretionary nature of citation to precedent, scholars have largely studied precedent as an internal phenomenon. Whether when exploring the attributes of a case that increase its vitality over time (Black and Spriggs 2013), exploring how ideology interacts with vitality in the construction of legal rules (Hansford and Spriggs 2006; Fowler et al. 2007), or examining how *stare decisis* binds the lower courts to the decisions of the Supreme Court (Benesh and Reddick 2002; Hansford, Spriggs and Stenger 2013) scholars have largely ignored the external political forces justices face when applying precedent.

There are several reasons to believe that justices might consider public opinion when crafting and applying legal rules. The decision to cite a given case is not made in isolation; it is not simply the endorsement or rejection of a legal rule in an individual case. Rather, precedent can be thought of as a proxy for the ideological development of jurisprudence in the United States at a macro level. Consistent endorsement of conservative legal rules on an issue through their application to present cases may serve as an even stronger indication of conservative movement on an issue than even the preponderance of conservative case outcomes. Thus, the wealth of literature compiled over the last 50 years that suggests the Courts ideological output is largely consistent with the mood of the country (Marshall 1989; Mishler and Sheehan 1993; McGuire and Stimson 2004; Giles, Blackstone and Vining 2008; Marshall 2008; Casillas, Enns and Wohlfarth 2011; Hall Forthcoming) might naturally point to a relationship between public opinion and the legal rules laid down by the precedent the Court choses to endorse or reject.

Moreover, there are issues upon which we might expect justices to view public opinion as a valuable guide for the development of jurisprudence. In other words, there are issues upon which the Court views the public as a source of authority. This is fundamentally the idea underlying the conception of a "Living Constitution": Americans' understanding and

beliefs about their own rights ought to be instrumental in defining them. In other words, this belief suggests that the Constitution itself is an instrument to democracy and therefore the "correct" interpretation of the Constitution should be responsive to the democratic will. Justice Stephen Breyer in his book *Making Our Democracy Work* furthers that justices have an obligation to "[help] ensure that the Constitution remains 'workable' in a broad sense of the term. Specifically, [they] can and should interpret the Constitution in a way that works for the people of today" (Breyer 2011, 73). There is also an abundance of anecdotal evidence to suggest that the Court frequently views public opinion as the correct source of jurisprudential authority when evaluating rights claims. For example, the dominant standards for obscenity and for what constitutes a "religion" protected by the Free Exercise Clause both come from popular consensus. Likewise, there are a number of landmark cases the Court has decided in recent years where a dispositive factor for the decision was the public's understand of what their rights were including Justice O'Connor's justification for reaffirming the core holding of *Roe vs. Wade* (1972) in *Planned Parenthood vs. Casey* (1992) and Chief Justice Rehnquist's justification for reaffirming Miranda Rights (even though he vehemently disagreed with the decision in *Miranda*) in *Dickerson vs. United States* (2000).

One might therefore expect a direct effect of public opinion on a justice's decision to follow, or deviate from, existing precedent. In other words, I posit

> ***General Hypothesis***: As the country becomes increasingly liberal (conservative) the Court should more positively cite liberal (conservative) decisions and be more prone to negatively cite conservative (liberal) decisions.

Of course, as I have shown throughout the earlier chapters of this dissertation, we might not expect justices to be equally concerned about public opinion in all cases. That is to say justices respond to public opinion because they are incentivized to do so to garner

either specific support for individual decisions or diffuse support for the Court. As the need to shore up each type of support increases or decreases, so theoretically should the Court's responsiveness to public opinion. Following the insights gleaned from earlier chapters, I posit that three indicators could condition the relationship between public opinion and judicial decision-making.

First, justices rely on diffuse support, or the trust in, and the legitimacy conferred to, the Supreme Court by the people. The nation's positivity bias in favor of the Supreme Court facilitates the public's acceptance of unpopular decisions (Gibson and Caldeira 1992, 2009*b*; Staton 2010). In essence, the more diffuse support the Court enjoys, the less need it has to issue popular decisions. Alternatively, a growing body of literature suggests that specific support can crystalize into diffuse support (Durr, Martin and Wolbrecht 2000; Hetherington and Smith 2007) . The more the Court issues popular decisions, the more the public tends to trust the Court as an institution and thus accept the occasional decision that runs contrary to the consensus gentium. Thus, when the Court faces a relative crisis of confidence with the American people, diffuse support can be augmented by decisions that align with public opinion. This leads me to posit,

> ***Diffuse Support Hypothesis***: Public opinion should have a stronger effect on the decision to positively or negatively cite a case when diffuse support for the Court is low.

Second, justices are concerned with specific support for decisions. As the Court can neither fund nor enforce its decisions, it must rely on the publicly elected branches to see its policies enacted into law. In other words, the Court relies on specific support for its decisions to be implemented. Thus, the Court should be particularly responsive to public opinion when the threat that decisions will not be complied with is highest. Akin to my findings in the previous chapters, there are two conditions where I expect justices to be

particularly responsive to public opinion in the quest to shore up specific support: salient cases, and when Congressional threat is high.

First, the public can only hold the Court accountable for decisions of which it is aware. Schauer (2005) correctly points out that the vast majority of the Court's agenda deals with issues that the public knows and cares little about. There is little reason to believe that the Court should respond to public opinion when either the public does not have a strong opinion on the issue or, more commonly, the public will not notice the outcome of the decision one way or the other. Alternatively, in highly salient cases, justices should be more responsive to public opinion because these are the cases that the public is most likely to be aware of and most likely to mobilize against unpopular decisions (Ignagni and Meernik 1994; Meernik and Ignagni 1995; Ignagni and Meernik 1997; Ignagni, Meernik and King 1998). This should be especially true in the decision to cite a salient case in subsequent cases. In the same way the Court relies on other famous sources to strengthen potentially weak or objectionable decisions (Corley 2008; Corley, Howard and Nixon 2005; Sorenson and Johnson 2013), the Court gets more purchase relying on well-known cases as justification for its decisions than it would from citations to cases about which the public has heard little. Following or disparaging *Roe vs. Wade* (1972) in an abortion case would likely give the Court far more credibility for a decision than a reference to the much lesser-known *Doe vs. Bolton* (1972). As such, I expect:

> ***Salience Hypothesis***: Public opinion should have a stronger effect on the decision to positively or negatively cite a case as the public salience of the cited case increases.

Finally, I expect justices to be especially responsive to public opinion when threats from Congress are high. A growing body of literature suggests that justices strategically

craft decisions to ensure compliance from the lower courts (Corley and Wedeking Forthcoming; Corley, Collins and Calvin 2011) and Congress (Owens, Wedeking and Wohlfarth 2013). In the same way that Owens and his colleagues find that justices try to obfuscate in their opinions to avoid Congressional review from unfriendly ideological regimes, I hypothesize justices will be more likely to rely on popular precedent to justify their decisions when Congress sends signals, in the form of introduction of Court-curbing legislation, that the Court is out of step with public opinion. Thus, I expect

> ***Congressional Threat Hypothesis***: Public opinion should have a stronger effect on the decision to positively or negatively cite a case as when Congressional threat is highest.

The preceding factors might especially influence the justices' decisions to cite cases because citations provide justifications for policy decisions. As I allude to above, the Court's reputation and legitimacy benefits from the norm of *stare decisis*. When justices can rely on popular decisions to defend and rationalize their decisions, thus making them seem legal in nature, rather political, the Court only increases the likelihood those decisions will be accepted and followed.

On the other hand, however, citations to precedent are some of the least visible, or at least some of the least paid attention to, components of decision-making. Indeed, even Hansford and Spriggs (2006, 26) concede that the mass public is not cognizant of the Supreme Court's use of precedent (see also Baum 2006; Baum and Devins 2010). The public and the vast majority of political elites likely do not even read the Court's opinions and instead rely on media or scholarly accounts to understand the content of individual decisions. This presents an interesting tension where finding no support for the hypotheses above may in fact give us more insight into the reasons justices follow public opinion and the effect of public opinion as a constraint on decision-making. Precedent sets legal rules,

but the vast majority of Americans largely ignores its use.

Chief Justice Roberts' opinion in the Affordable Care Act cases is just one example of the fact that the American people notice the result in a case much more than they notice the application of the legal rules. Roberts' decision was heralded as a victory for the Left, as it upheld President Obama's crowning legislative achievement. However, many legal scholars point to the decision as a strategically brilliant move in favor of Roberts' conservative ideology by substantially restricting the power of Congress under the Commerce Clause (see Mariner, Glantz and Annas 2012). Roberts was able to issue a decision in line with public opinion, and against his ideology, while using little-noticed interpretation of precedent to pursue his broader ideological goals.

Justices, therefore, can use precedent to justify and forward their strategic aspirations. Indeed, some scholars have gone so far as to say precedent merely serves as window dressing to legitimize justices' ideologically driven decisions (Segal and Spaeth 1993, 2002). Even federal appeals court Judge Richard Posner regards most uses of precedent as little more than smoke and mirrors. In an interview with long-time Supreme Court reporter Linda Greenhouse, Judge Posner quipped,

> There is a tremendous amount of sheer hypocrisy in judicial opinion-writing. Judges have a terrible anxiety about being thought to base their opinions on guesses, or their personal views. To allay that anxiety, they rely on the apparatus of precedent and history, much of it extremely phony . . . (quoted in Segal and Spaeth 2002, 85).

Under this alternative view, precedent provides one avenue where the justices can see their policy preferences enacted into law in a broad scheme, even when those preferences deviate from public opinion, without having to face the broader political consequences of issuing counter-majoritarian decisions. Thus, I test an alternative hypothesis that:

Null Result Hypothesis: Despite the influence of public opinion on more

> visible portions of the Court's decision-making, public opinion should have no influence on the Court's treatment of precedent over time.

I turn now to the data and methods I use to test these competing interpretations.

Data and Methods

Fundamentally, my hypotheses question what drives the Court to positively or negatively interpret its precedent over time. To test these hypotheses, then, I began by constructing a database consisting of every citation by a federal or state Court to a Supreme Court precedent since 1791. This database, which contained over 11 million observations, was constructed by collecting the Shepard's Citation Report ® for each case decided by the Supreme Court since it started issuing written decisions, and using a Python script to parse them for their content.[2] Shepard's Reports are "a legal citation index that, among other things, provides a list of all U.S. court opinions that refer to any U.S. state or federal case decided since the beginning of the U.S. legal system. Importantly, Shepard's also indicates how a particular court opinion is legally interpreted by the subsequently decided cases that cite it" (Hansford and Spriggs 2006, 43-44).[3] Shepard's reports have been consistently used in the literature as a valid data source by scholars interested in citations to and treatment of precedent (see e.g. Segal and Spaeth 2002; Spriggs and Hansford 2001, 2002; Hansford and Spriggs 2006; Fowler et al. 2007; Hansford, Spriggs and Stenger 2013).

The next step was to collapse the database into the proper unit of analysis. The unit

[2]I owe a great debt to Jim Spriggs for his help and advice on the construction of this database, which was modeled largely on the database originally constructed for his 2006 book.

[3]For a discussion of Shepard's coding protocol and the reliability, validity, and potential drawbacks of these data see Hansford and Spriggs (2006, 44-50).

of analysis in the models I present below is a dyad between each precedent (which I will refer to as a cited case) and each subsequent Court term. In other words, the model allows for the possibility of any case to be cited in each year after it was initially decided. For example, a case decided in 1972 would include an observation for 1973, 1974, and so on through 2011.[4]

The dependent variable, then, is a count of the number of positive or negative citations to that precedent in each of the subsequent years. Following previous work (Hansford and Spriggs 2006, chapter 4), I run separate models for positive and negative interpretations of precedent.

Before continuing on to the independent variables I include in the model, the definition and measurement of positive and negative interpretation of precedent is worth a bit of further explanation. A positive interpretation of precedent, according to Shepard's coding scheme requires that a treating case rely on a cited case as the "controlling authority" on the issue. Positive interpretations of precedent theoretically strengthen its vitality by applying the same legal rule in subsequent cases. Following Hansford and Spriggs (2006), I define a case as being positively interpreted when a Shepard's codes a treating case as having "Followed" cited case.[5]

Alternatively, negative treatments of precedent attempt to distance the treating case from the cited case and, in essence, weaken its vitality. Shepard's codes denoting a negative treatment include: "Distinguished" (the cited case is "different either in law or in fact" from the treating case), "Criticized" (the "soundness of the decision or reasoning is criticized"),

[4]My analysis is limited, because of data availability, to cases decided in or after the 1953 term and ends in the 2011 term.

[5]I also included as positively treated cases Shepard's coded as "extended" or "parallel." Both of these codes indicate that the treating case fully applied the cited case but these codes did not exist when Hansford and Spriggs constructed their original dataset.

"Limited" (the treating case refuses "to extend the decision of the cited case beyond the precise issues involved"), "Questioned" (the treating case questions the "soundness or reasoning in the cited case"), or "Overruled" (the treating case "expressly overruled or disapproved" of the cited case) (*Shepards Citations Reports Codebook.* 1993, 12-13).

My hypotheses suggest that the Court should be more prone to positively cite liberal cases when the country becomes more liberal on an issue and more prone to negatively cite conservative cases as the country grows more liberal. To test this hypothesis, I employ my issue-specific measure of public mood. This measure, which is describe in more detail in the earlier chapters, uses Stimson's (1999) corpus of every domestic policy public opinion question asked in the latter half of the 20th century and re-estimates his yearly measure of policy mood based on seven unique issue areas: civil rights, criminal rights, defense, economics, the environment, government power, and social welfare. I then categorized each of the more than 5200 cited cases as implicating primarily one of these issue areas.

The measure of public opinion actually measures the strength of countervailing public opinion, how conservative the country is given a liberal case and how liberal the country is given a conservative case. In other words, I am interested in the force of public opinion and the extent to which it disagrees with the ideological direction of the cited case. The Supreme Court Database codes each decision issued since 1946 as either liberal or conservative in outcome. Countervailing public opinion is then coded from most conservative (low values) to most liberal (high values) for conservative cases and from most liberal to most conservative for liberal cases. This measurement strategy means that low values of countervailing public opinion can be interpreted as public opinion that is more in line with the outcome in the cited case and higher values can be interpreted as more opposed. I thus expect the effect of this variable to be negative in the positive citation model and positive

in the negative citation model.[6]

For the models testing my conditional hypotheses, I interact countervailing public opinion with case salience, Congressional threat, and the Courts level of diffuse support in the previous term. These variables are measured in the same way as I describe in previous chapters. Following Clark (2011) I measure "Congressional Threat" as a logistic transformation of the number of pieces of court-curbing legislation introduced in the House or the Senate in the past year. Case salience requires a media-based measure. To this end, I again employ Collins and Cooper (2011) data indexing the cases salience based on the amount of and location of coverage in four major national newspapers. Finally, I include my updated version of Durr, Martin, and Wohlbrect's (2000) measure of diffuse support for the Court which uses Stimson's algorithm to construct a single measure of institutional

[6]A slightly different take on this theoretical story might instead counsel examining how much public opinion has changed over time. This story would argue that the Court does not look at whether contemporary public opinion supports or opposes the legal policy set forth in a decision, but rather attempts to gauge how far public opinion has come since the decision was issued – if the times have changed and thus the decision should too. To examine this possibility, I replicated the models I present in the text but instead of including a variable for public opinion pressure against a decision, I included a variable for the absolute value of the difference between public opinion the year a cited case was issued and public opinion on that issue in the treating year. These results are presented in the appendix. Importantly, I find substantially the same null result in these models as the ones I present below. There is neither a direct effect of public opinion drift, as I call the variable, nor a conditional effect of public opinion drift considering the case salience, level of diffuse support enjoyed by the Court, or threat posited by Congress. These results are presented in the appendix Table A.7.

support for the Court using as many public opinion questions as possible which tap into trust in, support for, or approval of the Court as an institution.

To test for the possibility of both a direct effect or a conditional effect of public opinion on the positive or negative treatment of precedent, I present four separate count models: two models each for positive interpretation and negative interpretation of precedent, one each that includes only the direct effect of public opinion and one each for the effect of public opinion conditioned on salience, threat, and support.

The vast majority of cases receive no substantive interpretation at all; the count data are highly over-dispersed. Indeed, 91% of the observations for positive treatment and 93% of the observations for negative treatment equal zero on the dependent variable. Thus, I employ a negative binominal regression.[7]

Following Hansford and Spriggs (2006) I control for a number of other factors that could potentially influence the treatment of a precedent over time. Most importantly, I control for the interactive effect of ideological distance and precedent vitality. Specifically, using Martin and Quinn's (2002) data, I measure the absolute value of ideological distance from the median in the majority coalition of the cited case to the term median in each

[7]It is possible the data are systematically zero inflated. In other words, there is separate process determining whether a case even had the potential to be substantively than that which governs how many times a case is treated. In this scenario a zero-inflated negative binomial model would be more appropriate (Zorn 1998). In order to account for this possibility, I ran identical models to those presented below using a zero-inflated negative binomial specification that models the "hurdle process" separately as a function of precedent age, the Court's agenda, whether the case was overruled, and case vitality. The results of this alternative specification are substantively identical to the ones I present below. These results are available in the appendix Table A.8.

year.[8] Precedent vitality is measured as the difference between the number of prior positive interpretations of a precedent minus the number of negative interpretations. Thus, higher values indicate a more authoritative precedent (see Hansford and Spriggs 2006, 60-61). To ensure that the variable is exogenous, I lagged vitality one year. I then interacted ideological distance and vitality.

Hansford and Spriggs also control for whether the cited case included a special concurrence (concurring only in the result, rather than fully with the legal reasoning), was a *per curiam* opinion, the amount of interest group involvement in the cited case (measured as the number of amicus briefs filed at the merits stage), whether the Solicitor General was involved, the vote margin in the cited case, and whether the cited case had been previously explicitly overruled by the Supreme Court. I follow their work and include each of these controls. I also control for the natural log of total number of past interpretations a cited case has received by the Supreme Court, the number of cases in that issue area on the Court's docket in the treating term (theoretically justices would have more opportunity to treat a case in a given issue area the more cases they decide in a term implicating that issue), and both the age of the precedent and the squared age of the precedent.[9]

[8]Several recent theoretical (Carrubba et al. 2011) and empirical (Clark and Lauderdale 2010) articles suggests that the median in the majority coalition is a more accurate approximation of the ideological position of the majority opinion than either the ideology of the term median or the ideology of the opinion author. It would be better, of course, if the term median values were issue specific, as justices' ideologies probably vary from issue to issue in the same way public opinion does, but such ideology measures are not currently available.

[9]Hansford and Spriggs (2006) find, through experimentation, that the relationship between precedent age and treatment of precedent is quadratic.

Results

I begin the discussion of my results by examining only a direct effect of countervailing public opinion on the decision to positively or negatively treat a case in a given year. Table 4.1 provides the results of the model described above. While the control variables perform largely as they do in Hansford and Spriggs' earlier model, the most salient finding is that countervailing public opinion has no statistically significant direct effect either on the decision to treat a precedent as controlling or on the decision to negatively treat a precedent. Indeed, the while the coefficients on the key independent variable of interest in both models are in the expected direction, they are both statistically insignificant and substantively nominal.

At first glance, these results may not be surprising. After all, in the same way that we would not expect the Court to be equally responsive to public opinion in all cases, it might be equally reasonable that we would not expect the Court to be responsive to public opinion equally in all issues over time. If justices respond to public opinion for strategic incentives, then the conditional need to seek out those incentives (diffuse and specific support) might make a direct effect seem insignificant when, in fact, the effect is just being masked by the conditional nature of the relationship. Table 4.2 presents the same model while interacting countervailing public opinion with diffuse support, case salience, and Congressional threat.

As Table 4.2 makes clear, public opinion likewise has an insignificant effect on treatment of precedent over time when accounting for the potential conditioning effect of support, salience, or threat. All three interactions are insignificant in both the positive and negative interpretation models. Contrary to the hypotheses outlined above, the Court is not more or less likely to respond to public opinion in highly salient cases, when diffuse support is low, or when Congressional threat is high. Indeed, public opinion does not appear to play a role in the Court's citation to its own precedent no matter the salience of

	Positive Cites	*Negative Cites*
Ideological Distance	.04315*	.0848*
	(.0170)	(.0204)
Case Vitality	.0146*	-.0051*
	(.0013)	(.0007)
Case Vitality x Ideo. Distance	-.0038*	.0010*
	(.0007)	(.0005)
Special Concurrence	-.0123	-.0234*
	(.0076)	(.0098)
Vote Margin	.0024	.0006
	(.0032)	(.0039)
Logged Number of Prev. Treatments	1.733*	1.747*
	(.0183)	(.0173)
Court Agenda	.0035*	.0032*
	(.0012)	(.0015)
Amicus Involvement	-.0025	.0037
	(.0025)	(.0030)
SG Involvement	.0437	-.0632*
	(.0229)	(.0248)
Per Curiam Opinion	-.1355*	-.0804
	(.0634)	(.0616)
Case Overruled	.0680	.8729*
	(.0622)	(.0634)
Precedent Age	-.1658*	-.0631*
	(.0040)	(.0050)
Precedent Age^2	.0015*	.0001
	(.0001)	(.0001)
Case Salience	-.0419*	.0095
	(.0045)	(.0050)
Countervailing Public Opinion	-.001	.0014
	(.0010)	(.0013)
Observations	180,029	
Log pseudoikelihood	-71,129.19	-57,548.56
Alpha	2.408*	2.296*

Table 4.1: Negative binomial regression of number of positive (left column) or negative (right column) citations to precedent in a year. Robust standard errors clustered on term-issue. * indicates $p < .05$

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the citing case or the broader political context.[10]

[10]There is some debate in the literature as to whether the insignificance of the coefficient on the interaction term itself is sufficient to conclude an insignificant interactive effect (Brambor, Clark and Golder 2006). It is far outside of the scope of this work to wade into that debate but out of an overabundance of caution I take the strategy suggested by

Extension: Treatment of Precedent in the Majority Opinion

I argue throughout the bulk of my dissertation that the best way to study the strategic decision-making of various actors is at the individual level. For the most part, "the Court" does not make decisions, as it is not an actor itself, but is rather composed of nine individual actors making individual strategic decisions. As Justice Holmes famously quipped "the Court" is really just "nine scorpions in a bottle." As a result, while the analyses I present above, which model the aggregate number of citations to a precedent in a given year, give a strong indication that justices do not view public opinion as a constraint when they interpret precedent over time, it is an aggregate test that treats the Court as a unitary actor and is therefore limited in its generalizability.

To present a more nuanced test of my theory, I extend these analyses to examine a justice's decision to treat a precedent in a given majority opinion. To begin, I randomly selected 1500 orally-argued majority opinions decided between the 1953 and 2011 terms.[11] I then constructed a dataset including an observation for each cited case/citing case dyad; the unit of analysis is whether any given precedent is cited in any given majority opinion.

Brambor, Clark and Golder (2006) and plot the difference in marginal effect of countervailing public opinion across the range of the variable at the highest and lowest values of the conditioning variables: salience, threat, and support. If the confidence intervals around the differences do not overlap zero at any point, the interaction is statistically significant at least at that value of countervailing public opinion. For the sake of brevity, these figures are presented in the appendix (see Figures A.1 and A.2). It is worth noting here only that the interaction of all three variables is insignificant at all values of countervailing public opinion in both the positive and the negative citation models.

[11]Because of data availability, I do not examine citations to any cases decided before 1953.

Theoretically, a majority opinion could cite any precedent decided prior to the day that majority opinion is issued.

The dependent variable, then, equals one if the majority opinion treats a precedent (positively in the positive treatment model and negatively in the negative treatment model) and zero otherwise. The controls largely remain the same as the models I present above with a few exceptions. First, I measure ideological distance as the absolute value of distance between the median in the majority coalition of the treating case and the median in the majority coalition of the cited case.

I also include variable to assess the potential similarity between the cited and treating case. While theoretically a majority opinion could cite any case decided prior to the opinion announcement, some cases are simply more relevant than others. To tap into potential relevance, I construct a series of similarity dummies equaling one when the cited and citing case: implicate the same broad Supreme Court Database issue, implicate the same narrow Supreme Court Database issue, implicate the same issue under my 7-issue public opinion coding scheme, or involve the same major, or minor, legal provision. I then constructed an additive index of these dummies to create a "case relevance index." This variable ranges between 0 (no overlapping issue area or legal provision) and 5 (complete overlap).

Finally, I include a dummy variable for if the cited and treating cases were decided in the same ideological direction; positive citations should be more likely when the cases share an ideological outcome and negative citations should be more likely when the treating case and cited case are decided in opposite directions.

As with the previous models, I present both the direct effects of countervailing public opinion and the effect of public opinion conditioned on threat, salience, and diffuse support. The results from these four models are presented together in Table 4.3.

Across all four models, the pattern of insignificance holds. While there is some weak evidence of a direct effect of countervailing public opinion on whether a case is positively cited in the majority opinion and an effect of countervailing public opinion conditioned on cited case salience for negative treatment, neither is substantively very large and, when plotted out, the interactive effect of salience and public opinion is not even statistically significant for vast majority of the range of countervailing public opinion.[12] The insignificance of the these models is even more striking considering that due to the unit of analysis, the model include nearly 2 million observations and should, therefore, have extremely strong statistical power.

Indeed, it would seem to be the case that even an opinion author's decision to cite any given precedent largely ignores the constraint of public opinion. Justices are no more likely to rely on conservative precedents as the country becomes more conservative and are no more likely to disparage conservative precedents as the country grows more liberal.

Conclusion

While all statistical results should be interpreted with a level of caution, and causality should never be inferred solely from the existence of a statistical relationship, even more caution should be used when interpreting null results as proof of a lack of relationship. Null results can only tell us that the statistical relationship between two variables does not significantly differ from zero in one particular model specification with, as is always the case, imperfect data. That interpretation is a long way from being able to definitely conclude that public opinion does not impact justices decision to treat precedent. However, that no relationship exists under any of the model specifications I present above is at least an initial indication the public opinion does not have the same sway over the Courts opinion

[12]See appendix Figure A.3.

content that it does over the justices' decision to vote to grant a case or to deviate from their ideologies on the final votes on the merits.

Taken at face value, then, these results point to a number of important implications. Chief among them is that while the Court seems to respond to public opinion in the more visible portions of its decision-making process, precedent appears to be one avenue where the justices are not constrained to be majoritarian. Rather, because the American people largely ignore the legal content of the Court's opinions, the Court's opinions seem to be free to ignore the American people.

This finding is of little normative importance if, as some scholars have suggested, *stare decisis* is little more than "phony" window-dressing meant to veil ideological decisions. It makes sense that justices would not be concerned about justifying their decisions to the mass public with a reliance on popular past decisions if the public will never read those justifications. If all that we are concerned with is the direction of the Court's decisions, then the preceding chapters indicate that the Court is relatively majoritarian, especially in pursuit of its own strategic goals.

The normative story is more troubling, however, if we instead conceptualize precedent as creation and application of legal rules – as a proxy by which we can observe the very development of law in the United States. Under this view, that justices consider majoritarian views in the ideological outcome of cases but not in their legal reasoning, which "can have more far-reaching consequences by altering the existing state of legal policy and thus helping to structure the outcomes of future disputes" (Hansford and Spriggs 2006, 3), could imply that the Court is majoritarian in little more than appearance. Justices shore up diffuse support by issuing individual decisions that have little consequence outside the parties involved but are free to pursue their ideological goals in the broader legal rules they establish.

In essence, if scholars ascribe to the belief that it is the content of the Court's opinion that is most important (Maltzman, Spriggs and Wahlbeck 2000; Clark and Lauderdale 2010) these results cast a shadow of doubt over the normative importance of the public's views to the Supreme Court.

In a more optimistic frame, however, the Court was established to be a counter-majoritarian institution and to be protected from what Hamilton called the "great beast" of public opinion which is "prone to sudden breezes of passion." These results, then, have the potential to suggest that, at least through Hamilton's lens, the Supreme Court really is the "least dangerous branch."

	Positive Cites	*Negative Cites*
Ideological Distance	.0542*	.1216*
	(.0179)	(.0237)
Case Vitality	.0154*	-.0057*
	(.0015)	(.0007)
Case Vitality x Ideo. Distance	-.0047*	.0008
	(.0009)	(.0007)
Special Concurrence	-.0046	-.0220*
	(.0077)	(.0100)
Vote Margin	.0031	.0053
	(.0032)	(.0045)
Logged Number of Prev. Treatments	1.731*	1.718*
	(.0198)	(.0186)
Court Agenda	.0032*	.0079*
	(.0011)	(.0020)
Amicus Involvement	-.0047	-.0130*
	(.0026)	(.0037)
SG Involvement	.0263	-.0469
	(.0215)	(.0259)
Per Curiam Opinion	-.0999	-.0150
	(.0642)	(.0661)
Case Overruled	.0925	.9123*
	(.0680)	(.0698)
Precedent Age	.0016*	-.0701*
	(.0040)	(.0067)
Precedent Age^2	.0015*	-.00002
	(.0001)	(.0001)
Public Opinion Parameters		
Countervailing Public Opinion	-.0258	.0130
	(.0257)	(.0336)
Case Salience	-.0057	.0209
	(.0227)	(.0263)
Public Opinion x Case Salience	-.0008	.0001
	(.0004)	(.0005)
Congressional Threat	-.5483	.2745
	(.4133)	(.5353)
Public Opinion x Threat	.0077	-.0073
	(.0081)	(.0091)
Diffuse Support	-.0094	-.0139
	(.0104)	(.0150)
Public Opinion x Support	.0002	-.0001
	(.0002)	(.0003)
Observations	153,397	
Log pseudoikelihood	-62,285.39	-51,374.166
Alpha	2.107*	2.143*

Table 4.2: Negative binomial regression of number of positive (left column) or negative (right column) citations to precedent in a year, including interactive effects. Robust standard errors clustered on term-issue. * indicates $p < .05$

Effect of Public Opinion on Majority Opinion Treatments				
Variable	*Positive*	*Pos. Conditional*	*Negative*	*Neg. Conditional*
Control Variables				
Ideological Distance	-.0998	-.1232	.2540*	.2113*
Case Vitality	.0021	.0014*	-.0238*	-.0242*
Case Vitality x Ideo. Distance	-.0027*	-.0034*	.0072*	.0080*
Special Concurrence	-.0849	-.0629	-.0147	-.0162
Vote Margin	.0560*	.0521*	-.0078	-.0173
Logged Number of Prev. Treatments	1.023*	1.077*	.8088*	.8211*
Similarity Index	1.172*	1.168*	1.099*	1.082*
Same Ideo. Direction	.5284*	.5605*	.0037*	.0034*
Amicus Involvement	.0324*	.0292*	.0270*	.0235*
SG Involvement	.0002	-.1240	-.1755	-.1744
Per Curiam Opinion	-.1772	-.1229	.1098	.0980
Case Overruled	-.2342	-.1740	.8827*	.7552*
Precedent Age	-.1650*	-.1872*	-.1450*	-.1536*
Precedent Age^2	.0019*	.0024*	.0014*	.0018*
Public Opinion Parameters				
Countervailing Public Opinion	.0204*	.1666	-.0100	.1173
Case Salience	-.0456	-.4150*	.0158	.5764
Public Opinion x Case Salience		-.0012		-.0115
Congressional Threat		2.495		-4.304
Public Opinion x Threat		-.0326		.1045
Diffuse Support		.0808		.0365
Public Opinion x Support		-.0014		-.0010
Constant	-12.712*	-21.462*	-10.176*	-14.807*
Log Pseudo-Liklihood	-2,852.18	-2,607.25	-3,124.46	-2,910.4
Observations	2,217,183	1,931,762	2,217,183	1,931,762

Table 4.3: Logistic regression model of citation to past precedent in majority opinion. * indicates $p < .05$ (standard errors omitted but available upon request). Robust standard errors clustered on term-issue.

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Appendix A

The tables and figures below present the results of a number of robustness checks described in the text and footnotes of the results presented throughout my three empirical chapters.

	Coefficient	Standard Error
Solicitor General Pressure	1.355*	0.082
Amicus Brief Pressure	-0.015	0.011
Countervailing Public Opinion	0.215*	0.053
Congressional Threat	-3.918*	1.455
Salience	-0.354*	0.073
Diffuse Support	0.093*	0.021
PO x Congressional Threat	0.085*	0.029
PO x Salience	0.006*	0.001
PO x Diffuse Support	-0.002*	0.0004
Constant	-10.345*	2.676
Wald Chi-Squared	431.86*	
Observations	10752	

Table A.1: Logistic regression justice's decision to vote counter to her preferences including only votes for the majority coalition. Random effects by ideological position. * denotes $p < 0.05$ (two-tailed test).

	Coefficient	Standard Error
Solicitor General Pressure	0.959*	0.052
Amicus Brief Pressure	-0.005	0.009
Majority Coalition	0.974*	0.055
Countervailing Public Opinion	0.283*	0.029
Congressional Threat	-0.104	0.797
Salience	0.0002	0.0008
Diffuse Support	0.116*	0.011
PO x Congressional Threat	0.007	0.016
PO x Salience	0.0002	0.0008
PO x Diffuse Support	-0.003*	0.0002
Constant	-14.737*	1.496
Wald Chi-Squared	693.63*	
Observations	13994	

Table A.2: Logistic regression justice's decision to vote counter to her preferences using Policy Agendas Broad Issue Areas. Random effects by ideological position. * denotes $p < 0.05$ (two-tailed test).

	Coefficient	Standard Error
Solicitor General Pressure	1.009*	0.074
Amicus Brief Pressure	-0.004	0.010
Majority Coalition	0.867*	0.058
Ideological Extremity	-2.252*	0.177
Countervailing Public Opinion	0.068	0.051
Congressional Threat	-3.486*	1.367
Salience	-0.363*	0.069
Diffuse Support	-0.001*	0.0004
PO x Congressional Threat	0.069*	0.027
PO x Salience	0.006*	0.001
PO x Diffuse Support	-0.001*	0.0004
Constant	-4.513*	2.580
Wald Chi-Squared	632.42*	
Observations	13810	

Table A.3: Logistic regression of justice's decision to vote counter to her preferences defining liberal and conservative using direction of Judicial Common Space scores. Because there is no clear corollary to rank position in the JCS scores, I instead control for ideological extremity (the absolute value of the JCS score) and include random effects by voting justice. * denotes $p < 0.05$(two-tailed test).

	Coefficient	*Standard Error*
Ideological Preference for Grant	-1.462*	0.214
Amicus Briefs	0.471*	0.134
Lower Court Dissent	0.840*	0.263
SG Opposes Grant	-0.629*	0.274
Public Issue Salience	9.882*	2.719
Public Opinion Pressure	-0.310*	0.119
Certworthiness	5.049*	1.431
Diffuse Support	-0.145*	0.055
Pressure x Diffuse Support	0.003*	0.001
Pressure x Certworthiness	0.024	0.024
Constant	14.233*	6.331
Observations	3652	
Log Likelihood	-1696.7262	
Random Effects Parameters	*Estimate*	*Standard Error*
Groups in First Level (Term Issues)	.478*	.222
Groups in Second Level (Cases)	2.067*	.133
Random Effects LR Test Chi Square	837.58*	

Table A.4: Robustness check using cardinal direction of JCS score to define liberal or conservative expectation. * indicates $p < .05$

	Coefficient	*Standard Error*
Ideological Preference for Grant	-1.364*	0.232
Amicus Briefs	0.463*	0.138
Lower Court Dissent	0.899*	0.269
SG Opposes Grant	-0.741*	0.280
Public Issue Salience	9.731*	2.761
Public Opinion Pressure	-0.509*	0.145
Ideological Extremity	-0.091	0.317
Certworthiness	1.799	2.042
Diffuse Support	-0.216*	0.065
Pressure x Ideological Extremity	*-0.001*	*0.006*
Pressure x Diffuse Support	0.004*	0.001
Pressure x Certworthiness	0.093*	0.040
Constant	23.672*	7.535
Observations	3303	
Log Likelihood	-1526.0494	
Random Effects Parameters	*Estimate*	*Standard Error*
Groups in First Level (Term Issues)	.453*	.229
Groups in Second Level (Cases)	2.064*	.137
Random Effects LR Test Chi Square	731.56*	

Table A.5: Robustness check interacting average extremity with public opinion pressure. * indicates $p < .05$

	Coefficient	*Standard Error*
Ideological Preference for Grant	-1.514*	0.224
Amicus Briefs	0.372*	0.137
Lower Court Dissent	0.874*	0.270
SG Opposes Grant	-1.126*	0.277
Lower Court Judicial Review	3.841*	0.776
Landmark Legislation Involved	-0.046	0.262
Public Issue Salience	9.526*	2.759
Public Opinion Pressure	-0.471*	0.143
Lower Court Conflict	0.186	0.754
Diffuse Support	-0.219*	0.065
Pressure x Diffuse Support	0.004*	0.001
Pressure x Lower Court Conflict	0.029*	0.014
Constant	23.878*	7.471
Observations	3303	
Log Likelihood	-1536.585	
Random Effects Parameters	*Estimate*	*Standard Error*
Groups in First Level (Term Issues)	.514*	.237
Groups in Second Level (Cases)	2.067*	.140
Random Effects LR Test Chi Square	743.40*	

Table A.6: Robustness check including interaction with lower court conflict variable as proxy for certworthiness and including direct effects of lower court judicial review and landmark legislation as controls. * indicates $p < .05$

Public Opinion Drift Specification				
Variable	*Positive*	*Pos. Conditional*	*Negative*	*Neg. Conditional*
Control Variables				
Ideological Distance	.0067	.0136	.0843*	.0718*
Case Vitality	.0154*	.0160*	-.0056*	-.0054*
Case Vitality x Ideo. Distance	-.0038*	-.0048*	.0010*	.0008
Special Concurrence	-.0006	.0077	-.0235*	-.0106
Vote Margin	-.0052	-.0034	.0004	-.0022
Logged Number of Prev. Treatments	1.721*	1.724*	1.750*	1.714*
Court Agenda	-.0014	-.0014	.0037*	.0034*
Amicus Involvement	.0124*	.0083	.0044	.0003
SG Involvement	.0633*	.0410	-.0601*	-.0415*
Per Curiam Opinion	-.2646*	-.2067*	-.1191	-.1257*
Case Overruled	.0917	.1181	.8743*	.8822*
Precedent Age	-.1441*	-.1586*	-.0630*	-.0516*
Precedent Age^2	.0013*	.0015*	.0001	-.0002
Public Opinion Parameters				
Public Opinion Drift	.0009	.0340	.0004	.0232
Case Salience	-.0639*	-.0547*	.0071	.0102
Drift x Case Salience		-.0012		-.0008
Congressional Threat		-.0639		-.0510
Drift x Threat		-.0407*		-.0232
Diffuse Support		.0147*		-.0043
Drift x Support		-.0001		-.0001
Constant	-3.503*	-5.089*	-5.170*	-4.632
Observations	180,250	153,548	180,250	153,548

Table A.7: Alternative specification examining public opinion drift rather than countervailing public opinion * indicates $p < .05$ (standard errors omitted but available upon request). Robust standard errors clustered on term-issue.

Zero-Inflated Negative Binomial Specification				
Variable	*Positive*	*Pos. Conditional*	*Negative*	*Neg. Conditional*
Control Variables				
Ideological Distance	.0318	.0040	.1010*	.0603*
Case Vitality	.0147*	.0175*	-.0056*	-.0055*
Case Vitality x Ideo. Distance	-.004*	.0008	0.793*	.0003
Special Concurrence	-.0094	.0077	-.0256*	-.0066
Vote Margin	-.0002	-.0074*	.0036	-.0067
Logged Number of Prev. Treatments	1.624*	1.641*	0.035	1.605*
Court Agenda	-.0009	-.0054*	.0022	-.0031*
Amicus Involvement	-.0039	0.158*	-.0102*	.0018
SG Involvement	.0349	.0348	-.0782*	-.0578*
Per Curiam Opinion	-.1226	-.1751*	-.0589	-.1427*
Case Overruled	.0054	.0636	1.031*	.9783*
Precedent Age	-.1358*	-.138*	-.0447*	-.0190*
Precedent Age^2	.0017*	.002*	0.003*	.0001
Public Opinion Parameters				
Countervailing Public Opinion	-.0018*	-.0414	.0006	.0173
Case Salience	-.0436*	-.0235	.0241*	-.0032
Public Opinion x Case Salience		0.002		.0001
Congressional Threat		-.9051*		.0575
Public Opinion x Threat		.0129		-.0034
Diffuse Support		-.0035		.0025
Public Opinion x Support		.0003		-.0001
Constant	-11.728*	-2.381*	-13.601*	-5.158*
Observations	180,029	153,397	180,029	153,397
Inflation Parameters				
Case Vitality	-.0016*	-.0011*	-.0013*	-.0011*
Court Agenda	-.0164*	-.0187*	-.0228*	-.0253*
Case Overruled	-.1897	-.2104	.2952*	.2619*
Precedent Age	.1257*	.1414*	.1985*	.2303*
Precedent Age^2	-.0010*	-.0011*	-.0020*	-.0025*
Constant	-1.893*	-2.267*	-3.020*	-3.408*

Table A.8: Zero-inflated negative binomial model alternative specification. * indicates $p < .05$ (standard errors omitted but available upon request). Robust standard errors clustered on term-issue.

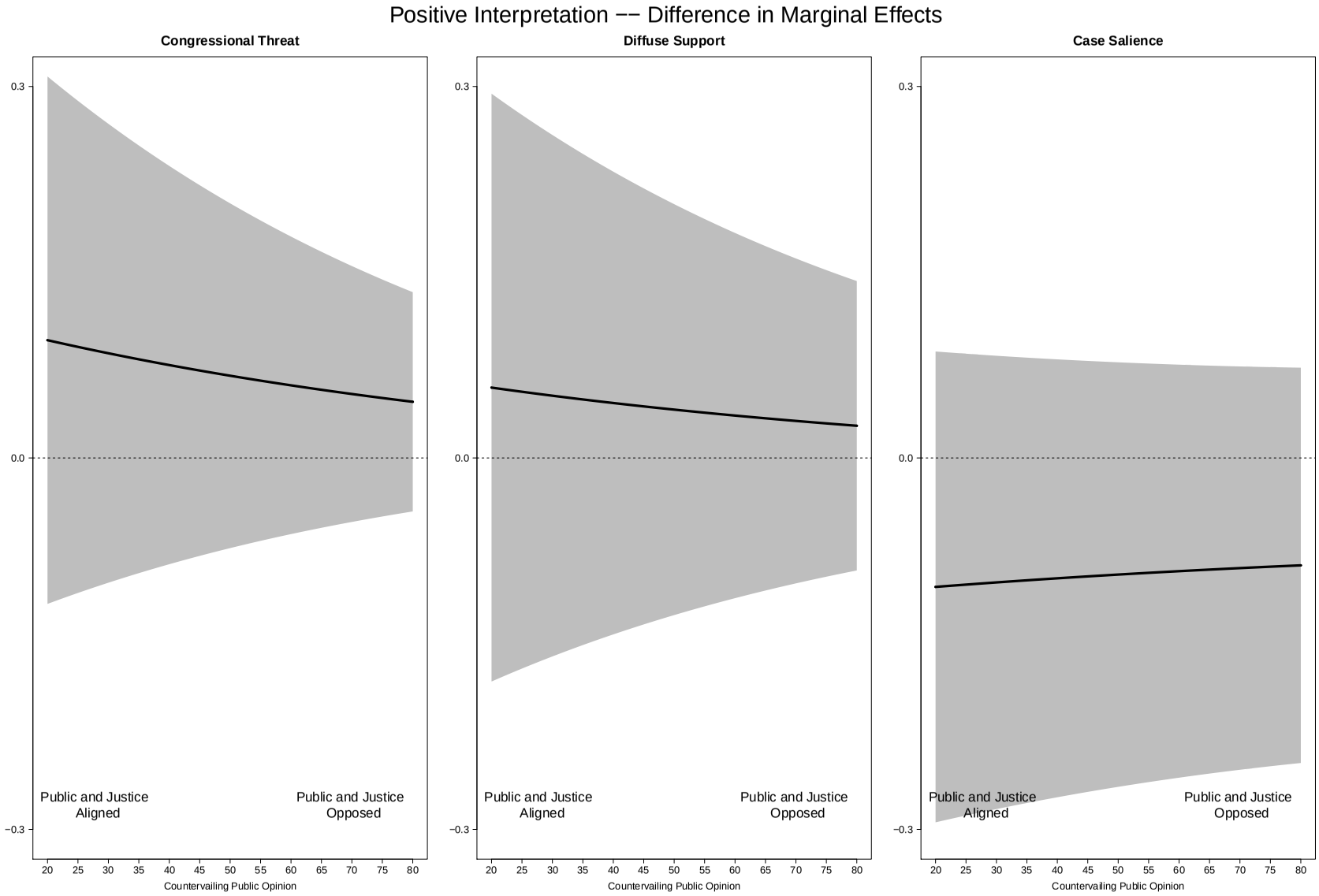

Figure A.1: Difference in marginal effects of public opinion on positive treatment of precedent given the minimum and maximum values of Congressional threat, diffuse support, and case salience. Shaded region indicates the 95% confidence interval around the difference.

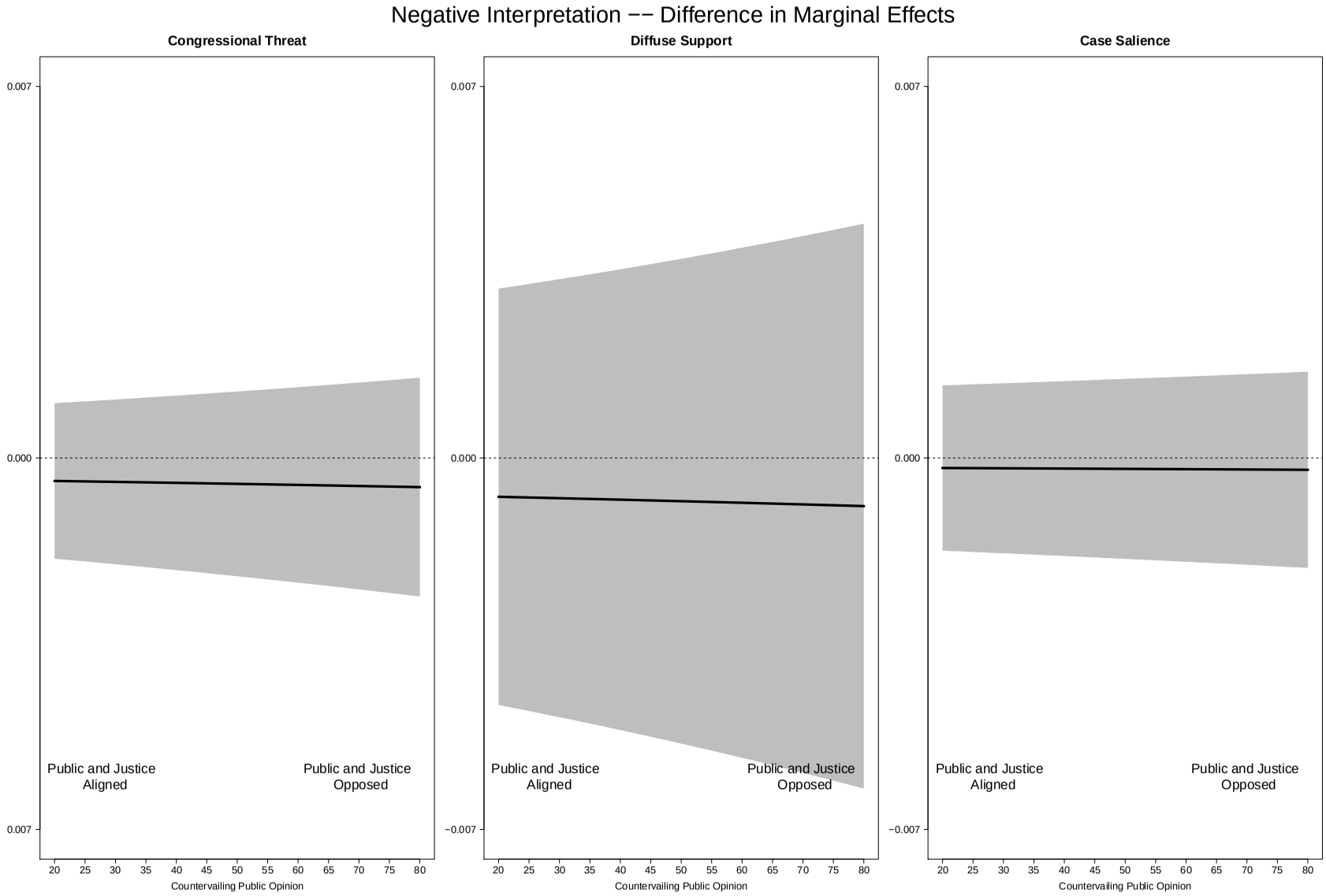

Figure A.2: Difference in marginal effects of public opinion on negative treatment of precedent given the minimum and maximum values of Congressional threat, diffuse support, and case salience. Shaded region indicates the 95% confidence interval around the difference.

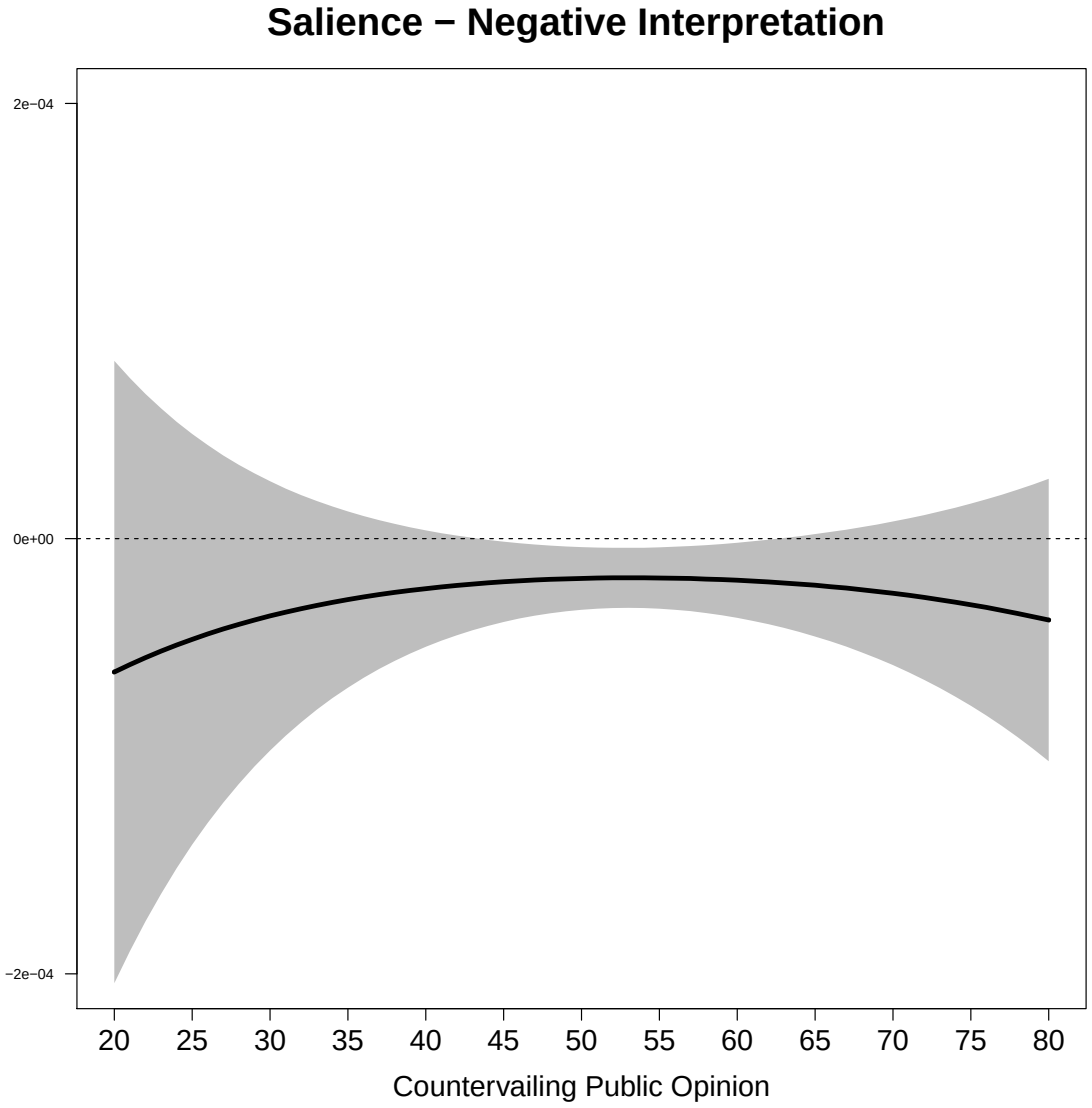

Figure A.3: Difference in marginal effects of public opinion on negative treatment of precedent in the majority opinion given the minimum and maximum values of case salience. Shaded region indicates the 95% confidence interval around the difference.