

The united states supreme court and public opinion

[Law](#), [Court](#)



The United States Supreme Court is a unique American institution. It is unique because, unlike the individuals serving in the executive and the legislative branches of government, the nine justices serving at the highest level of the United States Supreme Court are insulated in significant ways from the public they are sworn to serve. Most significantly, the justices are provided lifetime terms following nomination and confirmation. Unlike presidents or members of Congress, for example, the justices do not have to endure initial public elections or prepare for reelection campaigns.

In effect, in many ways, the members of the United States Supreme Court are insulated from the public that they serve in extraordinary and unique ways. This very insulation, in turn, has generated fierce debates among legal scholars, political scholars, and historians regarding the proper characterization of the relationship between the United States Supreme Court and public opinion and the consequences of different characterizations.

This essay will argue that the justices of the United States Supreme Court are not nearly as isolated as conventional wisdom and scholarship too frequently assume, that public opinion affects the justices in a myriad of deeply significant ways, and that adopting a majoritarian model better explains the United States Supreme Court as well as better serving important public policy objectives.

In order to support the argument that majoritarian framework is the preferable model, this essay will explain why analytical frameworks are especially important in this context, the consequences of the different

approaches, and why a majoritarian approach is the better framework for analyzing and discussing the relationship between the United States Supreme Court and public opinion. B. Why Analytical Frameworks Matter

This debate is particularly important because these justices, serving for life terms, are elevated to the United States Supreme Court as a result of political decisions rather than intellectual merit or the possession of a neutrally objective judicial philosophy. Indeed, it is commonly agreed by scholars that Judges and scholars perpetuate the myth of merit. The reality, however, is that every appointment is political.

Merit competes with other political considerations, like personal and ideological compatibility, with the forces of support or opposition in Congress and the White House, and with demands for representative appointments on the bases of geography, religion, race, gender, and ethnicity. (O'Brien 33) It is this political connection that makes the relationship between the United States Supreme Court and the American citizenry such an important issue.

This is because certain assumptions may encourage special interests to pursue political appointments to the Supreme Court in an effort to circumvent public opinion. For those whom subscribe to the countermajoritarian school of thought, which holds that the Supreme Court is largely immune to public opinion and hardly influenced by public opinion, the belief is that once a nominated justice is confirmed that he or she will be able to issue rulings unhindered by the pressures of public opinion (Davis 4).

As a result, this approach encourages deeply political appointments because there is a belief that minority interests can be advanced or otherwise

protected by a public institution shielded from public opinion; this, in turn, encourages potential justices to refrain from expressing their intellect or their opinions honestly in order to minimize political problems.

One scholar has described this dumbing down of a candidate's merits thusly:

" A fictive discourse of appointments has thus emerged: a nominee's advocates make his case in the ideologically neutral language of merit, as if the candidate's views had no bearing on his selection," (Greenberg, n. p.)

That prospective justices of the United States Supreme Court are compelled to engage in a " fictive discourse" is both disturbing and contrary to the American ideal of open and free discourse.

The confirmation battle involving Robert Bork was illustrative of this type of political battle; indeed, rather than focusing on Bork's intellectual abilities or merits the confirmation hearings devolved into perhaps the most contentious confirmation battle in modern history. Indeed, as one leading scholar of the Bork proceedings has noted, highlighting the aforementioned dangers associated with the countermajoritarian framework,

Because few knowledgeable observers questioned Judge Bork's professional qualifications, opposition to Bork quickly focused on his judicial philosophy. The focus on ideology raised a crucial issue as to whether it was proper for the Senate to reject for ideological reasons an otherwise qualified nominee. (Vieira, and Gross vii)

On the other hand, for those whom subscribe to the majoritarian school of thought, an increasingly influential approach to the relationship between the United States Supreme Court and public opinion, the belief is that the

justices are not only not insulated from public opinion but that public opinion affects the justices intimately in terms of the types of cases they choose to decide each year (O'Brien 165), what legal justifications that justices choose to rely on when deciding particularly contentious cases (Waltenburg, and Swinford 242), and whether to uphold or overturn longstanding legal precedents (Norrander, and Wilcox 707).

Such assumptions, that public opinion does matter and that it matters significantly, have several significant implications if they are true. First, selecting politics over merit when deciding whom to nominate to the United States Supreme Court may be overrated; more specifically, justices will ultimately be more sensitive to public opinion than the political alliances that earned them the nomination in the first place.

They will, after all, be freed of the need to sustain the political alliances after confirmation as a result of their lifetime tenure whereas they will always be judged by public opinion. A case in point was the Republican nomination of Warren Burger. He was known to have been a conservative with a strict construction approach to the interpretation of the United States Constitution. In short, from a countermajoritarian point of view, Burger had seemed an extraordinarily safe political choice for the United States Supreme Court.

The reality, however, was that as the 15th Chief Justice of the United States Supreme Court, Burger began to rule in ways that shocked his initial supporters. Rather than shunning public opinion, as his supporters wanted on issues such as race, he has since become known as one of the more activist Chief Judges in the history of the United States Supreme Court. The

countermajoritarian school of thought cannot account for such a shift in judicial behavior, and this is a major flaw in this particular analytical framework.

Burger is much better understood, as is the United States Supreme Court more generally, by employing a majoritarian framework that accounts for public opinion in addition to underlying political alliances or political philosophies. Second, if these assumptions are true, then public opinion matters. That means that studying the United States Supreme Court in isolation, rather than in conjunction with other related social factors such as public opinion, is a flawed approach.

The better analytical framework is the majoritarian approach which, though a minority approach, accomplishes two important objectives. Initially, by accounting for and analyzing more carefully the relationship between public opinion and the United States Supreme Court, courts like Burger's can be better understood and better explained; in addition, the majoritarian approach legitimizes public opinion as a part of the national debate with respect to legal issues of public interest rather than confining these issues to nine distant justices in a mysterious ivory tower.

If one of the main functions of the justices is to safeguard the legitimacy of the American constitution, a document conceived of and designed to protect the public generally, then sound policy demands public participation and influence. There are two main questions to be resolved. First, does the countermajoritarian or the majoritarian framework better explain how the United States Supreme Court functions? Second, and related to the first

issue, which model better contributes to the legitimacy of the United States Supreme Court and its legal decisions.

C. Main Questions 1. Countermajoritarian or Majoritarian: A Threshold Issue

Although the United States Supreme Court is one of the most heavily studied American institutions, there remain significant differences of opinion regarding the nature of the relationship between the Supreme Court and public opinion. One of the more fundamental debates among legal scholars, political scientists, and historians centers on whether the United States Supreme Court is in essence a countermajoritarian institution or a majoritarian institution.

This debate has important implications. Those that believe that the countermajoritarian model best characterizes the actual function and operation of the United States Supreme Court also tend to view the Supreme Court as being largely insulated from public opinion; on the other hand those that believe that the majoritarian framework best characterizes the Supreme Court tend to believe that public opinion, to some extent, affects the function, operations, and the ultimate legal decisions of the Supreme Court.

How one resolves this debate, therefore, pervasively affects American jurisprudence; indeed, " Much constitutional discourse is predicated on the assumption that the United States Supreme Court is a counter-majoritarian institution, and normative theories supporting the exercise of judicial review are seen, by some, as having to accommodate that fact.

" (Solimine, and Walker n. p). Should this fundamental assumption be proven to be incorrect, and there is a growing body of research that suggests that it

may be incorrect, then the constitutional discourse and the normative theories that have flowed from the traditional countermajoritarian characterization of the Supreme Court may be similarly flawed and incorrect.

In short, a threshold determination needs to be made. This threshold question, as is relevant to the relationship between the United States Supreme Court and public opinion, is whether the Supreme Court is in fact a countermajoritarian institution as scholars have traditionally assumed or a majoritarian institution as some modern scholars argue. 2. Supreme Court as Arbiter of Legitimacy

In addition and intimately related to the aforementioned characterization debate, scholars have also examined the relationship of the United States Supreme Court and public opinion in terms of legitimacy; more specifically, scholars have debated whether and to what extent Supreme Court decisions resolve contentious legal issues legitimately so far as public opinion is concerned and whether and to what extent legitimacy instead results from public opinion affecting the Supreme Court either directly or indirectly.

In short, is the ultimate source of legitimacy regarding contentious legal issues the Supreme Court, public opinion, or the interplay between the two? This source of legitimacy debate is made more difficult by the fact that public opinion tends to be more responsive to a narrow range of legal issues or what has otherwise been referred to in the literature as landmark cases such as *Brown v. Board of Education*, *Roe v. Wade*, and, more recently, *Bush v.*

Gore. If this assumption is correct, that public opinion is only concerned with landmark cases, then the scope of academic inquiry must be significantly narrowed; to this end, one scholar has noted that "if we assume that only the huge national landmark cases affect public opinion, in essence, we are saying that the remainder of the Court's work is inconsequential, at least in terms of public opinion." (Hoekstra 3).

An additional set of threshold questions, therefore, needs to address the more precise relationship between different types of Supreme Court cases and public opinion. Is the relationship relevant only with respect to national landmark cases? Does the relationship differ between landmark and non-landmark cases? This, in turn, demands an analysis which examines both the national and local effects of Supreme Court decisions. Indeed, acknowledging that "Using national data, it may be possible to connect cases such as Bush v.

Gore to changes in public opinion and support for the Court" (Hoekstra 3) one scholar has argued for engaging in a more nuanced analysis that examines localized effects as well by suggesting that beneath the noise may actually be systematic effects—ones not easily detectable or the same for all citizens—but systematic nonetheless. If citizens learn about different Court decisions based on information available and salient to them, then looking for uniform national level effects is misguided. This does not mean that Court decisions are without national effect.

If the Court's effect is more localized—either in terms of geography or some other process—we might still see the effect of Court decisions on public

opinion and that Court decisions might affect support for the Court on a national level. The process is just more subtle and possibly more gradual. Another reason to look at local public opinion is that Court decisions frequently require active implementation, oftentimes by local officials. If the Court can change public opinion on the issues, or at least cast legitimacy on the policy under review, the probability of successful implementation is greatly enhanced (Hoekstra 3)

Thus, in short, a second threshold set of questions addresses the extent to which scholars assume that relationships between the Supreme Court and public opinion are limited to national landmark cases or whether the relationship can be extended according to local effects and conditions. C. Benefits of a Majoritarian Approach The first benefit of a majoritarian approach is rather intuitive; more specifically, because legal issues affect the public then the public's opinion ought to be considered.

Although this essay also argues that public opinion is relevant in disputes that may not be considered landmark cases, the evidence strongly supports the proposition that public opinion particularly affects national landmark cases and that landmark cases decided by the United States Supreme Court tend to affect public opinion. What complicates a proper characterization of the court derives from different historical relationships between the court and the United States Supreme Court. Traditionally, the American public did view the justices as enlightened individuals whom didn't require public input.

This sort of public trust justified, in the past, the countermajoritarian approach; indeed, with respect to general public opinion, the justices were

significantly insulated. One leading scholar, writing in 1957, stated that Until recently, the attitude of Americans toward the Supreme Court recalled with singular fidelity that with which, according to Burke, Englishmen of a century and a half ago should have looked upon the institutions of their country: " We ought to understand it according to our measure; and to venerate where we are not able to understand.

" (Schwartz iii). This veneration, this assumption that the public can no longer understand the legal issues presented to the United States Supreme Court, is no longer an accurate description of the American public; quite the contrary, the public regularly criticizes Supreme Court decisions, it more carefully follows potential and actual nominations to the highest court in the land, and through a variety of groups and organization it attempts to influence the court by presenting friend of the court legal briefs on virtually every type of imaginable case.

What has emerged more recently is a United States Supreme Court that is besieged by rather than isolated from public opinion; one scholar has noted that even presidents attempt to influence the justices, stating that " presidents can influence the Supreme Court beyond the appointments process. " (Martinek, n. p.). From the unemployed mother interested in an abortion issue to competing presidential candidates seeking a favorable ruling the United States Supreme Court has become, for better or worse, America's arbiter of last resort.

This change in the way the public perceives and interacts with the United States Supreme Court is the first reason why the countermajoritarian

framework is no longer the best approach for analyzing the justices or the relationship between the Supreme Court and public opinion. The detached veneration of the public is a relic of the past and has been replaced by a greater public awareness. This greater public awareness, however, cannot be overstated; to be sure, though " Shifting majorities of the public do disagree with many decisions, to the extent they perceive them, or are simply ignorant of the great mass of the Court's jurisprudence.

" (Solimine, and Walker, n. p.) There are, therefore, gaps in the public's knowledge about the nature of the Supreme Court's power and the underlying issues. This imperfect knowledge, however, does not render public opinion marginal or irrelevant. It simply suggests that public opinion may at times be somewhat irrational; both a rational and an irrational public opinion can affect the Supreme Court and the majoritarian approach can be adapted to account for an idealized public which possesses an advanced understanding of complex legal issues and an imperfect public which sometimes reacts in less than informed ways.

In short, the majoritarian approach is better able to incorporate the complex interactions between the United States Supreme Court than the rigidly outdated countermajoritarian model. In addition to the fact that public perceptions and demands have changed over time, it is also evident that legal precedents have been modified or overturned in response to public opinion. Some of the more well-known cases illustrating this fact have involved controversial issues dealing with racial segregation, abortion, and civil rights more generally.

A countermajoritarian framework would assume that the justices would be significantly isolated from the public in cases such as *Brown v. Board of Education* and *Roe v. Wade*. Had these justices been insulated, it is entirely plausible that these cases would never have reached the United States Supreme Court, and if they had, that they would have been decided differently. The majoritarian model, on the other, admits that these issues were, to some extent, forced upon the United States Supreme Court and that the justices accommodated public opinion by resolving important national issues.

This framework further contributes to an ultimate type of legitimacy with respect to the judicial decisions, even if the legitimacy remains challenged by some members of the public, because it treats the decision as a sort of cooperative effort between the United States Supreme Court and the American public. These decisions, in turn affected public opinion. More people accepted racial integration, more people accepted abortion, and more people came to believe that George W. Bush was entitled to the highest office in the land. In *Brown v. Board of Education*, for instance, the public was badly divided regarding issues of racial segregation.

While it is true that the modern trend was toward integration the sad fact was that many members of the public, including states, resisted attempts to integrate the races more completely; as a result, pressure was brought to bear on the United States Supreme Court. On the one hand, there was a notion that the federal government shouldn't interfere too much in state affairs; on the other hand, there was also a growing public recognition that

only a decision by the United States Supreme Court, and not any actions by the executive or legislative branches alone, would settle the issues legitimately across the country (Klarman 348).

A countermajoritarian framework would instead assume, and incorrectly so, that the justices themselves suddenly decided that racial segregation was unconstitutional rather than attributing a great deal of credit to the American public. The majoritarian model can both predict and explain cases such as *Brown v. Board of Education*. D. Conclusion In the final analysis, the United States Supreme Court is best analyzed when accounting for the influence of public opinion on its operational and decision-making process.

This necessitates shifting toward a more majoritarian approach that also analyzes why and how legitimacy is often a function of the interaction of the Supreme Court and public opinion rather than the outdated view of the justices as isolated wise-men immune to public scrutiny or understanding. Works Cited Davis, Richard. *Electing Justice: Fixing the Supreme Court Nomination Process*. New York: Oxford University Press, 2005. Questia. 16 July 2009 . Greenberg, David. " The New Politics of Supreme Court Appointments. " *Daedalus* 134.

3 (2005): 5+. Questia. 16 July 2009 . Hoekstra, Valerie J. *Public Reaction to Supreme Court Decisions*. Cambridge, England: Cambridge University Press, 2003. Questia. 16 July 2009 . Klarman, Michael J. *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*. New York: Oxford University Press, 2004. Questia. 16 July 2009 . Lasser, William. *The Limits of Judicial Power: The Supreme Court in American Politics*.

Chapel Hill, NC: University of North Carolina Press, 1988. Questia. 16 July 2009 . Martinek, Wendy L. " Popular Justice: Presidential Prestige and Executive Success in the Supreme Court. " Presidential Studies Quarterly 33. 3 (2003): 692+. Questia. 16 July 2009 . Norrander, Barbara, and Clyde Wilcox. " Public Opinion and Policymaking in the States: The Case of Post-Roe Abortion Policy. " Policy Studies Journal 27. 4 (1999): 707. Questia. 16 July 2009

qst? a= o&d= 5001889368>. O'Brien, David M. The Supreme Court in American Politics The Supreme Court in American Politics. New York: W. W. Norton, 2000. Questia. 16 July 2009 . Perry, Barbara A. "" The Cult of the Robe": The U. S. Supreme Court in the American Mind. " Social Education 66. 1 (2002): 30+. Questia. 16 July 2009 . Schwartz, Bernard. The Supreme Court, Constitutional Revolution in Retrospect. New York: Ronald Press, 1957. Questia. 16 July 2009

qst? a= o&d= 59482427>. Solimine, Michael E. , and James L. Walker. " The Supreme Court, Judicial Review, and the Public: Leadership versus Dialogue. " Constitutional Commentary 11. 1 (1994): 1-6. Questia. 16 July 2009 . Spurlock, Clark. Education and the Supreme Court. Urbana, IL: University of Illinois Press, 1955. Questia. 16 July 2009 . Stephenson, Donald Grier. Campaigns and the Court: The U. S. Supreme Court in Presidential Elections. New York: Columbia University Press, 1999.

Questia. 16 July 2009 . Vieira, Norman, and Leonard Gross. Supreme Court Appointments: Judge Bork and the Politicization of Senate Confirmations. Carbondale, IL: Southern Illinois University Press, 1998. Questia. 16 July 2009

. Waltenburg, Eric N. , and Bill Swinford. " The Supreme Court as a Policy Arena: The Strategies and Tactics of State Attorneys General. " Policy Studies Journal 27. 2 (1999): 242. Questia. 16 July 2009 .