

# DOES PUBLIC OPINION INFLUENCE THE SUPREME COURT? POSSIBLY YES (BUT WE'RE NOT SURE WHY)\*

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## Introduction

Using qualitative data and historical methods, Barry Friedman asserts with confidence that “we the people” influence the decisions of the U.S. Supreme Court.<sup>1</sup> Using quantitative data and statistical methods, political scientists are not so sure. Despite their best efforts to validate basic claims about the effect of public opinion on the Court, the evidence remains mixed at best.<sup>2</sup>

We enter this dialogue but in a voice distinct from existing political science work. Rather than explore the relationship between the public and the Court on a term-by-term basis, we analyze it at the level of the case. This allows us to exploit more nuanced public opinion data, as well as to attend to the many other case-level factors that may influence the Court’s decisions.

Based on our analysis, we are prepared to say that Professor Friedman is on to something. When the “mood of the public” is liberal (conservative), the Court is significantly more likely to issue liberal (conservative) decisions. But why is anyone’s guess. Professor Friedman posits that the Justices will bend to the will of the people because the Court requires public support to remain an efficacious branch of government. Our analysis could be read to support this view but it is equally consistent with another mechanism: that “the people” include the Justices. On this account, the Justices do not respond to public opinion directly but rather respond to the same events or forces that affect the opinion of other members of the public.<sup>3</sup> Or, as Cardozo once put it, that “the great tides and

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<sup>1</sup> The full title of Professor Friedman’s book tells the story, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

<sup>2</sup> See *infra* Part II.

<sup>3</sup> The debate between these two accounts has a long history in the Political Science literature. Compare Beverly B. Cook, *Public Opinion and Federal Judicial Policy*, 21 AM. J. POL. SCI. 567 (1977) (showing that federal judges were more lenient with Viet Nam draft dodgers as public opinion toward the war grew increasingly negative) and Herbert M. Kritzer, *Federal Judges and Their Political Environment: The Influence of Public Opinion*, 23 AM. J. POL. SCI. 194, 204 (1979) (arguing that Cook’s findings reflected “the judges’ own doubts about the war” rather than a direct response to public opinion). See generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 424-428 (2002).

currents which engulf the rest of men do not turn aside in their course and pass the judge by.”<sup>4</sup>

Our study proceeds as follows. In Part I we briefly review the extant literature, emphasizing the similar methodology it invokes but the varying conclusions it reaches. Parts II and III describe our methods and findings. We end, in Part IV, with the implications of our statistical work for Professor Friedman’s claims, as well as for future research assessing the Court’s response to public opinion.

## II. The Existing Literature

Professor Friedman's book is only the last in a long and distinguished line of research evaluating the link between the public and the courts. Much, perhaps most, of the work in the social sciences has explored the flipside of Professor's Friedman's interest: the extent to which Court decisions affect (or “move”) public opinion.<sup>5</sup> But there is no shortage of quantitative (and multivariate) work addressing directly the question of whether the public *influences* the Court. Rather than waste space with lengthy descriptions of each paper, we summarize the key results in Table 1. We limit our list to studies of the U.S. Supreme Court, the focus of Professor Friedman’s book.<sup>6</sup>

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<sup>4</sup> Benjamin Cardozo, *The Nature of the Judicial Process* 167–68 (1921).

<sup>5</sup> The classic work is Charles Franklin & Liane Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751 (1989). For recent research, see, e.g., Brandon L. Bartels & Diane C. Mutz, *Explaining Processes of Institutional Opinion Leadership*, 71 J. POLITICS 249 (2009) (experiment showing that an endorsement from Court affected respondents’ opinions about particular public policy issues); Mark D. Ramirez, *Procedural Perceptions and Support for the U.S. Supreme Court*, 29 POLIT. PSYCH 675 (2008) (experiment demonstrating that positive media coverage increases support for the Court); James W. Stoutenborough, et al., *Reassessing the Impact of Supreme Court Decisions on Public Opinion: Gay Civil Rights Cases*, 59 POLIT. RES. Q. 419 (2006) (Court is able to legitimate controversial policies); Valerie J. Hoekstra, *The Supreme Court and Local Public Opinion*, 94 AM. POL. SCI. REV. 89 (2000) (particular Court decisions affect overall evaluations of the Court in the geographic areas that gave rise to the case).

<sup>6</sup> Studies of other federal judges include Cook, *supra* note 3; Kritzer, *supra* note 3. There are also studies of state court judges. These are more uniform in their results, tending to confirm the obvious: that (elected) state court judges must consider their constituents’ preferences to keep their jobs. See, e.g., James Kuklinski & John Stanga, *Political Participation and Governmental Responsiveness*, 73 AM. POL. SCI. REV. 1090 (1979); Steven P. Croly, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995); Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157 (1999).

Finally, a growing number of scholars are exploring the relationship between public sentiment and judicial decisions in courts outside the United States. Along these lines, we commend JEFFREY A. STATON, *JUDICIAL POWER AND STRATEGIC COMMUNICATION IN MEXICO* (2010, forthcoming). Staton documents the Mexican Supreme Court’s “coordinated and aggressive” public relations campaign to “go public” to create public support. He also shows that courts throughout the world publicize their decisions, issue press releases, and maintain websites describing their procedures and publishing their cases and biographies of their members.

**Table 1. Summary of Notable Multivariate Studies on the Effect of Public Opinion on the Decisions of the Supreme Court or Individual Justices**

Author (Year)	Description of Methods and Key Findings
Clark (2009) <sup>7</sup>	Examines the number of federal laws struck down by the Court each term; finds that as public support for the Supreme Court declines, the Court strikes fewer laws.
McGuire & Stimson (2008) <sup>8</sup>	Analyzes the percentage of liberal decisions each term in cases in which the Court reverses the court below; shows that the public's mood affects the percentage even after controlling for ideology.
Giles, et al. (2008) <sup>9</sup>	Explores the percentage of liberal votes cast by each Justice each term; finds that public opinion exerts only a small effect and that it operates on "as few as" 20 percent of the Justices serving between 1956 and 1999.
Flemming & Wood (1997) <sup>10</sup>	Analyzes the percentage of liberal votes cast by each Justice each term; shows that the Court's composition accounts for most of the variation but that the public's mood also exerts a small (though significant and quick) effect on most Justices in the majority of legal areas under analysis.
Mishler & Sheehan (1996) <sup>11</sup>	Considers the percentage of liberal votes cast by each Justice each term; finds that some moderate Justices respond to the public mood and concludes that it "shapes the subjective norms of individual justices thereby potentially influencing their decisions." <sup>12</sup>
Stimson, et al. (1995) <sup>13</sup>	Analyzes the ideological direction of decisions each term; unearths some responsiveness to the mood of the public but the effect nearly disappears when controlling for the Court's composition.
Link (1995) <sup>14</sup>	Examines the percentage of liberal decisions each term in criminal procedure and race cases; finds that the public's mood, to greater and lesser extents (and with some lags) has a direct effect on Court decisions.
Norpoth & Segal	Reexamines Mishler & Sheehan's 1993 study; finds that any change in the direction of the Court's decisions was due to an "indirect model" of

<sup>7</sup> Tom Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971 (2009).

<sup>8</sup> Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited*, 66 J. POLITICS 1018 (2008).

<sup>9</sup> Micheal W. Giles, Bethany Blackstone & Richard L. Vining, Jr., *The Supreme Court in American Democracy: Unraveling the Linkages between Public Opinion and Judicial Decision Making*, 70 J. POLITICS 293 (2008).

<sup>10</sup> Roy B. Flemming & B. Dan Wood, *The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods*, 41 AM. J. POL. SCI. 468 (1997).

<sup>11</sup> William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POLITICS 169 (1996).

<sup>12</sup> *Id.*, at 174.

<sup>13</sup> Stimson, James A., Michael B. MacKuen, & Robert S. Erikson, *Dynamic Representation*, 89 AM. POL. SCI. REV. 543 (1995).

<sup>14</sup> Michael W. Link, *Tracking Public Mood in the Supreme Court: Cross-Time Analyses of Criminal Procedure and Civil Rights Cases*, 48 POL. R. Q. 61 (1995).

(1994) <sup>15</sup>	public influence in which “popularly elected presidents, through new appointments, affect the ideological composition of the Court.” <sup>16</sup>
Mishler & Sheehan (1993) <sup>17</sup>	Explores the percentage of liberal decisions each term; finds that (lagged) public mood influences Court’s decisions both indirectly (through composition changes) and directly. Claims that the Justices “are broadly aware of fundamental trends in the ideological tenor of public opinion, and... at least some justices, consciously or not, may adjust their decisions at the margins to accommodate such fundamental trends.” <sup>18</sup>

Two features of the studies in Table 1 stand out: their common methodology and their mixed findings. Both deserve some elaboration.

### A. Common Methods

As even a cursory glance at Table 1 reveals, the studies tend to follow the same methodological approach to answer the question of whether public opinion influences the Court. They begin by calculating the percentage of liberal decisions (or votes) that the Court (an individual Justice) reaches each term—or, in the jargon of social science, by aggregating decisions (votes) on a term-by-term basis. Figure 1 provides an example.

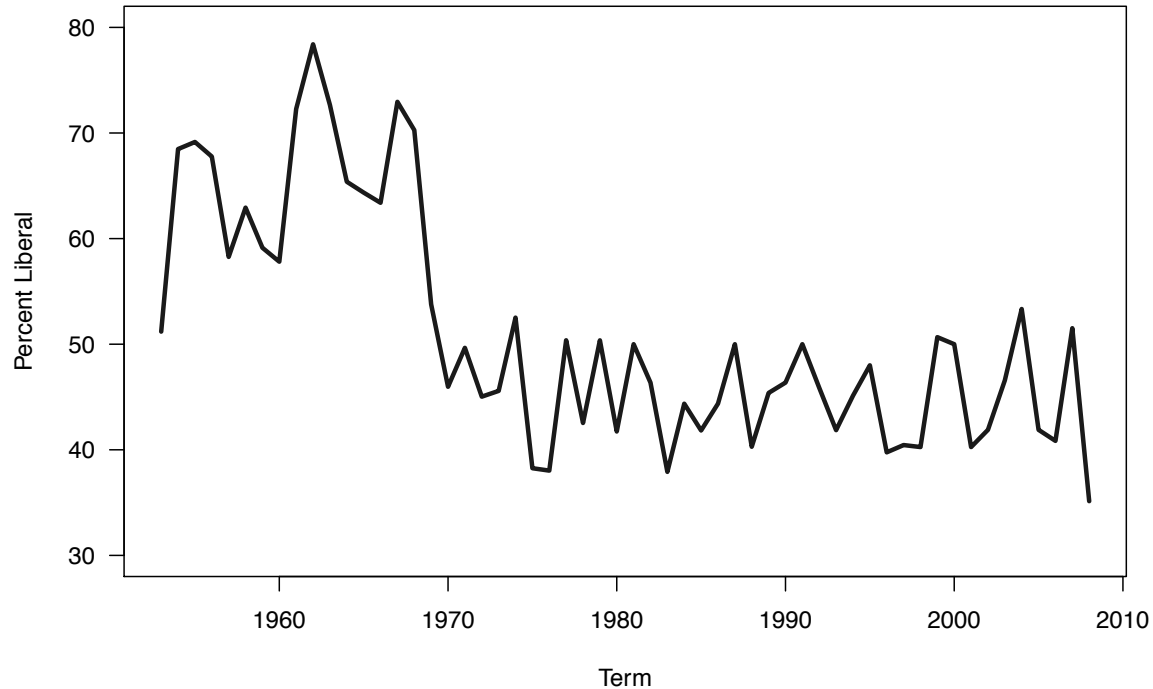
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<sup>15</sup> Helmut Norpoth, Helmut, and Jeffrey A. Segal, *Comment: Popular Influence on Supreme Court Decisions*, 88 AM. POL. SCI. REV. 711 (1994)

<sup>16</sup> *Id.*, at 711.

<sup>17</sup> Mishler, William & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 88 AM. POL. SCI. REV 87 (1993).

<sup>18</sup> *Id.*, at 89.

**Figure 1. Percentage of Liberal Decisions, 1953-2008 Terms**

Because almost all the authors use the U.S. Supreme Court Database to categorize decisions as liberal or conservative (as do we in Figure 1), their definitions of ideology do not vary much. Where differences emerge are in the types of cases they include in their study. E.g., some studies analyze only a few areas of the law;<sup>19</sup> one focuses on reversals;<sup>20</sup> and another separates the cases into “salient” and “non-salient” categories.<sup>21</sup> Figure 1 is a generic depiction of the percentage, using all cases decided between the 1953-2008 terms.<sup>22</sup> (As an aside, readers should take care in interpreting Figure 1 or any other display based on “percent liberalism” because the types of cases the Justices agree to hear and decide in a given term will affect the percentage.)

The percentage of liberal decisions (votes) per term is the dependent variable in the studies (i.e., what the authors are trying to explain). The key independent variable is, of course, public opinion. In other words, the authors are interested in determining whether a more liberal public leads the Court (or the individual Justices) to produce more liberal decisions (votes) each term, all else being equal. To measure public opinion, the studies typically rely on

<sup>19</sup> See, e.g., Link, *supra* note 14. Others analyze separately particular areas of the law or control for areas in the analysis. See, e.g., McGuire & Stimson, *supra* note 8; Flemming & Wood, *supra* note 10.

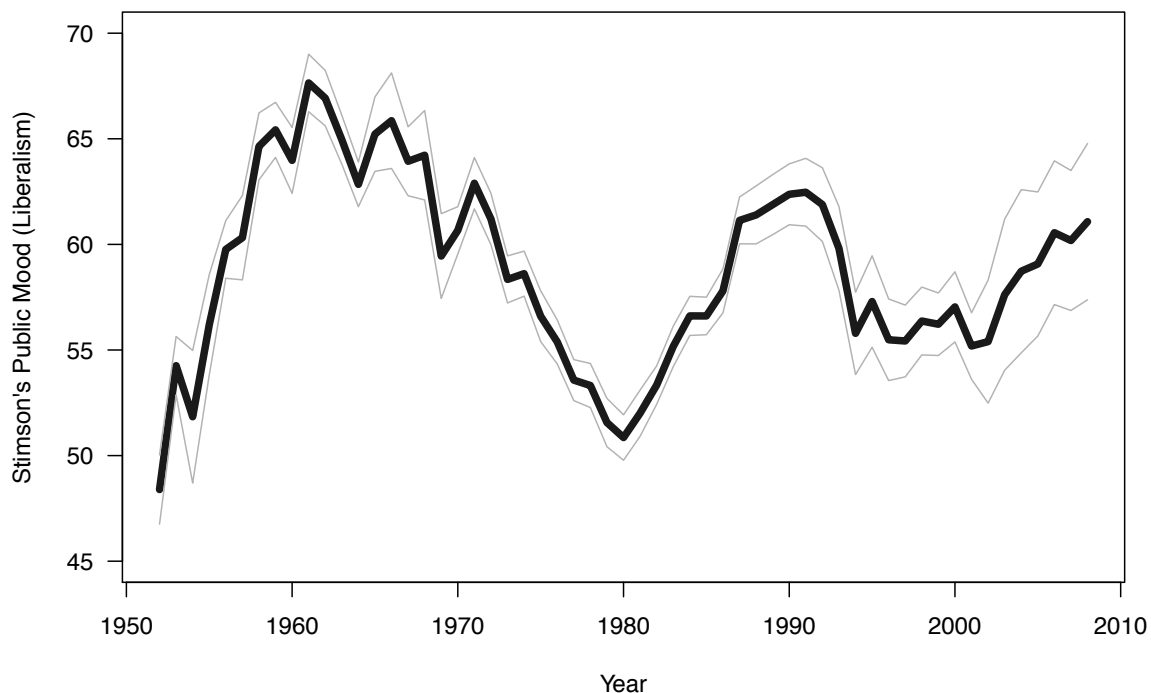
<sup>20</sup> McGuire & Stimson, *supra* note 8.

<sup>21</sup> Giles, et al., *supra* note 9.

<sup>22</sup> Using the U.S. Supreme Court Database (<http://supremecourtdatabase.org>) (cases organized by citation) and orally argued cases (decisionType=1 or 6 or 7) in which the direction of the decision is liberal or conservative (i.e., we omit the 60 cases coded as “unspecifiable”). Worth noting is that

Stimson's indicator of "public mood."<sup>23</sup> Computed by analyzing survey responses to a range of questions with a sophisticated dynamic factor analysis model, the indicator is a single number summarizing the mood of the public along a liberal-conservative dimension. Although Stimson calculates his measure on a quarterly basis, the articles in Table 1 use an annual indicator of mood because their dependent variable (percentage liberalism) is also aggregated (though usually to the term rather than the year). Figure 2 displays this annual version.

**Figure 2. Stimson's Annual Measure of the "Public Mood," 1953-2008**



## B. Mixed Findings

The final step in most of the studies in Table 1 is to analyze whether the annual public mood measure explains term-by-term variation in the Court's (Justice's) liberal decisions (votes), while controlling for other things that also might affect the percentage of liberal decisions (votes) each term. These other things almost always include a measure of the Court's ideology but otherwise tend to vary from study to study.<sup>24</sup>

Also varying from study to study are the results, though perhaps it is worth starting with a common finding: virtually all the studies demonstrate an *indirect*

<sup>23</sup> James A. Stimson, *Public Opinion in America: Moods, Cycles, and Swings*, 2<sup>nd</sup> ed. (1999). Stimson updates his measure each year (at: <http://www.unc.edu/~jstimson/time.html>).

<sup>24</sup> E.g., Link, *supra* note 14 controls for the preferences of Congress and the President; Giles, et al., *supra* note 9 separate salient and non-salient cases; Flemming & Wood, *supra* note 10, among others, control for the areas of the law.

effect of public opinion via the appointments process. That is, they tend to show that changes in the Court's composition can lead to a higher or lower percentage of liberal decisions each term. Political scientists deem this "indirect" because the public does not directly affect the percentage of liberal decisions; its role comes in electing the President and the Senate, who appoint Justices reflecting the public's preferences.<sup>25</sup> Accordingly, the "ideological orientation of the Court [will] generally correspond to the attitudes of the electorate"<sup>26</sup> and the ruling regime.

The more controversial matter is whether the public *directly* influences Court decisions (as Friedman claims). The answers from the existing literature, as Table 1 suggests, run the gamut. Perhaps the strongest supporters of a direct, causal link between public mood and Court decisions, McGuire & Stimson, are as unequivocal as Friedman: "public opinion is a powerful influence on the decisions of the Supreme Court..." [The evidence shows that] a system of popular representation is alive and well in the Supreme Court."<sup>27</sup> In direct juxtaposition comes Norpoth and Segal's famous reanalysis of Mishler & Sheehan's 1993 study, in which they declare that "contrary to Mishler and Sheehan, [we find] no evidence of a direct path of influence from public opinion to Court decisions."<sup>28</sup> Charting a more moderate course are those scholars who identify some "direct" but relatively small effect. Stimson et al., fall into this category:

Norpoth and Segal (1994) argue that the role of public opinion on Court decisions is wholly indirect through the election-nomination-confirmation process. Mishler and Sheehan (1993) claim a direct public opinion influence. Our results, with similar data but quite a different model specification, leave us in the middle of this debate. We believe that there is a trace of influence for both processes, but our results are too weak to leave us confident about the matter.<sup>29</sup>

### III. Our Study

Although the studies listed in Table 1 are thoroughly professional efforts, published in top disciplinary journals, features of their research design raise some red flags. Of particular concern is that they cannot incorporate controls at the case level because they aggregate by term. To provide but one example: we know that the Justices tend to reverse the decisions of the court below (usually a U.S. court of appeals).<sup>30</sup> To account for this tendency, researchers modeling the

<sup>25</sup> Justice Antonin Scalia put it this way: "Ultimately, the justices of the Court are taken from society . . . and however impartial they may try to be, they are going to bring with them those societ[al] attitudes." Quoted in DAVID O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* (2000).

<sup>26</sup> McGuire & Stimson, *supra* note 8, at 1020; See also Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

<sup>27</sup> McGuire & Stimson, *supra* note 8, at 1033.

<sup>28</sup> Norpoth & Segal, *supra* note 15, at 711.

<sup>29</sup> Stimson, et al., *supra* note 13, at 556.

<sup>30</sup> Between the 1953 and 2008 terms, the Court ruled for the petitioner in 64% of the 6286 orally argued cases in which the Supreme Court Database specifies the direction of the decision and a winning party. Calculated via the U.S. Supreme Court Database.

ideological direction of the Court's decisions (liberal or conservative) almost always incorporate a variable encoding the direction of the lower court's decision (liberal or conservative).<sup>31</sup> The idea is that even a very liberal (conservative) Supreme Court would be inclined to reverse a liberal (conservative) lower court decision given the majority's general propensity to reverse.

It is easy to add this variable if the study models decisions on a case-by-case basis; it is impossible to do so if the study models decisions on a term-by-term basis—as the existing public opinion research does—without running the risk of ecological fallacy. The same holds for many other covariates of Court decisions. Although some are annual (such as the ideology of the median Justice), others are not, including the issue area and the parties. Aggregating by term isn't even an especially good strategy for considering the effect of the public's mood on the Court because it fails to exploit Stimson's quarterly data.

For these reasons, our analysis of Friedman's thesis proceeds at the case level. The dependent variable is the ideological direction of each decision in all orally argued cases between 1958 and 2008<sup>32</sup>—and not the percentage liberal each term. That is, we intend to study the decisions in 5,675 cases, rather than a single percentage in 50 terms.

By "ideological direction" we mean the direction of the decision (liberal or conservative), as coded by the U.S. Supreme Court Database, the same source most of the other public opinion studies use.<sup>33</sup> The Database's classifications generally comport with conventional understandings. "Liberal" decisions are those in favor of defendants in criminal cases; of women and minorities in civil rights cases; of individuals against the government in First Amendment, privacy, and due process cases; of unions over individuals and individuals over businesses in labor cases; and of the government over businesses in cases involving economic regulation. "Conservative" decisions are the reverse. Table 2 provides basic summary information about this variable (and all others in our analysis).

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<sup>31</sup> See, e.g., Segal & Spaeth, *supra* note 3; Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Circuit Effects: How the Norm of Federal Judicial Experience Biases the U.S. Supreme Court*, 157 U. PENN. L. REV. 101 (2009).

<sup>32</sup> Quarterly public mood data begin with the 4<sup>th</sup> quarter of 1958 (covering all but two cases in the 1958 term) through the 4<sup>th</sup> quarter of 2008 (covering only 4 cases of the 2008 term).

<sup>33</sup> The Database is located at: <http://supremecourtdatabase.org>.



**Table 2. Summary Statistics (N=5675)**

<b>Variable</b>	<b>Description</b>	<b>Mean (Std. Dev.)</b>
<i>Dependent Variable</i>		
Direction of Decision	Whether the Court reached a liberal (=1) or conservative (=0)	0.501 (0.500)
<i>Key Independent Variable</i>		
Public Mood	Stimson's quarterly measure of public mood (the higher the score, the more liberal the public)	61.062 <sup>34</sup> (4.628)
<i>Control Variables</i>		
Direction of the Lower Court Decision	Whether the court whose decision the Supreme Court reviewed reached a liberal (=1) or conservative (=0) decision	0.463 (0.499)
Ideology of the Supreme Court	Martin & Quinn's estimate of the ideology of the median justice (the higher the score, the more conservative the median)	0.364 <sup>35</sup> (0.495)
US Liberal Party	Whether the United States (or an agency), as petitioner or respondent, argued for a liberal decision (=1) or not (=0)	0.065 (0.247)
US Conservative Party	Whether the United States (or an agency), as petitioner or respondent, argued for a conservative decision (=1) or not (=0)	0.134 (0.340)
Civil Liberties	Civil liberties case (=1) or not (=0) <sup>36</sup>	0.549 (0.498)
Economics	Economics case (=1) or not (=0) <sup>37</sup>	0.275 (0.446)
Judicial Power	Judicial power case (=1) or not (=0)	0.129 (0.335)
Federalism	Federalism case (=1) or not (=0)	0.048 (0.214)
Ideology of the President	Poole's Common Space score (the higher the score, the more conservative the President)	-0.211 <sup>38</sup> (0.519)
Ideology of the House	Poole's Common Space score (the higher the score, the more conservative the House)	0.057 <sup>39</sup> (0.114)

<sup>34</sup> The minimum is 51.363; the maximum is 74.18.<sup>35</sup> The minimum is -.85; the maximum is 1.027<sup>36</sup> The Civil Liberties category includes Criminal Procedure, Civil Rights, First Amendment, Due Process, Privacy, and Attorneys (i.e., issueArea= in the U.S. Supreme Court Database<sup>37</sup> The Economics category includes Unions, Economic Activity, and Taxation (i.e., issueArea=7, 8, 12) in the U.S. Supreme Court Database<sup>38</sup> The minimum is -.724; the maximum is .503.

Ideology of the Senate	Poole's Common Space score (the higher the score, the more conservative the Senate)	0.069 <sup>40</sup> (0.106)
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The independent variable of primary interest is Stimson's quarterly public mood measure. Because lower scores are more conservative, we expect this variable to be positively related to the direction of the decision. In other words, if Friedman is right and public opinion influences the Court, then the more liberal the public mood, the higher the likelihood of a liberal decision.

Finally, we include in the model a host of variables that might also affect the Court's decision (see Table 2). Seven are case-level variables: the direction of the lower court's decision, the side represented by the U.S. government (if it was a party to the suit, liberal or conservative), and four issue dummies (*Federalism* is the omitted category in the model). Given the Court's tendency to reverse (and our coding of the relevant variables), we expect the direction of the lower court decision to be negatively related to the Court's decision. As for the U.S. government, the existing literature suggests that the side it represents will prevail more often than not.<sup>41</sup> If so, *US Liberal Party* should be positively signed; *US Conservative Party* should be negatively signed.

This leaves the four term-level covariates, all of which attempt to assess the ideology of the various branches of government. For the U.S. House of Representatives, the U.S. Senate and the U.S. President, we use Poole's Common Space scores. These reflect roll call votes in each House or, in the case of the President, his position on bills before Congress.<sup>42</sup> We measure the Court's ideology using Martin & Quinn's ideal point estimate of the median Justice each term.<sup>43</sup> The Martin & Quinn measure is also based on votes—all those cast by the Justices in non-unanimous cases. Table 2 supplies summary statistics on all four measures of ideology; Figure 3 depicts them over time.

<sup>39</sup> The minimum is -.226; the maximum is .194.

<sup>40</sup> The minimum is -.199; the maximum is .183.

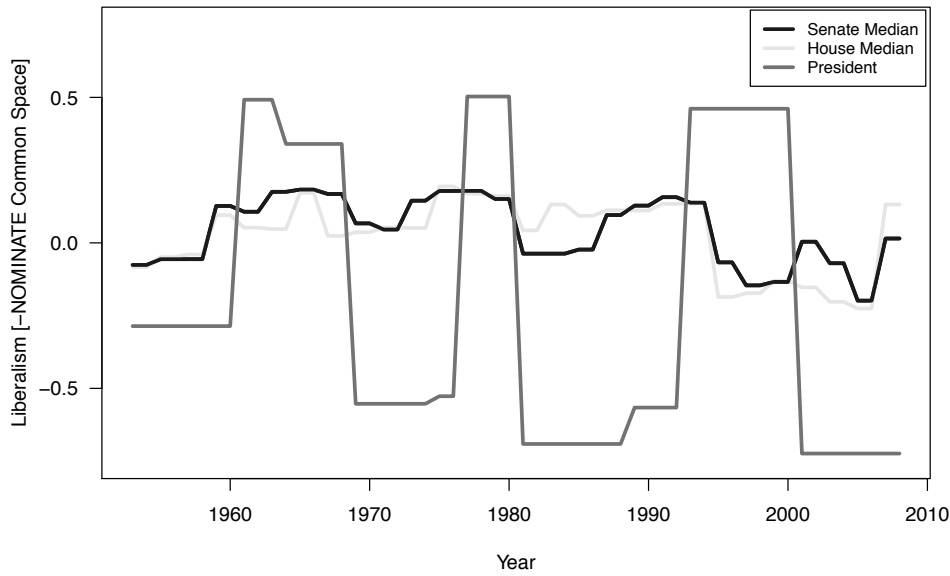
<sup>41</sup> See, e.g., REBECCA SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* (1992); JEFFREY YATES, *POPULAR JUSTICE: PRESIDENTIAL PRESTIGE AND EXECUTIVE SUCCESS IN THE SUPREME COURT* (2002); RICHARD PACELLE, *BETWEEN LAW AND POLITICS: THE SOLICITOR GENERAL AND THE STRUCTURING OF RACE, GENDER, AND REPRODUCTIVE RIGHTS LITIGATION* (2003); ROBERT SCIGLIANO, *THE SUPREME COURT AND THE PRESIDENCY* (1971); Jeffrey A. Segal & Cheryl Reedy, *The Supreme Court and Sex Discrimination: The Role of the Solicitor General*, 41 POL. RES. Q. 553 (1988); Tracey George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323 (1992).

<sup>42</sup> Available at: <http://voteview.com/>. See KEITH T. POOLE & HOWARD ROSENTHAL, *CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING* (1997).

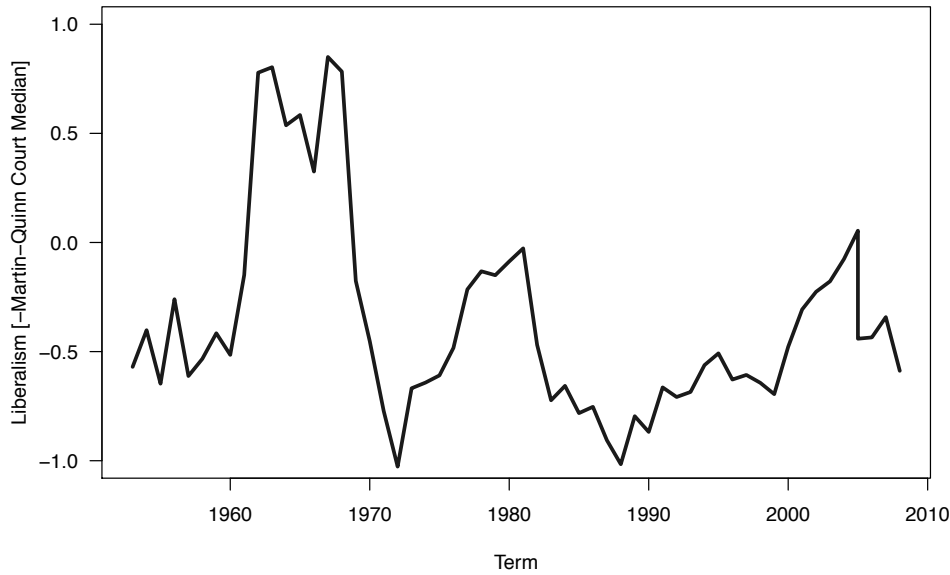
<sup>43</sup> Available at: <http://mqscores.wustl.edu/>. See Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134 (2002).

**Figure 3. Ideology of the Three Branches of Government**

**3a. The Senate, House, and President**



**3b. The Court**



Under Poole's and Martin & Quinn's coding schemes, the lower the ideology score, the more liberal the branch. Hence, if these variables affect the Court's decision, we expect negatively signed coefficients (i.e., the lower the score, the higher the likelihood of a liberal decision).

## IV. Results

To assess the effect of the public's mood on the ideological direction of the Court's decision we use logistic regression (with various robustness checks<sup>44</sup>). Table 3 displays the results. Note that we cluster the observations by term, which helps account for any term-to-term correlations in the data (and results in higher standard errors).

**Table 3. Results of Regressing the Direction of the Court's Decision (1=Liberal; 0=Conservative) on the Public Mood and Other Covariates**

Variable	Coefficient	(Standard Error)
<i>Public Mood (Quarterly)</i>	0.023	(0.008)
<i>Direction of the Lower Court Decision</i>	-1.041	(0.070)
<i>Ideology of the Supreme Court</i>	-0.547	(0.049)
<i>US Liberal Party</i>	0.316	(0.131)
<i>US Conservative Party</i>	-0.757	(0.095)
<i>Civil Liberties</i>	-0.287	(0.134)
<i>Economics</i>	-0.033	(0.135)
<i>Judicial Power</i>	-1.015	(0.148)
<i>Ideology of the President</i>	0.017	(0.056)
<i>Ideology of the House</i>	-0.140	(0.331)
<i>Ideology of the Senate</i>	0.283	(0.412)
Intercept	-0.367	(0.459)

Note: Robust standard errors reported, clustered by term. Italicized variables are statistically significant at the  $\alpha=0.05$  level. Federalism is the omitted category. N=5675.

Beginning with the primary variable of interest, *Public Mood (Quarterly)*, we find support for Friedman's basic claim. The coefficient is statistically significant and positively signed, indicating that the more liberal the public mood, the higher the likelihood of a liberal decision.

But how much higher? Keeping in mind that the Court usually takes cases to reverse,<sup>45</sup> the predicted probability of a liberal decision is .59<sup>46</sup> when the Justices review a conservative lower court decision and the public mood is very conservative.<sup>47</sup> If the public mood is very liberal, the probability jumps to .71.<sup>48</sup> Alternatively, if the Court reviews a liberal lower court decision when the public is very conservative, the probability that it will affirm (i.e., reach a liberal decision) is just .33<sup>49</sup> but increases to .46<sup>50</sup> when the public is very liberal. Figure 3 shows the predicted probabilities in between these extremes, along with the 95% confidence intervals.

<sup>44</sup> E.g., we reestimated the model using a random effects logistic regression. The results are virtually identical to those displayed in Table 3. Most importantly, the coefficient on *Public Mood (Quarterly)* remains statistically significant (.023, with a standard error of .007).

<sup>45</sup> See *supra* note 30.

<sup>46</sup> The 95% confidence interval is [.54, .63].

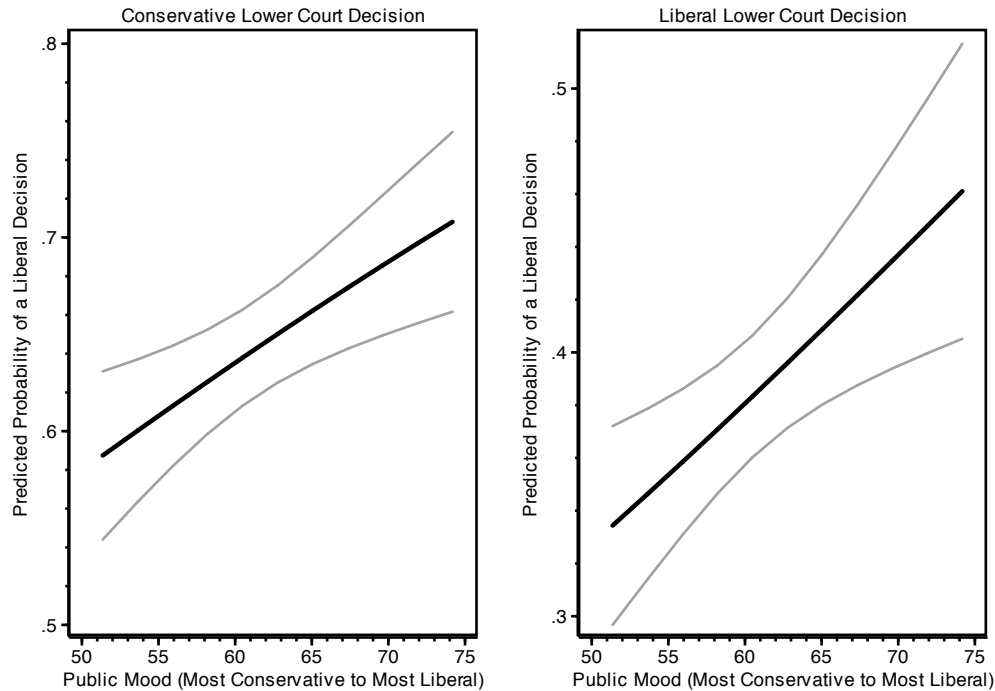
<sup>47</sup> All other variables are set at their mean or mode.

<sup>48</sup> The 95% confidence interval is [.66, .75].

<sup>49</sup> The 95% confidence interval is [.30, .37].

<sup>50</sup> The 95% confidence interval is [.41, .52].

**Figure 4. Predicted Probability of a Liberal Decision in a Civil Liberties Case as the Public Mood Moves from Very Conservative to Very Liberal**



*Note:* This figure is based on the model in Table 2. The black lines indicate the predicted probabilities in civil liberties cases and the gray lines shows 95% confidence intervals. To generate these quantities of interest, we used S-Post. *Civil Liberties* is set at 1. All other variables are set at their means (*Ideology of the Supreme Court*, *Ideology of the President*, *Ideology of the House*, *Ideology of the Senate*) or at their mode, which is 0 (*US Liberal Party*, *US Conservative Party*, *Economics*, *Judicial Power*).

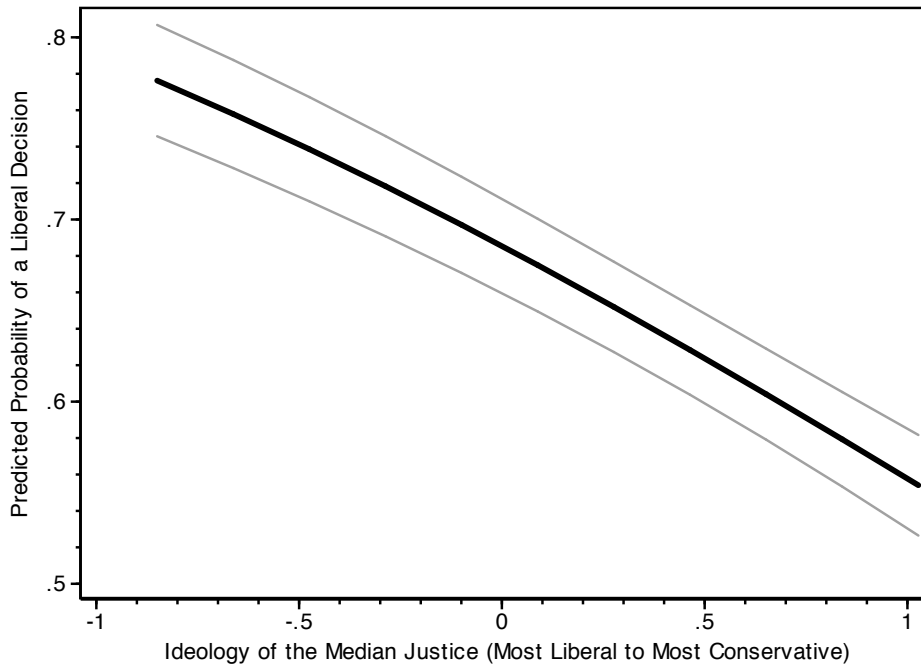
Whether the difference in the predicted probabilities displayed in Figure 3 is large or small is a question readers must answer for themselves. For what it's worth, we think they are large—actually quite large given that we control for many other variables that have an appreciable effect on the direction of the Court's decisions.

The ideology of the Court, as represented in our model by the ideal point of the median Justice, provides an example. Table 3 tells us that the effect is statistically significant, such that the more conservative the median, the less likely a liberal decision; and Figure 4 reveals that the effect is quite dramatic. All else being equal, the likelihood of the Court reversing a conservative lower court decision (i.e., reaching a liberal decision) when the median Justice is very liberal is a high .78.<sup>51</sup> The likelihood plummets to 0.55 when the median is very conservative.<sup>52</sup>

<sup>51</sup> The 95% confidence interval is [0.75, 0.81].

<sup>52</sup> The 95% confidence interval is [0.53, 0.58].

**Figure 5. Predicted Probability of a Liberal Decision in a Civil Liberties Case as the Median Justice Moves from Most Conservative to Most Liberal**



*Note:* This figure is based on the model in Table 2. The black line indicates the predicted probabilities in civil liberties cases and the gray line shows 95% confidence intervals. To generate these quantities of interest, we used S-Post. *Civil Liberties* is set at 1 and the *Direction of the Lower Court Decision* is conservative. All other variables are set at their means (*Public Mood*, *Ideology of the Supreme Court*, *Ideology of the President*, *Ideology of the House*, *Ideology of the Senate*) or at their mode, which is 0 (*US Liberal Party*, *US Conservative Party*, *Economics*, *Judicial Power*).

This finding is not especially surprising. On most realist theories of judging—especially judging on the Supreme Court—the Justices’ ideology affects their decisions. What is surprising is that even after taking into account ideology, *Public Mood* continues to be a statistically significant and seemingly non-trivial predictor of outcomes (see Table 3 and Figure 4).

#### IV. Discussion

No doubt, our results should encourage Professor Friedman and others who believe that “the Court and the public will come into basic alliance with each other.”<sup>53</sup> At the least, our results indicate that an association exists between the public’s mood and the Court’s decisions.

Whether that association is something more—whether public opinion “influences” the Court, as the subtitle of Professor Friedman’s book asserts—we cannot say. This is so for two reasons. First, despite our efforts to control for the

<sup>53</sup> Friedman, *supra* note 1, at 15.

more obvious determinants of the Court's decisions, our statistical model undoubtedly misses some important variables. One indication of underspecification comes from our own model. When we reestimated it, retaining the main effects of *Public Mood (Quarterly)* and the issue area dummies but interacting *Mood* with the issues, we found that public opinion was not a good predictor of the outcome in Judicial Power cases. Because litigation in this area tends to fly under the public's radar screen, the (non-)result implies the need to control for the importance of each case.<sup>54</sup> Future research could take this step by deploying any number of measures of salience, including the Epstein-Segal "New York Times" approach,<sup>55</sup> the number of participating amici,<sup>56</sup> or even future citations to the opinion.<sup>57</sup>

A second reason we are unwilling to make the leap from association to causality is we have neither posited nor tested a mechanism for the effect of public opinion on the Court. Certainly, Professor Friedman and others could be right: the public has a direct influence on the Court because the Justices are concerned about their legitimacy in the short and longer terms. But it is equally plausible, as Flemming & Wood explain, that the Justices are simply "social beings confronted with the plethora of stimuli emanating from American culture, media and politics..."<sup>58</sup> In other words, the same things that influence public opinion may influence the Justices, who are, after all, members of the public too.

Until we can behaviorally distinguish and assess these and other mechanisms, statistical confirmation of Professor Friedman's causal story must wait yet another day. What we can say, what our results suggest, is that his account is not as implausible as some of the political science literature suggests.

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<sup>54</sup> But see Giles, et al., *supra* note 9, finding that "that the effects of public opinion on liberalism appear to be consistently less in salient cases" because "case salience may actually intensify the operation of [the Justices' own ideological] preferences."

<sup>55</sup> Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66 (2000).

<sup>56</sup> FORREST MALTZMAN, JAMES F. SPRIGGS & PAUL J. WAHLBECK, *CRAFTING THE LAW* (2000).

<sup>57</sup> See, e.g., James H. Fowler, et al., *Network Analysis and the Law: Measuring the Legal Importance of Supreme Court Precedents*, 15 POL. ANALYSIS 324; Lee Epstein, William M. Landes, & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1542834](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542834).

<sup>58</sup> Flemming & Wood, *supra* note 10, at 471.