

Toward a Theory of “The Public” in Research on the Relationship Between Public Opinion and Supreme Court Outcomes

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Abstract

Does public opinion influence Supreme Court decision making? Nearly every research study answers in the affirmative, though scholars disagree on the nature and mechanisms underlying such effects. This essay first critically reviews the literature on the impact of public opinion on Supreme Court decision making, focusing on key debates about theory, mechanisms, and the conditions under which public opinion matters. I then begin developing a theory of “the public” that draws on theories of “public support” in the American and comparative literatures. Developing deeper theory of public impact, like what I begin developing here, helps place many of the open debates in a fresh, broader context and suggests the important role of the public in building judicial power and autonomy in the political system.

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“To speak with precision of public opinion is a task not unlike coming to grips with the Holy Ghost.” - V.O. Key Jr. (1961)

Does public opinion influence Supreme Court decision making? Does the public “constrain” high courts to make decisions they otherwise wouldn’t make? Do justices even *care* about public opinion? These questions have kept law and courts scholars on their toes for decades, leading one review of the literature (Epstein and Martin 2010) to hedge on both the *whether* and the *why* of public impact—even in the face of a robust effect of the public. Though nearly every piece of research in the literature points toward a robust impact of public opinion on Supreme Court outputs, scholars continue to debate: (1) the theory and mechanisms of influence, (2) the conditions under which public opinion matters (issues, levels of analysis, salience), and (3) the magnitude of the public’s impact.

While scholarly disagreements persist about the nature of the public’s impact on Supreme Court decision making, the literature does contain a semblance of converging theory and empirical results that weave together a narrative of the mechanisms of public influence. In the course of critically evaluating these research findings, this essay will begin building a theory of “the public” when it comes to public impact on the Supreme Court. This account incorporates, extends, and integrates innovative theory from comparative politics on *public support* that both places the U.S. Supreme Court in global context and sheds light on additional dynamics that are operative. In reviewing disagreements about micro- and macro-level studies of the public alike, this theory conceptualizes the public from the Supreme Court’s point of view—akin to a “pivotal” entity (Krehbiel 1998) that the Court must acknowledge because it is a gauge of how far it can push an issue. The public is an

underlying source of judicial power and autonomy, which is a state of the world that courts and judges wish to achieve.

Is there demand—scholarly or otherwise—for such a theory of “the public?” Beyond the scholarly fascination dating at least as far back as the countermajoritarian difficulty (Bickel 1962), Supreme Court justices themselves are prone to invoke the public as benchmarks for important characteristics such as judicial power and institutional legitimacy (Clark 2011). Justice Elena Kagan’s quote is illustrative of this sentiment: “Every single one of us needs to realize how precious the court’s legitimacy is. You know we don’t have an army. We don’t have any money. *The only way we can get people to do what we think they should do is because people respect us*” (Sherman 2018, emphasis added). Clark (2009, 973) quotes an anonymous Supreme Court justice who reflects a similar sentiment: “We read the newspapers and see what is being said—probably more than most people do.... We know if there is a lot of public interest; we have to be careful not to reach too far.” These anecdotes are illustrative of a Court and justices who perceive the public as a mechanism for calibrating the degree of judicial power and autonomy. This essay will elaborate on this theory in the context of the body of research on public effects on the Supreme Court.

1. Theory and Mechanisms of Public Impact

Political science theory on public influence is quite comprehensive and proceeds from the following question: *Why would the public influence a Supreme Court that has a robust level of judicial independence and lacks of direct public accountability mechanism?* Below, I discuss three general mechanisms of public impact that structure scholarly debates on this topic.

1.1. Strategic Motivations and Rational Anticipation

One of the more developed theoretical explanations of public impact centers on a strategic, forward-looking motivation. The logic begins with what Vanberg (2001, 2005) has dubbed the “implementation problem”—the Supreme Court, like most high courts around the world, lacks formal mechanisms for implementing its rulings. The Court relies on the other branches and the public for compliance. Many an article has also tagged this dilemma as the Court possessing “neither the purse nor the sword” (quoting Caldeira 1986), which summarizes Alexander Hamilton’s framing of the topic in Federalist 78. The implementation problem poses a detriment to the Supreme Court’s *judicial power*, or its ability to “cause by its actions the outcome that it prefers” (Staton 2010, 9). And in a separation-of-powers structure, it generates a power deficiency for the Court relative to the other branches, each of which possesses robust, constitutionally-enumerated powers.

At the decision-making stage, the aforementioned definition of judicial power is synonymous with *judicial independence*. An independent court makes decisions without external political constraint, influence, or coercion (Cameron 2002; Clark 2011; Rosenberg 1992). In other words, it can act *sincerely* as opposed to *strategically*. Note how this particular element is central to Staton’s definition of judicial power. When courts or justices behave strategically, they are willing to deviate from their preferred course of action to avoid a worst-case scenario, i.e., their least-preferred course of action (Epstein and Knight 1998). Central to this first mechanism, then, is a court that engages in forward-looking behavior with respect to the public. Because it knows it relies on the public and the other branches for compliance, it strategically anticipates potential public backlash that may result from a prospective

course of action. A strategic court, such as the U.S. Supreme Court (or a strategic justice), is willing to strategically deviate from its preferred course of action in order to avoid such backlash and the risk of noncompliance from the public.

In Clark’s (2009, 2011) theory of judicial independence, congressional threats to curb judicial power and independence are a signal to the Court that public support is slipping, which risks noncompliance. Clark shows that when congressional threats are high, the Court behaves less assertively—it strikes down fewer laws—compared to when threats are low. The public induces strategic behavior from a Court looking down the decision tree and forecasting noncompliance or potential threats to its power and independence.

Studies examining the effect of “public mood”—Stimson’s (1999) measure of public’s aggregate liberalism or conservatism across numerous issues—on Supreme Court decision making have also invoked a rational anticipation mechanism. In Stimson et al.’s (1995, 545) theory of dynamic representation, political actors engage in rational anticipation of public opinion: They “sense the mood of the moment, assess its trend, and anticipate its consequences.” McGuire and Stimson (2004) invoke a rational anticipation mechanism to explain why public mood influences Supreme Court outputs.

Justices who sought to raise any reasonable degree of political capital would surely need to consider whether their preferred policies would be met with acclaim or disdain. Estimating the nature of public mood, they should temper their ambitions, as circumstances warrant.... Notwithstanding the absence of an electoral motive, a justice who wished to maintain institutional legitimacy for the future would have substantial incentive to trim his sails and follow popular sentiment in the present. (McGuire and Stimson 2004, 1022)

1.2. Responsiveness

While the strategic, rational anticipation mechanism of influence is forward-looking, classic “responsiveness” to the public is retrospective. The difference, which I will discuss below, is subtle. Dahl’s (1957) classic study of the Supreme Court implied that the public’s impact was significant though indirect and mediated by the selection process for justices (nominated, of course, by the president and confirmed by the Senate). Put another way, the public elects the president and senators, presidents and senators select the justices, and voter-induced electoral change thus influences the direction of Supreme Court policymaking. This process implies textbook *democratic responsiveness*. Such trends are tangibly observable in at least three period since the 20th century.

First, though the Supreme Court initially and famously frustrated President Franklin Roosevelt’s New Deal agenda, Roosevelt eventually appointed eight new justices who were widely viewed as partners in the New Deal coalition.¹ Second, President Richard Nixon’s election victory in 1968 aided in ending the liberal Warren Court revolution, arguably just when it hit its peak by the mid to late 1960s. Nixon’s and Ford’s five appointments from 1969-1975 (and replacements of certain liberal bulwarks such as Chief Justice Warren and Justices Black, Fortas, and Douglas) generated a clear right turn in policymaking that almost surely would not have occurred absent Nixon’s victory.²

¹ FDR also elevated Justice Harlan Stone (a Coolidge appointee) to Chief Justice.

² This right turn certainly did not generate a “conservative counterrevolution” given that some Republican appointees were center-right justices or eventually outright liberals (e.g., Blackmun and Stevens).

Finally, President Donald Trump’s three appointments twice moved the ideological balance of power to the right and ultimately generated a reliable six-justice conservative majority.³ Specifically, Trump’s replacement of Justice Ruth Bader Ginsburg with Justice Amy Coney Barrett was the impetus for the Court overturning (by a 5-4 vote) the landmark *Roe v. Wade* precedent in 2022 (in *Dobbs v. Jackson Women’s Health Organization*). Trump’s 2016 election victory over Hillary Clinton has been the driver of legal change in the conservative direction. The Court seems poised to generate more conservative policymaking. In sum, we see clear episodes in time of Supreme Court policymaking reflecting the partisan and ideological changes ushered in by elections. *Elections have consequences* for who appoints Supreme Court justices. If appointments are “pivotal”—they change the ideological balance of power on the Court—elections have consequences *for the nature and direction of Supreme Court policymaking*. Under certain conditions, then, the Supreme Court evinces clear democratic responsiveness.

Implicit in this aforementioned narrative is *attitudinal voting* on the part of justices (Segal and Spaeth 2002). As emphasized by Baum (2003) and Epstein, Knight, and Martin (2001), Dahl’s theory assumes that justices will vote on the same ideological and partisan bases on which they were selected. That is, presidents and senators choose justices based

³ Trump’s replacement of Justice Anthony Kennedy with Justice Brett Kavanaugh in 2018 moved the Court’s ideological balance of power to the right and resulted in a reliable five-justice conservative majority on the Court. Second, Trump’s replacement of Justice Ruth Bader Ginsburg with Justice Amy Coney Barrett in 2020 again moved the Court to the right, which produced a six-justice conservative supermajority.

on ideological congruence, justices vote on the basis of policy and ideological preferences that got them selected, and Supreme Court outputs thus reflect the partisan and ideological changes that voters usher in. In the attitudinal model, justices vote almost exclusively on the basis of their ideological and policy preferences. Segal and Spaeth (2002) argue that justices lack incentives to strategically deviate from sincere, ideological voting because: (1) they are not electorally accountable; (2) they are at the top of their profession and do not possess progressive ambition that can induce strategic voting; (3) they decide the hardest of hard cases that contain valid legal arguments on both sides (thus freeing them from one-sided legal constraint); and (4) they are at the top of the judicial hierarchy and no other court can overturn their rulings.

A counterintuitive implication emerges: While rational anticipation casts justices acting in a highly *strategic*, forward-looking manner, the Dahl’s “indirect influence mechanism” of democratic responsiveness requires *sincere*, attitudinal behavior. This proposition has normative implications, too. While ideological voting is typically viewed as undesirable, since justices are purportedly prioritizing ideology over legal considerations, it seemingly possesses normative value for theories that place a premium on democratic responsiveness (assuming political selection based on partisan and ideological congruence) of courts, e.g., “popular constitutionalism” (e.g., Friedman 2002; Kramer 2004).

Beyond this indirect public influence mechanism, can public opinion or mood *directly* influence the Court’s or the justices’ decisions, even when controlling for both ideological preferences and membership change? To answer this question, some scholars have posited a direct influence of public opinion via a *responsiveness* mechanism. The first systematic test of this proposition was Mishler and Sheehan’s (1993) innovative examination of Supreme

Court decision making employing a large-N statistical analysis. The authors emphasize the mechanisms by which justices may be responsive to shifts in public opinion or trends aside from forward-looking considerations discussed above:

Justices are no less susceptible than other individuals in society to influence by evolving societal norms and values.... Gradually, the attitudes of at least some of the justices are likely to change, thus shifting the...ideological center of gravity, as well. (Mishler and Sheehan 1993, 89)

From this responsiveness mechanism comes their “political adjustment hypothesis”—the general outputs of the justices should “respond gradually, and at a considerable lag, to broad trends in the ideology of the public” (Mishler and Sheehan 1993, 89). That is what they find—public mood matters at about a five-year lag, suggesting a gradual process by which justices take time to perceive changes in public mood and then eventually respond.⁴ Norpoth and Segal (1994) quickly responded to these findings with Dahl’s indirect influence mechanism in mind: Public influence is not direct; it is indirect and mediated by the selection process.

Still other works have suggested that justices are responsive not to the *general public* but to a particular group of the public: *Elite* audiences, particularly legal audiences and networks in which justices are embedded (Baum and Devins 2010). Baum (2006) argues that many justices are motivated to care about how elite legal audiences perceive and evaluate their work. These audiences can then influence justices’ decisions vis-à-vis interaction within networks (Baum and Devins 2010; Devins and Baum 2019). One example that Baum

⁴ They find that public mood matters as expected until 1981, but after that, mood exhibits a *negative* effect.

(2006) highlights is the “Greenhouse effect”—named after *New York Times* legal report Linda Greenhouse—positing that the “liberal legal culture” in Washington, DC can capture Supreme Court justices who spent their prior careers “outside the beltway” and are therefore not immune to the “pull” of this liberal force (e.g., Justices Blackmun, Stevens, O’Connor, Kennedy, and Souter). This perspective is one explanation for “ideological drift” in the liberal direction among some Republican appointees. In addition, Hollis-Brusky (2015) shows how the intellectual theories and legal arguments advanced by Federalist Society—an elite network of conservative lawyers and judges—have made their way into conservative Supreme Court precedents. This is another form of responsiveness to a specialized, elite subset of the public.

Rational anticipation and responsiveness are theoretically distinct mechanisms of public influence, but empirically testing those specific differences is quite difficult. Scholars typically use theory to make those distinctions or simply specify both mechanisms of public influence in order to justify an effect of the public on Supreme Court outputs.

1.3. Congruence

Another mechanism that may explain associations between public opinion and Supreme Court outputs is mere congruence. Under this account, the public does not *influence* the Court, it merely has the same underlying preferences as the Court. Therefore, the public and the Court will generally be in agreement with one another. I distinguish this type of congruence from the indirect influence mechanism (Dahl 1957; Norpoth and Segal 1994) discussed earlier as part of responsiveness. In their defense of the attitudinal model, Segal and Spaeth (1993, 2002) advance a brief sketch of this type of congruence.

That is, justices are members of “the public,” so cultural changes and trends that occur in society operate simultaneously on both the public writ large *and* elites in Washington, DC, including Supreme Court justices (see also Giles, Blackstone, and Vining 2008). This would render any direct effect of public opinion on Supreme Court outputs as a *spurious association* (i.e., correlation, *not* causation).

The most prominent work in the congruence camp comes from Marshall’s (1989, 2008, 2022) extensive examinations of the extent of congruence between the Supreme Court’s ruling on an issue and public opinion on that same issue. Marshall has generally found congruence between the Court and the public in a supermajority of cases. Friedman’s (2009) comprehensive historical examination of the Supreme Court and public opinion echoes aspects of Marshall’s work: The Supreme Court largely reflects public sentiment over time; it is rarely out of step with public opinion (see also Barnum 1985).

From these findings, scholars are wont to refer to the Supreme Court as a *representative* institution. Such findings seemingly allay concerns over the countermajoritarian difficulty. One important distinction to make is that this representation has been of the “substantive,” not “descriptive,” variety. That is, while the Court may be generally congruent with the public’s substantive policy positions, the Court has certainly not “looked like” America in terms of personnel. The justices are elite lawyers, most of whom attended elite law schools and possess high socioeconomic status. For 177 years, the Court consisted exclusively of white men. Not until 1967, with President Lyndon Johnson’s appointment of Justice Thurgood Marshall (the first black justice), was that pattern broken. For 191 years, the Court was exclusively male. President Ronald Reagan’s appointment of Justice Sandra Day O’Connor in 1981 broke that trend.

The current Court is actually the most descriptively diverse Court in history, consisting of four women, two black justices, and one Latina justice. In fact, the Supreme Court resulting from President Biden’s appointment of Justice Ketanji Brown Jackson (replacing Justice Stephen Breyer) in June 2022 marks the first time in history that *white males make up a minority of the Supreme Court*. Descriptive representation is an important aspect of congruence, as it can certainly have tangible implications for substantive representation. Ironically, though, some scholars and commentators argue that this highly descriptively representative Supreme Court is substantively *unrepresentative* (e.g., Jessee, Malhotra, and Sen 2022), largely due to the Court’s conservative supermajority—another first, at least since the beginning of the New Deal era.

2. Research Findings and Areas of Scholarly Disagreement

While most research has found at least some impact of the public on Supreme Court decision making, areas of disagreement exist along the lines of: (1) issues, (2) levels of analysis (individual versus Court-level), and (3) salience.

2.1. Issue-Based Differences

One of the first follow-up analyses to Mishler and Sheehan’s (1993) work was Link’s (1995) study examining whether public mood exhibited greater influence across different issue areas. According to Link’s findings, public mood exhibits a stronger effect in civil rights cases relative to criminal procedure—and a slightly different temporal dynamic. McGuire and Stimson (2004) report a robust and comparable impact of public mood in both criminal procedure and civil rights and liberties outcomes but a weaker (and statistically insignificant) public effect in economic outputs.

McGuire and Stimson (2004) advance another “issue-related” nuance: They argue that the true nature of the Court’s policymaking is reflected in cases in which it *reverses* compared to *affirms* the lower court. The argument is rooted in rational litigant strategy: Litigants—specifically the losers at the lower court—should only appeal to the Supreme Court when they have a high likelihood of winning (which means the Supreme Court would reverse the lower court). Sometimes litigants make mistakes in their strategic calculations, and sometimes the Supreme Court grants certiorari to those “mistakes.” Under this theory, which McGuire et al. (2009) develop in further detail, affirmances are an inaccurate gauge of Supreme Court policymaking, whereas reversals are the most accurate gauge of policymaking. The findings give credence to this view: McGuire and Stimson find that public mood has the expected positive effect on Supreme Court liberalism using reversals only (as mood becomes more liberal, Court outcomes become more liberal as well). However, this effect is *negative* when using affirmances only.⁵ Casillas et al. (2011) also use this measure in their study (discussed below).

Another issue-based distinction is what Hall (2011, 2014) calls “lateral” versus “vertical” issues, which have implications for judicial power and implementation. In vertical cases, the lower courts, which are bound by Supreme Court precedent, implement the Supreme Court’s policy. In lateral cases, the Court depends on nonjudicial actors, including elected officials, bureaucrats, and the public, for implementation. According to Hall (Hall 2011), the Court enjoys greater compliance and implementation in vertical cases. Harkening back

⁵ The authors also find that Court composition (the Court becoming more liberal and conservative in ideology) matters for reversals only (see also McGuire et al. 2009).

to the aforementioned implementation problem, lateral cases elicit a greater “fear of nonimplementation” than vertical cases. Drawing on the rational anticipation mechanism, then, Hall (2014) finds that public mood matters more in vertical compared to lateral issues (particularly among salient cases, which I discuss in more detail below).

2.2. Levels of Analysis

While many of the studies above focus on the “Court” as the level of analysis, other studies have examined the impact of public mood on *individual justices*. And disagreements in findings emerge. While Mishler and Sheehan (1996) found that the public influenced a minority of justices (primarily moderate “swing justices”; see also Enns and Wohlfarth (2013)), Flemming and Wood (1997) found that public mood exhibited consistent effects on all justices. Giles, Blackstone, and Vining (2008) find that public mood is operative for a subset of justices and that the aforementioned “indirect influence” mechanism is responsible for a significant share of the public’s impact. The authors find evidence of direct effects of public mood as well (see also Unah, Rosano, and Milam 2014).

Importantly, Giles et al.’s analysis includes an attempt at testing the operation of the rational anticipation (strategic) mechanism versus the congruence mechanism that cultural changes and trends operate simultaneously on the public and justices (what Giles et al. call the “mechanism of attitudinal change”). Finding no evidence in favor of the rational anticipation mechanism, Giles et al. (2008, 303) contend that “the most likely explanation for the direct linkage between public mood and justices’ liberalism observed in past studies is through the mechanism of attitudinal change.”

2.3. Salience

Does the impact of public mood on Supreme Court outcomes depend on salience? The findings here are all over the map. First, a salient issue is one that receives ample attention in media and public discourse. Its importance is shared among elites and the public. Media coverage captures that degree of salience for an issue. Salience is also a measure of *transparency*. Since much of the Supreme Court’s work is done behind closed doors and most cases do not capture the public’s attention, highly salient cases give the public a chance to observe the Court’s resolution of these important issues, many of which have become central to American politics (e.g., race, abortion, free speech, privacy, and religion).

While some studies of Supreme Court decision making tapped salience using measures such as the number of amicus curiae briefs filed in a case (e.g., Maltzman, Spriggs, and Wahlbeck 2000), Epstein and Segal (2000) developed a binary, media-based measure: Salient cases were those that the *New York Times* covered on its front page the day after the decision. Collins and Cooper (2016) expand on the Epstein-Segal measure by coding coverage of three additional newspapers (*Chicago Tribune*, *LA Times*, and *Washington Post*) and coding coverage beyond just the front page. The result is a more fine-grained continuous index.

One potential problem with these measures is temporal ordering. It measures salience *after* the Court issues its ruling. In analyses that use salience as an independent variable, this aspect poses potential endogeneity concerns. On the other hand, Epstein and Segal argue that their measure taps *contemporaneous* salience of an issue despite the temporal ordering issue. Clark, Lax, and Rice (2015) develop a measure that responds to both this temporal

sequencing issue and the source and “beyond front page” issues addressed by Collins and Cooper. Their salience index taps both pre-decision (one year before) *and* post-decision (one year after) coverage of a case. The pre-decision measure thus avoids the potential endogeneity issues.

Why would salience moderate the effect of public mood on Supreme Court outcomes? Theoretical arguments have been made—and empirical results have followed—for public mood exhibiting three different moderating effects:

1. Salience *enhances* the impact of public mood; mood matters more in salient cases relative to nonsalient cases (Bryan and Kromphardt 2016; Hall 2014; Strother 2019).
2. Salience *attenuates* the impact of public mood; mood matters more in nonsalient cases relative to salient cases (Casillas, Enns, and Wohlfarth 2011; Giles, Blackstone, and Vining 2008; Unah, Rosano, and Milam 2014).
3. Salience’s moderating effect is *nonlinear* (u-shaped); public mood matters more when salience is high *and* low but matters less for moderate levels of salience (Collins and Cooper 2016).

Given greater transparency in salient cases, theory suggests that the Court should be more mindful of public opinion. Since the public is better able to monitor the Court’s behavior when the information environment is high, the Court might be more attuned to anticipating public backlash and the risks of noncompliance, thus inducing it to take the public’s preferences into account (e.g., Hall 2014). In other words, a more transparent information environment, brought on by issue salience, may induce strategic motivations via rational anticipation.

On the other hand, salience goes hand-in-hand with *issue importance for the justices themselves*. Thus, these cases may activate policy motivations to a greater extent than nonsalient cases, leading to higher degrees of attitudinal behavior. Indeed, studies have shown that ideological voting is more pronounced in salient relative to nonsalient cases (Bartels 2011; Unah and Hancock 2006). The more that ideology—already a prominent force in decision-making—is primed in a case, the less room other forces like public mood have to operate in the decision calculus (see Casillas, Enns, and Wohlfarth 2011; Giles, Blackstone, and Vining 2008; Unah, Rosano, and Milam 2014).

For the nonlinear moderating effect of salience, Collins and Cooper (2016) argue that the Court is essentially balancing policy benefits against the costs of bucking the public. In low-salience cases, the authors agree with Casillas et al. (2011) that the policy benefits are not worth it in these cases to justify going against the public. In highly salient cases, “there are certainly personal benefits to deciding consistent with their ideology, but these benefits do not outweigh the costs of deciding against an activated, monitoring public” (Collins and Cooper 2016, 242). Moderately salient cases hit the sweet spot in terms of being able to maximize policy benefits while escaping public scrutiny that accompanies high salience and rigorous media coverage. Thus, in these cases, justices prioritize their policy preferences over being attentive to public mood.

2.4. A Null Impact?

Though every study discussed above finds evidence of at least some public impact on Supreme Court outputs, Johnson and Strother’s (2021) methodological audit of prior studies purportedly casts doubt on this linkage. The authors focus on three aspects: (1) whether

effects of public mood are time-bound and confined to the Warren Court era and before; (2) the aforementioned salience debate and whether different measures generate different results; and (3) whether alternative specifications of interaction terms (accounting for nonlinear moderating effects) in the salience debate alter conclusions. The authors claim that the totality of their evidence suggests a null impact of public mood after the Warren Court era.

While a full review of Johnson and Strother’s extensive analysis is beyond the scope of the current chapter, I note the following. The purported time-boundedness of public impact seems compelling and worthy of further examination. Recall that both Mishler and Sheehan (1993) and Link (1995) found that public mood mattered up until the Reagan administration, and after 1981, the effect of public mood was actually negative (Mishler and Sheehan 1993). On the other hand, one should proceed cautiously when subsetting time-series data by temporal eras. For example, in their minimum specification analysis, Johnson and Strother examine scatterplots between public mood and Supreme Court liberalism *separately* by Chief Justice era. Yet basic time-series analysis requires a sufficiently large number of years to analyze. Subsetting necessarily reduces statistical power and alters the nature of the dynamics (accounting for how the past influences the present). Time-series analysis, almost by definition, requires the full range of data in order to generate reliable effects and appropriate controls for dynamics.

An illustrative example is Johnson and Strother’s (2021) reanalysis of Casillas et al. (2011). In Figure 5, Johnson and Strother’s point estimates for the post-Warren effects of public mood are almost identical to Casillas et al.’s original results (the post-Warren short-term effect is actually somewhat *larger* than Casillas et al.). However, the post-Warren standard errors are larger, and the effects fall short of statistical significance. But is this

a statistical artifact of a truncated time-series with lower statistical power or a genuine, substantive difference? In my opinion, Johnson and Strother’s analysis does not provide a definitive answer to that question, meaning that demand for future research on the time-boundedness issue should be high.

Johnson and Strother emphasize concerns about salience, including the appropriateness of measures and the linear functional form of its moderating effect. The authors make valid points, of course, and they clearly show evidence casting doubt on a linear moderating role for salience. However, one solution for future research is rigorous robustness checks (part of Johnson and Strother’s point, perhaps): Choose the measure or specification you think appropriate and then estimate alternative specifications as robustness checks. On the moderating effects of salience, one way to avoid the “linear moderating” assumption is to subset the data by low and high salience, or alternatively, low, medium, and high as emphasized by Johnson and Strother as well as Collins and Cooper (2016). In interaction analyses, one can also relax the linear moderation assumption (an implication of Johnson and Strother’s analysis).

Finally, while Johnson and Strother’s extensive empirical examination should be applauded for injecting new rigor into these important issues, the debate they have reignited could benefit greatly from an injection of new theory, particularly concerning the salience moderation debate and also lingering questions about distinguishing mechanisms of influence, which some past studies have done quite well. I now turn to this general issue with a pivot back to core theoretical issues surrounding the public’s impact on Supreme Court outcomes.

3. Toward a Theory of “The Public”

Where do we go from here? The review of the literature suggests at least some association between public opinion (or public mood) and Supreme Court outcomes. Some argue it is direct influence rooted in strategic, rational anticipation, while others argue it is responsiveness to the public either directly or indirectly via the selection mechanism. It might be a direct effect reflecting influence that’s quite robust across time and for certain types of justices. Still others would argue the public does not exhibit influence, *per se*, but the Court is merely *congruent* with public preferences. As Epstein and Martin (2010, 281) emphasize, “Until we can behaviorally distinguish and assess these and other mechanisms, statistical confirmation of [a] causal story must wait yet another day.”

Scholars have added building blocks to such a causal story by attempting to: (1) control for shared preferences between the public and the Court, (2) account for the public’s indirect influence via the selection process, and (3) test a “fear of nonimplementation” motivation (via the rational anticipation mechanism) by leveraging salience and “lateral versus vertical” issues (Hall 2014). And despite Johnson and Strother’s (2021) sober assessment showing a minor public impact, certainly more research can be done to expand both theory and new design and empirical strategies.

In fact, the literature contains many works casting “the public” as a sort of a “calibrator” of judicial power (Bartels and Johnston 2020; Carrubba 2009; Carrubba and Zorn 2010; Clark 2011; Staton 2010; Stephenson 2004; Ura and Wohlfarth 2010; Vanberg 2005). In this sense, the public regulates how far the Court can reach on issues in a manner resembling Krehbiel’s (1998) theory of “pivotal politics.” I am cautious about not extending this

logic too far, as the public does not necessarily possess a fixed preference on legal issues nor would the justices perceive such a position. But generally, the public helps determine the feasible set of policy outcomes that the Court can produce without inducing public backlash or threats from elected officials to undermine its power and independence. The public may thus induce the Court to aim for the “gridlock interval” (Krehbiel 1998)—the equilibrium policy region within which subsequent policy change is not possible. As discussed with the respect to the rational anticipation mechanism, anticipation of public backlash means that the public is a *constraint* on judicial power.

In these theories, the Court and its justices “care” about the public, as opposed to being “indifferent” to it, as Johnson and Strother (2021) imply. On the other hand, they may also care about a different dimension of “the public” than the left-to-right changes in public mood emphasized in the public influence literature. They may care more about how much capital or underlying *support* they have with the public as a means toward maintaining judicial power and independence in the political system. In rational anticipation parlance, they care about their “legitimacy”—or their rightful authority to render rulings for the nation (Bartels and Johnston 2020; Bartels and Kramon 2020; Gibson, Caldeira, and Spence 2003).

3.1. Is Legitimacy a Floor or a Ceiling?

Related to this argument regarding the rational anticipation mechanism, I contend that *legitimacy is actually a misplaced panacea in this mechanism*—or it at least provides an incomplete story. Instead, what judges care most about is achieving and maintaining “judicial power.” Recall Staton’s (2010, 9) definition of judicial power from above: the ability to “cause by its actions the outcome that it prefers.” Judicial power and independence occur

when courts and judges are able to render *sincere* rulings without fear of public backlash or political attacks on its powers. On the other hand, concerns about legitimacy, as cast by the rational anticipation mechanism, result in *strategic* behavior—courts and judges strategically deviate from their preferred courses of action in order to maintain legitimacy.

The prior discussion begs the question: Is legitimacy a *floor* or a *ceiling*? When scholars invoke legitimacy in this context, they usually cast it as a ceiling—as the pinnacle of judicial authority in the system. But in this context, legitimacy is actually more of a bare threshold, or a floor, by which the Court survives to live another day. A court is “legitimate” if it is “acceptable.” If someone makes a “legitimate” argument, we say that it passes acceptable standards for further discussion in that it is not fatally flawed or logically deficient. But a legitimate argument is not necessarily the most *powerful* or persuasive argument—it is certainly does not surpass a sufficiency threshold for power or persuasion. Thus, a powerful argument is higher on an underlying scale than a legitimate argument—it not only passes a threshold of acceptability for being worthy of discussion, it is persuasive and capable of generating respect and deference.

Applying this analogy to legitimacy versus power for courts, legitimacy is actually a floor—an acceptable threshold for serious consideration. Judicial power is the ceiling—a court becomes an autonomous, binding force commanding respect and deference—to which courts and judges aspire. This logic generates a corollary to the rational anticipation mechanism. If concerns over legitimacy induce *strategic* motivations, judicial power gives courts the freedom, power, and autonomy needed to make *sincere* decisions.

If legitimacy is actually a floor and judicial power is the ceiling, what is the “basement?” That would describe a court that is constantly under attack, is subservient to the

government or even corrupt, and makes legal arguments that are not seen as meeting a legitimate threshold for appropriateness or acceptability because, e.g., they reflect the government's political posture. Consulting the comparative literature, Helmke (2005, 2017) casts many South American high courts in this situation.

In this perspective, courts fall on a spectrum where: (1) legitimacy is a floor (an acceptability threshold), (2) increasingly positive values reflect greater judicial power and autonomy, and (3) increasingly negative values reflect falling further beneath the legitimacy threshold, or tending toward *illegitimacy*. Importantly, as I will highlight below, the public plays a key role in calibrating where courts fall on this spectrum.

When cast in this light, new questions emerge. Are courts motivated more by maintaining mere legitimacy or aspiring to levels of judicial power and autonomy? Do courts and judges concerned about their legitimacy, as in the rational anticipation mechanism, actually believe they could slip down to “basement” levels? The rational anticipation mechanism for public influence implies that a court perhaps perceives that it is closer to the legitimacy threshold than higher up the ladder toward judicial power. This point underscores the importance of where courts and judges believe they stand with the public and other branches. If they believe they are close to the floor, or legitimacy threshold, they will frequently engage in strategic behavior as they scramble to remain above this floor. Courts and judges who believe they are at or close to the ceiling will engage in almost exclusively sincere behavior because they believe they have achieved autonomy. And for courts making their way up the ladder from floor to ceiling, mixed behavior will occur that will become increasingly tilted toward sincere behavior.

3.2. Salience, Transparency, and Public Signaling

Theories from comparative judicial politics regarding “the public” provide additional insight into both the prior discussion and the extensive salience debate. In these theories, “public support” is crucial for courts developing judicial power and independence (Carrubba 2009; Krehbiel 2016; Staton 2006, 2010; Stephenson 2004; Vanberg 2001, 2005; see also Friedman 2009). Public support can deter aggressive politicians from attacking courts, particularly if the public is willing to punish politicians at the polls for noncompliance or attacks on courts (Krehbiel 2021). If public support for a high court is robust, politicians, who are accountable to the same public, will resist attacking courts for fear of reprisals (e.g., at the polls). Note how public support in this context is distinct from “public mood” (as a liberal-to-conservative gauge of public opinion), but the theory has implications for the impact of public mood and its connection to both rational anticipation and responsiveness.

In theories advanced by Vanberg (2001, 2005) and Staton (2006, 2010), public support facilitates a high court’s ability to: (1) act assertively—if it needs to—against the government, and (2) induce compliance with its rulings. How does public support empower courts? This theory places a premium on transparency, which is related to salience (see also Krehbiel 2016). The public can only protect courts against attacks and noncompliance if transparency is relative high, i.e., media coverage is sufficiently high such that many in the public could become aware of any government noncompliance. Courts thus have incentives to use transparency to their advantage in order to signal public protection in the event of government noncompliance. Put another way, courts will act assertively against the government (e.g., invalidating government laws) when transparency is high, the salience of the issue is raised

by more media coverage, and the public is now aware of the issue and the potential for government noncompliance. For courts that perceive they have the public’s backing, “the public” serves as a backstop against government noncompliance. In this theory, courts care about the public because they can leverage public support to deter noncompliance (and other forms of court-curbing) by politicians (see also Bartels, Kramon, and Schmotter 2023).

Importantly, in the Vanberg-Staton theory, courts and judges may be acting strategically, but in a distinctly different manner than under rational anticipation. Under Vanberg-Staton, a high court leverages the public (perhaps strategically) to act assertively against the government—to be able to *sincerely* pursue its preferred course of action and to induce compliance from the government. Under rational anticipation, a high court *fears* a hostile public response and *strategically* deviates from its preferred course of action. Here is the upshot: Under Vanberg-Staton, the public ultimately facilitates a capacity for sincere behavior by the high court, thus enhancing judicial power and independence in the spectrum discussed above. Under rational anticipation, the public ultimately facilitates a capacity for strategic behavior, thus *constraining* judicial power and independence and pushing a court down several notches on the spectrum toward merely surpassing the legitimacy threshold.

Related to the salience debate in public influence research, this theoretical insight suggests that since a high court is more likely to act assertively—sincerely and without regard to external political influences—when the salience is raised and transparency is high, the public is *less likely* to influence or constrain the Court in salient cases (e.g., Casillas, Enns, and Wohlfarth 2011; Giles, Blackstone, and Vining 2008; Unah, Rosano, and Milam 2014). In these salient cases, the public is protecting, not constraining, a high court. This insight could spur future research seeking to resolve the salience debate.

Public support is thus a calibrator of judicial power in the political system. Carrubba's (2009) theory of public support contends that as courts "mature" and gain even greater public support,

...they are capable of getting government compliance with the regulatory regime's rules even when *both* governments and publics would prefer otherwise. That is, the court develops truly independent influence, or, put differently, the court's decisions become institutionally based exogenous constraints. (Carrubba 2009, 68)

Carrubba describes publicly supported high levels of judicial power and independence—a capacity for the sincere pursuit of preferred courses of action—that are well beyond mere legitimacy thresholds. In fact, at the highest levels, the Court is essentially autonomous, it generates decisions that are akin to binding rules, and it does not fear noncompliance or attacks on its powers. Ura and Wohlfarth's (2010) examination in the U.S. context shows how the public calibrates—and is capable of enhancing—judicial "institutionalization," a concept related to autonomy (see also McGuire 2004). In the constitutional realm, Carrubba's theory is akin to the pinnacle of "judicial supremacy," or the Court having the final word on constitutional meaning for everyone in the nation (see Friedman and Delaney 2011; Whittington 2007).

3.3. Does the Public Need to Know What's Going On?

Does the public need to be knowledgeable and aware of what's going on in order to influence the court—or protect it from attacks on its power? According to some critiques, the public is simply not knowledgeable enough to possess a robust capacity for influence (e.g., Devins and Baum 2017; see though Gibson and Caldeira 2009). While the U.S. Supreme

Court is a relatively low-information institution, citizens do make sensible connections between both policy and process considerations and support for the Supreme Court (Bartels and Johnston 2013; Bartels and Johnston 2020; Christenson and Glick 2015; Gibson and Nelson 2015).

But aside from whether citizens have sufficient levels of knowledge of the Court, the public’s impact on the Court may not *require* sufficient levels of knowledge, either in extant theory or for this theory of “the public” I have begun developing. Recall that from the Vanberg-Staton model, transparency (and salience) needs to be high to trigger public protection; a sufficient share of the public needs to be aware of potential noncompliance.

But in a broader sense, the Court only needs to *believe* that the public matters in order to remain above the “legitimacy floor” and ideally aspire to apex levels of judicial power and autonomy. In theory, such a belief is almost certainly accurate, as a rogue court that consistently behaved outside appropriate lines would certainly risk losing all credibility, slipping into basement levels of illegitimacy. The public matters then in routine decision-making. Judges must ask themselves: Would such a result truly be unacceptable to the public? The public can thus serve as a check on the Court without doing anything at all—and without a requirement for sufficient knowledge about the Court’s inner workings and the nuances of the Court’s rulings. Public influence can operate through judges considering appropriate and acceptable boundaries. According to Bartels, Kramon, and Schmotter (2023), high public support can trigger civil society groups and support networks to mobilize against government noncompliance and attacks on high courts. In this story, the general public need only play a minimal role in protecting courts, with certain judicial support networks doing the heavy

lifting. In sum, and invoking Carrubba (2009), as courts build more public support over time, they become more autonomous and powerful.

4. Conclusion

While some dispute the existence of a direct public influence on Supreme Court decision making (Johnson and Strother 2021), nearly every study concludes that the public’s effects on the Court are genuine and robust. Those debates will—and should, of course—continue into the future. Current debates emphasize: (1) whether the public influences certain types of justices more than others, and (2) the nature and direction with which salience moderates the effect of public mood. Each debate centers on the impact of “public mood”—as the public’s aggregate policy preferences become more liberal, the Court’s outputs become more liberal as well. In addition, research in both American politics (Carrubba and Zorn 2010; Clark 2011; Ura and Wohlfarth 2010) and comparative politics (Carrubba 2009; Staton 2010; Vanberg 2005) emphasizes how a different dimension of “the public” matters for courts: *Public support*. Generally speaking, the more the public supports courts, the more powerful and autonomous they become. That power and autonomy gives courts requisite discretion to act sincerely and assertively against the government when they deem necessary. Decreasing public support generates more strategic behavior.

Importantly, these literatures—one focusing on *public mood*, the other on *public support*—have proceeded somewhat separately yet more integration will likely generate more new insights and knowledge. Good examples of such integration include: (1) Hall’s (2014) incorporation of the “fear of nonimplementation” motivation (from the public support realm) to explain the conditions under which public mood matters; and (2) Bryan and Kromphardt’s

(2016) analysis of how public support influences “counterattitudinal” voting, i.e., justices voting against their preferences and in the direction of public mood.

Review and evaluation of the rich literatures on public mood and public support inspired this essay’s development of a theory of “the public” that draws on innovative theory and knowledge from comparative judicial politics as well. In this perspective, the public provides boundaries that define feasible outcomes—ones that will not induce backlash—for the Supreme Court. Importantly, the public also serves to *empower* courts. And over time, a high court, like the U.S. Supreme Court, can move beyond mere legitimacy and develop the type of judicial power and autonomy that can give the decisions it produces rule-like, “exogenous constraint” status in the political system (Carrubba 2009). Such a status is akin to judicial supremacy whereby the Supreme Court has the final word on constitutional meaning for everyone, meaning its rulings are binding on everyone. And where does judicial supremacy or “exogenous constraint” status come from? The answer is *universal subscription to such authority from both the public and politicians*. “The public” serves as the pivotal driver of the Court’s power and autonomy in the political system. Politicians acknowledge the public’s role because they are accountable (electorally and otherwise) to the same public. And courts acknowledge this role because the public can giveth (moving the Court up the ladder from mere legitimacy to judicial power and autonomy) and it can taketh (moving the Court down the ladder and below the legitimacy threshold into “illegitimacy” status).

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