CHAPTER ONE

Public Opinion and Supreme Court Policy-Making

A REPRESENTATIVE COURT?

Should U.S. Supreme Court decisions reflect American public opinion? Do most of its decisions actually reflect American public opinion? Since the late 1700s, these questions have divided politicians, judicial scholars, ordinary Americans, and the justices themselves.

Alexander Hamilton's well-known essay, *Federalist 78,* argued that a life-tenured federal judiciary would protect minorities' constitutional rights by serving as "an excellent barrier" against the "encroachments and oppressions of the representative body" and the "occasional ill humors in the society." In Hamilton's view, the federal courts will—and sometimes should—defy legislators, presidents, and majority public opinion. This argument was not unique. Many, but not all of Hamilton's contemporaries held a negative view of majority public opinion.[1] Antifederalist critics of the newly proposed Constitution feared Hamilton would be correct, and that the federal courts would often defy majority public opinion (Friedman 2002; Storing 1985: 197).

Until the 1930s there was no direct test by which to tell whether or not Supreme Court decisions agreed with American public opinion. Did *Marbury v. Madison* (1803) agree with American public opinion? Did *McCullough v. Maryland* (1819)? *Gibbons v. Ogden* (1824)? *Dred Scott v. Sanford* (1857)? *Plessy v. Ferguson* (1896)? *Lochner v. New York* (1905)?

Regrettably, no public opinion polls are available on these landmark decisions. True, some public opinion polls were conducted in the United States as early as the 1824 presidential election (Converse 1987, Robinson 1932, Smith 1990b). However, these early "straw polls" were conducted with very informal and unscientific methods, and only in selected localities, states, or regions. Until the 1930s, few polls were

conducted on a nationwide basis. Further, until the 1930s, most polls only measured the attitudes of targeted or local groups, such as farmers or consumers or likely voters, rather than the general public. When poll results could be compared to actual behavior, such as the vote returns in presidential elections, these early polls often had very large margins of error. By the early 1900s, nationwide polls—the *Literary Digest* poll being the best-known example—focused on voter choices in upcoming presidential elections, not on attitudes toward Supreme Court decisions. As a result, one cannot unearth polls of nationwide public opinion on prominent Supreme Court decisions before the 1930s.

During the 1930s, pioneering pollsters such as George Gallup, Elmo Roper, and Archibald Crossley developed new sampling methods that allowed cheaper, faster, and more accurate nationwide polls than those in earlier years (Converse 1987). For the first time nationwide polls included questions on Supreme Court decisions. That pollsters surveyed attitudes on well-known Supreme Court decisions is not surprising. Many important controversies eventually become lawsuits and are appealed to the Supreme Court (Cushman 2002). Indeed, nearly a century before modern public opinion polling, the French journalist, Alexis de Tocqueville, noted that "(t)here is hardly a political question in the United States which does not sooner or later turn into a judicial one" (Lawrence 1966: 248).

Modern public opinion polls made it possible to determine whether Supreme Court decisions reflected American public opinion. During the Rehnquist Court, for example, poll majorities agreed with the *Good News Club v. Milford Central School* (2001) decision allowing after-hours use of school facilities by student religious groups.[2] Poll majorities disagreed with the *Penry v. Lynaugh* (1989) decision upholding the death penalty for mentally retarded convicted murders.[3] Multiple polls yielded closely divided and conflicting results on the *Bush v. Gore* (2000) ruling, ending the Florida presidential recount and effectively giving the 2000 presidential election to George W. Bush.

Prior to the Rehnquist Court, if a clear poll majority (or plurality) existed, three-fifths (63%) of Supreme Court decisions agreed with public opinion (Marshall 1989: 78–79). Supreme Court decisions typically agreed with public opinion when public attention was closely focused on a dispute (such as during "crisis times") or when a federal law or policy was involved (most of which laws and policies were themselves consistent with public opinion polls). Chief justices, ideologically moderate justices, and justices from prestigious law schools most often cast votes agreeing with public opinion. Supreme Court rulings themselves did not usually greatly affect public opinion. Unpopular

Supreme Court decisions were more often overturned by constitutional amendments, Congress, the president, or by the Court itself.

Were the Rehnquist Court's decisions as often consistent with American public opinion as those of earlier Courts since the 1930s? What best explains which Rehnquist Court decisions agreed with American public opinion and which did not?

The best way to answer these questions is to compare nationwide public opinion polls with Supreme Court decisions. This book suggests that the Rehnquist Court was consistent with public opinion in three-fifths to two-thirds of its decisions—roughly as often as were earlier Courts since the 1930s. Yet the Rehnquist Court differed in several important ways from earlier Courts in how it achieved that level of representation.

HOW POLLSTERS VIEW THE COURT

American pollsters often write questions about Supreme Court rulings, the justices and nominees, or public knowledge of or attitudes toward the Court itself. During the Rehnquist Court, pollsters wrote well over two thousand poll questions tapping attitudes on Supreme Court decisions, the Court as an institution, or individual justices or nominees. On the average, major pollsters wrote roughly 122 questions a year—thereby providing a rich source of data by which to examine attitudes toward the Court

To investigate how pollsters view the Supreme Court, the Roper Archive's poll questions on the Supreme Court were reviewed. All poll questions directly mentioning the U.S. "Supreme Court" were counted, as were questions that mentioned individual justices or nominees (whether confirmed or not), and questions on an upcoming or previously announced decision.[4]

A total of 2,310 poll questions were identified for the Rehnquist Court era. The most common category (44%) of these questions measured attitudes toward specific decisions. Nearly all these were approval questions on specific cases, mostly pending or recently decided, but also including a few long-past decisions, for example, *Roe v. Wade* (1973).[5] Only a few (about 2%) of all poll questions tapped the public's factual knowledge of decisions. Later chapters rely heavily on these matches between attitudes and specific rulings.

Nearly as many questions (41%) measured public opinion toward Supreme Court nominees or sitting justices. Most of these questions were on controversial nominees, particularly Clarence

Thomas and Robert Bork. A small number of questions tapped either factual knowledge or attitudes toward sitting justices (about 1% each of all questions).

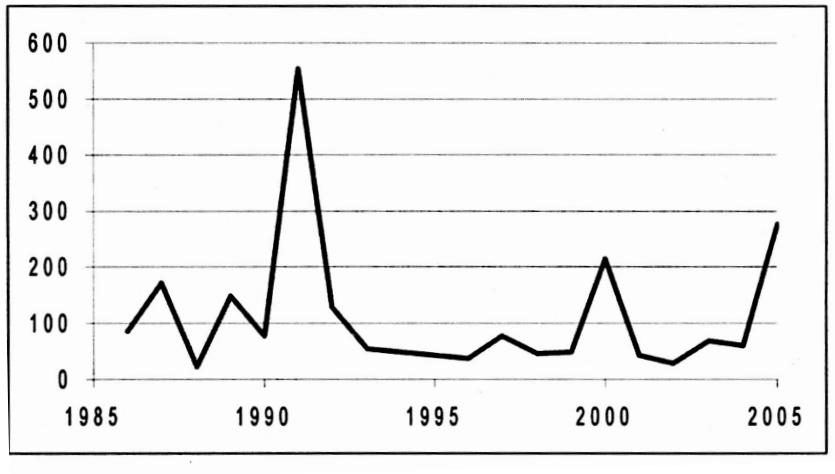
Fifteen percent of poll questions tapped attitudes toward the Supreme Court as an institution. The most common such questions measured trust, confidence, or approval of the Court as an institution (6% of all questions). Pollsters also wrote a few questions to tap factual knowledge of the Court (2% of all questions), perceptions of the Court's ideology and preferences for ideological change (3% of all questions), or the importance of the Court as an election issue (3% of all questions). The remaining 1% of all questions fell into the miscellaneous category.

Pollsters' attention to the Rehnquist Court varied considerably from year to year, with the number of poll questions averaging 122 a year. However, this average is deceptive. Only two types of events triggered an outburst of poll questions. The first was a controversial decision such as the flag-burning and abortion rulings in 1989 or the Florida presidential vote dispute in 2000. The other was a controversial or important nominee, such as Robert Bork in 1987, Clarence Thomas in 1991, or John Roberts in 2005. During these five years the number of poll questions rose sharply—to an average of 273 per year. For the remaining years the number of questions averaged only 53 a year—or about one poll question a week. Given that most pollsters archived in the Roper Archive are financed by the news media, this "current events" view of the Supreme Court is not surprising. Yet even with this caveat, these poll questions provide a rich source of information on American attitudes toward the Court. Figure 1.1 tracks the number of poll questions annually.

HOW THE JUSTICES VIEW PUBLIC OPINION

At least 123 Rehnquist Court opinions directly mentioned public opinion in a majority, concurring, dissenting, or per curiam opinion—an average of about six to seven opinions per term. A direct mention of public opinion either uses the term "public opinion," a close rewording (such as "opinion of the public"), or a close synonym that clearly refers to the mass public's attitudes and beliefs (such as "poll" data, "survey" results, the "common perception," "public reputation," "public confidence," "public's consciousness," a "national consensus," "public disapproval," "public confidence," "public trust," or "public attitudes and beliefs").[6]

Figure 1.1
Number of poll questions, per year, during the Rehnquist Court



As Table 1.1 indicates, over two centuries the number of direct mentions of public opinion, per term, rose slowly. The Rehnquist Court continued the long upward historical trend in direct mentions of public opinion. In fact, the number of direct mentions during the Rehnquist Court era about doubled from the Warren and Burger Courts.[7] The over-time rise in the number of direct mentions of public opinion resulted, in part, from a growing acceptance of public opinion as relevant to several key legal theories, discussed further below. The rising number of direct mentions is probably also an artifact of the growing length of written opinions and the growing number of dissents and concurring opinions (Ginsburg 1990; Johnson 1999; O'Brien 1999).

Each of the fourteen justices who served on the Rehnquist Court made at least one direct mention of public opinion, and several justices frequently referred to public opinion. Not surprisingly, the justices who most frequently referred to public opinion in their authored opinions were also those who served throughout the entire Rehnquist Court era—Justices Stevens (thirty-five direct mentions), Scalia (twenty-three direct mentions), Kennedy (nineteen), O'Connor (eighteen), and Chief Justice Rehnquist (sixteen). On a per-term basis the fourteen justices mentioned public opinion about equally often; none of the justices mentioned public opinion more than an average of twice per term in a majority, concurring, or dissenting opinion.[8] Liberal justices and conservative justices mentioned public opinion about equally often.

Table 1.1
Frequency of Direct Mentions of Public Opinion in Supreme Court Decisions, by Era

	Average Annual Number of Direct Mentions
1792–1859	.3
1860–1933	.5
1934–1959	2.4
1960–1986	3.1
1986–2005	6.5

Although the justices often discussed public opinion, they rarely referred to specific polls. As Table 1.2 indicates, two-thirds (70%) of direct mentions to public opinion were normative, theoretical, or abstract, and contained no empirical description at all. The next most common reference was to very indirect measures of public opinion, such as general knowledge or election results, statutes, or lower court decisions. Only a small percentage (15%) of direct mentions actually cited any specific polls.

As Table 1.2 indicates, few direct mentions of public opinion actually cited specific public opinion polls, either during the Rehnquist Court (when poll results are more often and more easily available) or in earlier time periods. In part, this inattention to polls occurs because polls were apparently not introduced as evidence in many cases that reach the Supreme Court. The Rehnquist Court's citations to specific poll questions most frequently appeared in two types of cases: first, cases involving the death penalty and information given to juries during sentencing; and second, in cases involving trademarks, secondary meanings, and commercial free speech and advertising claims. Examples of the former cases include *Atkins v. Virginia* (2002), *In re Stanford* (2002), *Penry v. Lynaugh* (1989), *Simmons v. South Carolina* (1994), *Brown v. Texas* (1997), and *Ramdass v. Angelone* (2000). The latter cases rarely win Supreme Court review; for examples that did, see *Wal-Mart Stores, Inc. v. Samara Bros* (2000), *Thompson v. Western States Medical Center* (2002), *Lorillard Tobacco Co v. Massachusetts* (2001), or *Borgner v. Florida Board of Dentistry* (2002).[9]

Perhaps the lengthiest discussion of specific poll results to date is in *Atkins v. Virginia* (2002), a landmark case in which the Court, 6–3, ruled that mentally retarded convicted murderers could not be executed. Justice Stevens' majority opinion cited a list of national poll questions submitted in an amicus brief as evidence of a national consensus among Americans against executing mentally retarded convicted murderers.[10] Chief Justice Rehnquist, dissenting, criticized the same

polling data as too inadequately explained and poorly presented to be credible. Justice Rehnquist also argued that legislatures and juries were better indicators of American attitudes.

Table 1.2
Evidence of Public Opinion Used in Supreme Court Opinions, by Era

	1792-1859	1860-1933	1934-1986	1986-2005
Direct evidence:	—	—	9%	16%
specific poll results	—	—	(8%)	(15%)
poll results mentioned, but no specific polls cited	—	—	(1%)	(1%)
Indirect evidence:	73%	81%	39%	28%
Elections, referendums	—	—	(2%)	(2%)
Community actions, word-of-mouth, news stories, editorials, mob actions)	(9%)	(14%)	(4%)	(2%)
Elite or specialized opinions	(3%)	(14%)	(2%)	(2%)
General knowledge	(32%)	(48%)	(17%)	(15%)
Statutes, lower court decisions	(29%)	(5%)	(14%)	(7%)
Normative, theoretical, or abstract (non-empirical) mentions only	44%	19%	70%	70%

Note: Percentages sum down and may exceed 100%, by column, due to multiple sources indicated in an opinion. Percentages in parentheses indicate subcategories.

In part, the inattention to specific polls may occur because several justices believe public opinion should not play a role in Supreme Court decision-making, or else these justices base their readings of American public opinion on statutes or jury verdicts, rather than poll results.[11] For example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), at 958–959, Justice Rehnquist, dissenting, wrote that "the Court's duty is to ignore public opinion and criticism on issues that come before it."[12] He noted that Supreme Court justices were poor judges of contemporary public opinion. Similarly, in *Stanford v. Kentucky* (1989), a death penalty case, Justice Scalia wrote that statutes and jury decisions, not public opinion polls, were the best indicators of contemporary public opinion.[13]

The justices often write about public attitudes and beliefs without referring to any empirical evidence. As discussed at greater length later in this chapter, Justices O'Connor and Scalia's lengthy debate over *stare decisis*, public confidence, and the Court's legitimacy in *Planned*

Parenthood of Southeastern Pennsylvania v. Casey (1992) is a well-known example of discussing the proper role of public opinion without any polling data at all.

Other justices set a high standard for the type of survey research they would consider. In practice, this demanding standard disallows many polls sponsored by litigants and polls with small or inappropriate samples, including many polls reported in law journal articles that might otherwise be cited in an opinion.[14] In *Ramdass v. Angelone* (2000) Justice Kennedy wrote that courts should disregard polls that had inadequate sample sizes, samples drawn from the wrong area, poorly drafted questions, inappropriate interviewing methods, or biased sponsors.[15] By contrast, Justice O'Connor set out a much more lenient standard for introducing polls and surveys as evidence in *Florida Bar v. Went For It, Inc* (1995).[16]

During the Rehnquist Court, direct mentions of public opinion most often occurred in criminal disputes. The plurality (41%) of the Rehnquist Court's direct references to public opinion involved a jury trial, a death penalty case, a criminal statute's interpretation, or some other court proceeding. Courtrooms, trials, sentencing, and other criminal matters have long been an area in which the Supreme Court evaluated American public opinion—in large part because these cases often involve the Eighth Amendment's ban on "cruel and unusual punishment," and many justices interpret this clause in light of changing public opinion (Robinson 2004). No other topic elicited even half as many references to public opinion as did crime and trials. Table 1.3 compares the Rehnquist Court's direct mentions of public opinion to earlier time periods.

The Rehnquist Court's direct mentions to public opinion included a mix of majority, concurring, and dissenting opinions, as reported in Table 1.4. A larger percentage appeared in dissenting opinions, as compared to earlier time periods. The growing percentage of direct mentions to public opinion in dissenting and concurring opinions may simply be an artifact of the growing number of concurring or dissenting opinions, sometimes very lengthy ones.

JUDICIAL THEORIES OF PUBLIC OPINION

Long before modern public opinion polling developed during the 1930s, the Supreme Court developed four theories to explain what role public opinion should play in judicial policy-making (Roesch 2006). None of these theories requires a very precise reading of public opin-

ion.[17] The Rehnquist Court did not originate any new or novel theories of the role of public opinion. However, as Table 1.5 indicates, it relied on the theory of evolving or contemporary public opinion much more often than did earlier Courts, and it almost ceased to use the judicial restraint theory of public opinion. Overall, nearly four-fifths of the Rehnquist Court's direct mentions of public opinion reflected a generally positive view of public opinion. Only a fifth of its direct mentions reflected the negative view that public opinion was a threat to rights. That the justices themselves apparently hold a generally positive view of American public opinion may, in part, explain why most Supreme Court decisions agree with public opinion.

Table 1.3
Type of Case Involved in Direct Mentions of Public Opinion, by Era

	1792-1859	1860-1933	1934-1986	1986-2005
Crime, trials, prisoners, courtrooms	19%	24%	35%	41%
Press, media	—	6%	21%	2%
Dissent, speech, religion	—	—	18%	11%
Labor, strikes, bargaining	—	6%	14%	2%
Elections, campaign, campaign finance	—	6%	8%	11%
Business regulations	48%	50%	8%	16%
Foreign, military policy	33%	9%	5%	1%
Civil rights, race	5%	12%	4%	9%
Privacy, sex, obscenity	—	—	3%	11%
All others	—	3%	6%	6%

Note: Percentages sum down and may exceed 100%, per column, because multiple topics are involved in a single case.

Table 1.4
Direct Mentions of Public Opinion, by Type of Opinion and Era

	1792-1859	1860-1933	1934-1986	1986-2005
Direct mention of public opinion in				
Majority opinion	76%	79%	52%	44%
Concurring opinion	5%	0%	13%	14%
Dissenting opinion	19%	21%	35%	42%

Note: Percentages sum down, by column, to 100%.

As a caveat, most direct mentions of public opinion are not based on any close reading of public opinion polls. Indeed, several justices are

quite skeptical that polls should carry much weight in judicial decision-making. While the Rehnquist Court was as sensitive to public opinion as were earlier Courts since the mid-1930s, it was clearly not "poll driven."[18] The next section briefly reviews how the Rehnquist Court's justices applied each of these four theories of public opinion.

Table 1.5
Theories of Public Opinion, by Frequency and Era

	1792-1859	1860-1933	1934-1986	1986-2005
Speech or action influences or informs public opinion, and merits protection	—	6%	41%	34%
In press cases	—	(6%)	(17%)	(3%)
In election, religion, speech and dissent cases	—	—	(16%)	(10%)
all other cases	—	—	(8%)	(21%)
Public opinion alone is an adequate check on policy	24%	50%	21%	7%
For government actions	(14%)	(44%)	(11%)	(6%)
For nongovernment groups	(10%)	(6%)	(10%)	(1%)
Law and policy should reflect contemporary or evolving public opinion	43%	29%	21%	64%
Public opinion threatens rights, should be restrained	29%	18%	19%	20%
In fair trial rights cases	—	(6%)	(8%)	(11%)
In speech and dissent cases	—	(3%)	(8%)	(2%)
In economic rights	(29%)	(9%)	(3%)	(1%)
All other cases	—	—	-—	(7%)
All other usages	5%	3%	6%	14%
Government influences public opinion	—	—	(3%)	(2%)
Miscellaneous uses	(5%)	(3%)	(3%)	(11%)

Note: Percentages sum down and may exceed 100%, by column, due to multiple usages in some opinions.

An Informed Public Opinion

Since the early 1900s, the Supreme Court has often held that certain types of speech inform public opinion, and that even controversial or unpopular speech deserves legal protection. Earlier Courts typically used this theory on behalf of the news media, political dissidents, labor

union actions (such as picketing), or commercial speech (such as advertising). Justices Oliver Wendell Holmes and Louis Brandeis are well known for advancing this theory during the early 1900s. From the mid-1930s through the mid-1980s, it became the Supreme Court's single most frequent theory of public opinion. Well-known examples include *Schenck v. U.S.* (1919), *Whitney v. California* (1927), *Near v. Minnesota* (1931), *Thornhill v. Alabama* (1940), *In re Oliver* (1948), and *New York Times Company v. Sullivan* (1964).

The Rehnquist Court continued to use this theory, although not quite as heavily as did earlier Courts since the 1930s. A third (34%) of the Rehnquist Court's direct mentions of public opinion relied on this theory. Examples include protecting speech that informs or influences trials and lawsuits, in *Simmons v. South Carolina* (1994), at 170–171 (holding that juries should be informed about the possibility of parole in a death penalty case), or *Gentile v. State Bar of Nevada* (1991), at 1043, 1064 (allowing a defense attorney's out-of-courtroom efforts to influence public opinion on behalf of his client).[19] This theory was also used in defense of speech in elections,[20] by dissenters,[21] by the media,[22] or by interest groups—for example, that "expressive" private groups can limit their membership despite prevailing public opinion, in *Boy Scouts v. Dale* (2000), at 648, 650, 661. Elsewhere, the theory was used in the defense of commercial speech that informs consumer opinion, in *Greater New Orleans Broadcasting Association v. U.S.* (2000), *Thompson v. Western States Medical Center* (2002), or *44 Liquormart, Inc., v. Rhode Island* (1996), and in defense of campaign disclosure laws[23] or secondary picketing in a labor dispute in *Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees* (1987).

Judicial Restraint

A second theory is that public opinion alone is an adequate check on abuses by government, and that the courts need not become involved in a dispute. This theory became popular during the early 1900s when several judges (most notably, Justices Holmes and Stone) urged the Court to defer to Congress or state legislatures in economic policy-making. Justice Frankfurter often argued that the Court should defer to public opinion and elected officials in criminal, dissent, and redistricting cases.

Decisions in favor of judicial restraint were quite common during the Rehnquist Court, but few such decisions were based on public opinion. This theory apparently fell out of favor with the justices

during the Rehnquist Court. Examples include Justice Breyer's argument that the Court should defer to a congressional statute protecting persons with disabilities, in *Board of Trustees v. Garrett* (2001), at 964, or Justice Souter's argument that the Court should defer to congressional findings that rape was a serious national problem, in *U.S. v. Morrison* (2000), at 628.

Contemporary Public Opinion

Since the late 1800s,[24] the Supreme Court advanced a third theory of public opinion by arguing that the Court should strike down laws and policies inconsistent with contemporary or evolving public opinion. This theory became the Rehnquist Court's most popular theory, with two widely used versions.[25] In the first version the Court may hold that a practice was permissible at an earlier time, and perhaps even widely practiced when the U.S. Constitution was signed. However, since then American public opinion has changed, and the practice is no longer acceptable.[26] *Weems v. U.S.* (1910)[27] and *Trop v. Dulles* (1957)[28] are landmark decisions holding that changing public opinion should determine what constitutes a "cruel and unusual" punishment. Earlier Courts used this theory most frequently in criminal cases, particularly in death penalty cases.[29]

The Rehnquist Court's justices frequently debated this theory both in criminal and noncriminal cases. In criminal cases the Rehnquist Court used the theory in arguing that the Miranda warning should continue to be required, in part because it had "become part of our national culture."[30] This theory was also found in several other criminal cases, particularly death penalty cases, for example, *Gomez v. U.S. District Court* (1992),[31] *Penry v. Lynaugh* (1989),[32] *Stanford v. Kentucky* (1989), *Thompson v. Oklahoma* (1988),[33] *Campbell v. Wood* (1994),[34] *Atkins v. Virginia* (2002), and *Roper v. Simmons* (2005). In noncriminal cases the theory of evolving public opinion appears in *Boy Scouts v. Dale* (2000), in dissent, at 700–702, and in *National Endowment for the Arts v. Finley* (1998).

An alternative, albeit less common version of this theory argues that the Court should follow public opinion because public confidence is important to the Court's legitimacy. The Rehnquist Court's best-known debate over this theory was in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), involving several state restrictions on abortions. Justice O'Connor's opinion, in part, argued that in extremely important cases the Court should consider public opinion in deciding whether to overturn precedents. O'Connor argued

that *Brown v. Board of Education* (1954, 1955) and *West Coast Hotel v. Parrish* (1937) correctly overturned earlier rulings, partly because American public opinion, American social life, and Supreme Court decisions had greatly changed since the earlier decisions in *Plessy v. Ferguson* (1896) or *Lochner v. New York* (1905). O'Connor argued that overturning *Roe v. Wade*'s (1973) view that abortion was a fundamental right would call into question public confidence in the Supreme Court: "The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands," at 865. In Justice O'Connor's view, the Court could protect its legitimacy by upholding a well-known, recent precedent that still enjoyed widespread legal acceptance, especially when public opinion was still sharply divided over the decision.[35]

Predictably, other justices vigorously criticized this argument. Justice Scalia, in dissent, argued that there was no fundamental right to an abortion, and that *Roe v. Wade* (1973) was wrongly decided; he also argued that later decisions sharply limited *Roe*. Justice Scalia then criticized O'Connor's argument that the Court should resist public opinion criticism of landmark rulings:" I am appalled by the Court's suggestion that the decision whether to stand by an erroneous constitutional decision must be strongly influenced . . . by the substantial and continuing public opposition the decision has generated . . . (W)hether it would 'subvert the Court's legitimacy' or not, the notion that we would decide a case differently from the way we otherwise would have in order to show that we can stand firm against public disapproval is frightening . . . (T)he notion that the Court must adhere to a decision for as long as the decision faces 'great opposition' and the Court is 'under fire' acquires a character of almost czarist arrogance," at 998–999.

Several other decisions argued that public perceptions should influence Supreme Court rulings. Most of these cases involved criminal trials, and suggested that an appeals court should correct a lower court's "plain errors" if there was evidence of actual innocence, or if the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings."[36] This argument about the "public reputation" of the courts reappeared in later criminal cases.[37] The Rehnquist Court also considered the importance of public perceptions in other areas, arguing that public opinion should be given serious weight in campaign finance regulations,[38] gambling regulations,[39] regulations concerning payments to or paid appearances by public employees,[40] financial and banking regulations,[41] and government-funded legal services to the poor.[42]

Public Opinion as a Threat

In the fourth theory, public opinion can at times threaten basic constitutional rights, and in these instances, should be ignored. Prior to the New Deal period this argument was most often made when justices voted against economic regulations, such as minimum wage laws,[43] or when criminal defendants had been convicted amidst an atmosphere of outraged local community opinion or threatened mob violence.[44] During the mid-1900s, this theory was used to support political dissenters, especially suspected Communists[45] or civil rights groups.[46]

The Rehnquist Court applied this theory in a fifth (20%) of its direct mentions of public opinion, most frequently in disputes over fair trial rights, such as *California v. Brown* (1987), allowing a jury instruction to disregard "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling." Several justices argued (usually in dissent) that public opinion favoring the death penalty threatens a defendant's ability to receive fair (i.e., nondeath) sentence—see, for example, *Harris v. Alabama* (1995), at 519, or *Payne v. Tennessee* (1991), at 866. [47] Elsewhere, this theory was used in business regulation cases,[48] in First Amendment cases,[49] or on behalf of mentally disabled persons,[50] gays and lesbians,[51] or families of suicide victims.[52]

LINKING PUBLIC OPINION AND THE REHNQUIST COURT

By this book's count, three-fifths to two-thirds of Rehnquist Court decisions agreed with American public opinion. How can this pattern best be explained? From the 1930s through the mid-1980s, Supreme Court decision-making was not equally likely to agree with public opinion on all types of cases. The Court most often agreed with public opinion in interstate commerce and civil rights decisions. On criminal rights, abortion, morality, privacy, and poverty decisions, the Court least often agreed with public opinion. What explains such patterns?

Court-watchers offer fifteen linkage models, described briefly below, to explain the relationship between Supreme Court decision-making and American public opinion. Some models focus on public opinion itself—for example, whether public attention is closely focused on an issue before the Court. Other models focus on popular judicial theories, such as federalism, judicial activism and restraint, or the preferred position argument. Other models focus on the justices' backgrounds, length of tenure on the Court, or on-the-Court roles. Still

other models focus on public reactions to Court decisions, or on key changes in public opinion, such as political realignments.

The fifteen linkage models come from a variety of different sources: well-known judicial theories, famous Supreme Court cases, case studies, judicial biographies, on-the-Court bargaining strategies, well-known scholarly essays, or empirical studies from other fields in political science, such as political socialization or interest groups. Individually, each model may seem logical and persuasive, but whether it is actually a good description is an empirical question. Because the models vary so widely, they must be tested in different ways: some by examining Supreme Court decisions, others at the level of the individual justice, and still others by examining events such as realignments or public opinion changes outside the Court.

The remainder of chapter one briefly describes the fifteen linkage models, the source of each model, and the predictions each model generates. Later chapters reexamine, document, and test each model. Just as for earlier Courts, several models receive strong empirical support during the Rehnquist Court, but for other models, little or no support appears. Chapter nine summarizes the evidence and offers an empirical model linking American public opinion and Supreme Court decision-making.

The State of Public Opinion Model

In the first model, the distribution and intensity of public opinion affect the Supreme Court's level of agreement with public opinion. Supreme Court decisions should most often agree with public opinion under three conditions. First, decisions should usually agree with one-sided public opinion—that is, when very large poll majorities exist on an issue. Second, decisions and public opinion should agree when public opinion is closely focused on an issue, such as during "crisis times." Third, decisions should agree with public opinion when an issue is highly visible—that is, when nearly all Americans express an opinion on an issue before the Court. When any or all of these conditions exist, Court decisions should significantly more often agree with American public opinion than a random-behavior model would predict—that is, more often than half of the time. Under any of these three conditions, the justices may themselves most easily "sense and share" current public opinion (Rehnquist 1986). In this first model, justices are not necessarily coerced by American public opinion. Rather, the justices are themselves attentive to and influenced by current issues, events, and media coverage, and the justices thereby sense and share prevailing

American attitudes. As one Court-watcher wrote: "(T)he justices have often agreed with the main current of public sentiment because they were themselves part of that current, and not because they feared to disagree with it . . . (T)he Court has seldom lagged far behind or forged far ahead of America" (McCloskey 1960: 224).

When public opinion is one-sided, closely focused on an issue, and well informed on an issue, the justices would not necessarily need to see any public opinion polls.[53] The justices could gauge public attention and interest from news reports, public statements, or interest group activities. At the extreme, the justices may sense that a highly unpopular decision might be widely criticized, evaded, or overturned, or that Congress and the president might even try to limit the Court's jurisdiction. Chapter two tests this model at the decision level.

The Federal Policy Model

For most of its history the Supreme Court was extremely deferential toward federal laws and policies. Indeed, for the first seventy years of its history the Court struck down as unconstitutional only two federal laws — *Marbury v. Madison* (1803) and *Dred Scott v. Sanford* (1857). Although the Supreme Court subsequently struck down many more federal laws and policies, it still does so far less often than for state-level laws and policies (Epstein et al. 1996: 144–174). Historically, on the average the Court struck down as unconstitutional only one or two federal laws or policies, per term, while striking down on constitutional grounds roughly ten times that many state or local laws per term (Baum 1998a: 199–204).[54] Taking this argument a step further, about three-fourths of challenged federal laws and policies reviewed by the Supreme Court are consistent with American public opinion. The federal policy model predicts that the Supreme Court will be very consistent with American public opinion because it simply upholds most challenged federal laws and policies.

From the mid-1930s through the mid-1980s, this model accurately described the Supreme Court's behavior in challenges to federal laws and policies. Was this linkage model as successful for the Rehnquist Court, which less often deferred to federal laws and policies than did earlier Courts? Chapters two and three examine this model at the decision level.

The State/Local Policy Model

Historically, the Supreme Court was not as deferential toward challenged state and local laws and policies as it was toward those of the federal government. Further, challenges to state/local laws and policies

constitute a very large part of the Court's annual docket—in recent terms, well over half of its full, written decisions. The state/local policy model makes three assumptions. First, challenged state/local laws or policies do not reflect nationwide public opinion very closely. Second, the Supreme Court shows little deference toward state/local laws and policies. Third, when nationwide polls disagree with state/local laws and policies, the Court will typically support nationwide public opinion. As a result, the Court strikes down many state/local laws and policies that disagree with nationwide public opinion. However, given that the Rehnquist Court was often more deferential toward states and localities than were earlier Courts, this linkage model merits reexamination. Chapters two and three examine this model at the decision level.

The Business-as-Normal Model

The modern Supreme Court clearly has routine customs and norms that influence its decision-making. For example, the Rehnquist Court heard only a small percentage of all appeals and it handed down a dwindling number of full, written opinions each term. Typically, the Court reverses most of the lower court rulings it hears. Further, most justices are fairly predictable in their liberal–conservative ideologies, and do not greatly change that position over time. Most justices bring their favorite judicial theories with them to the Court. Do these routine norms and practices affect the level of representation the Court provides? Chapter three examines the impact of several important norms and customs on representation.

The Interest Groups Model

Interest groups play an important role in initiating, sponsoring, publicizing, and financing lawsuits that reach the Supreme Court. Yet there is no evidence that interest groups' litigation strategies closely reflect nationwide public opinion. The interest groups model makes two assumptions. First, there is no significant relationship between American public opinion and the positions interest groups take in their lawsuits. Second, public opinion influences Supreme Court decisions (at least at the full opinion stage), but interest groups have no effect on decisions independent of public opinion. Chapter four examines this "null model" at the decision level.

The Political Parties and Ideology Model

Presidents typically pick justices from their own political party and, with varying success, who share their ideological views. Liberal

Democratic presidents typically pick liberal Democratic justices; conservative Republican presidents typically pick conservative Republican justices. Chapter five tests several measures of the justice's political party and ideology to see if these are linked to representing American public opinion.

The Political Socialization Model

Supreme Court justices bring a wide variety of background experiences with them to the Court. In the political socialization model, personal and career backgrounds that expose a justice to a broad, diverse, or majority-oriented culture, and political and career experiences that make a justice more sensitive to the nuances of public opinion predispose a justice, once confirmed, to vote more often with majority public opinion. Chapter five tests a large number of personal, familial, educational, political, and career experiences at the individual level.

The Appointment Process Model

Most Supreme Court justices are easily confirmed, but a few nominees face very divisive and controversial hearings, and receive numerous negative votes in the U.S. Senate. Typically, ideologically moderate nominees with outstanding credentials most easily win Senate confirmation. This model predicts that the appointments process provides valuable clues to a justice's later behavior. Nominees with broad, bipartisan support will later be the most consistent with majority public opinion. Chapter five tests this model at the individual justice level.

The Judicial Roles Model

Upon joining the Court, a justice may take on many roles. The best-known role is the chief justice's position, which carries greater management and lobbying duties. Some justices play a role as intellectual leaders. Others are particularly active in oral argument. Others are task leaders. Historically, a few justices even sought a political career beyond the Court. Some justices take on no particular leadership role at all. Chief justice status, intellectual or argument or task leadership, and ambitions beyond the Court are all predicted to sensitize a justice to public opinion, and to lead to a higher level of agreement with public opinion. Chapter five tests this model at the individual justice level.

The Length of Tenure Model

Supreme Court justices now average about a quarter of a century on the Court from their initial appointment (usually during their forties or fifties) until their retirement (usually in old age and poor health) or death. Over their entire Court tenure—and certainly by the time they retire—they represent an increasingly old and less numerous cohort, and perhaps move further and further away from the experiences and ideas of most Americans. This model predicts that the longer a justice sits on the Court, the less often his or her votes will represent majority public opinion. Stated otherwise, recently appointed justices should most often vote consistently with public opinion, and then become steadily less consistent as their Court tenure lengthens. Very senior justices should least often vote consistently with public opinion. Chapter five tests this model at the individual justice level.

The Realignment Model

Periodic crises, new issues, the coming of new generations and the passing of older generations, or unusually skillful (or inept) politicians can cause a political realignment in American political life. Political realignments cause millions of voters to change their political party loyalties and voting patterns. Within a few years this changes the outcome of state, congressional, and presidential elections—and, eventually, appointments to the Supreme Court itself. In the realignment model, public opinion reacts much more quickly to realignment events than do sitting Supreme Court justices or decisions. During realignment periods, sitting justices will be less consistent with majority public opinion than will be newly appointed justices. Unfortunately, realignments occur very infrequently in American life, and it is difficult to test this argument adequately. Chapter five tests the realignment model at the individual justice level both for the Reagan era of the 1980s and the early 1990s.

The Symbolic Representation Model

In this model the justices do not simply represent American public opinion as a whole; some justices best represent specific groups. The symbolic representation model argues that presidents often pick justices who "represent" an important group. Once confirmed, a justice who symbolically represents a group will more often vote in agreement with

that group's policy attitudes than do the remaining justices. Over half of all Supreme Court justices now symbolically represent some group, such as women, blacks, Catholics, or Jews. Chapter six examines whether symbolic nominees, once confirmed, also represent their group's policy views through their votes.

The Short-Term Manipulation Model

The short-term and long-term manipulation models are quite different from the other linkage models. Both assume that Supreme Court decisions themselves favorably influence public opinion. Once a decision is announced, public opinion should move at least modestly toward the Court's position. In the short-term model, public opinion changes should follow Court decisions very quickly, perhaps within a few days or weeks. The level of media publicity that a decision receives, the type of decision handed down, and the Court's degree of unanimity affect the public's response. Chapter seven tests this model at the decision level.

The Long-Term Manipulation Model

This model also assumes that Supreme Court decisions change attitudes, but assumes that public opinion responds to decisions very gradually—over many months and years, not over a few days or weeks. Decisions become accepted by being incorporated into daily American life, and are then slowly and gradually accepted over time. Over-time polls should show a slow and growing acceptance of Supreme Court decisions. Chapter seven tests this model at the decision level.

The Test-of-Time Model

In the final model, not all Supreme Court decisions endure over time. The Court itself reverses a few decisions, sometimes only a few terms after the decision was announced. Congress can overturn a statutory construction decisions by rewriting the legislation in question. A presidential or gubernatorial pardon or a new regulatory rule can mean that a decision no longer has any real-world effect. A few constitutional amendments overturn a Supreme Court decision. The test-of-time model predicts that unpopular decisions will more frequently and more quickly be overturned than popular decisions. Stated otherwise, public opinion has a "second chance" at Supreme Court decisions. Chapter eight tests this model at the decision level. Chapter nine then reconsid-

ers all fifteen models and offers an empirical model between American public opinion and the Rehnquist Court.

CONCLUSION

This chapter began with a long-standing debate in democratic theory: should Supreme Court decisions reflect American public opinion? That debate has now gone on for over two centuries, and very likely will continue. The question here is whether most Supreme Court decisions actually do reflect public opinion and, if so, why? From the 1930s to the mid-1980s, most Supreme Court decisions reflected majority public opinion. Was that also true for the Rehnquist Court?

During the Rehnquist Court era, pollsters wrote over two thousand poll questions tapping American attitudes toward the Court, its nominees and justices, and its decisions. The Rehnquist Court's justices often considered the role that public opinion should play in judicial decision-making. On the average, about six Rehnquist Court decisions a year directly referred to public opinion—a higher figure than for earlier Courts. The Rehnquist Court's direct mentions of public opinion ranged widely in their underlying theory, with a growing focus on evolving and contemporary public opinion. Direct mentions of public opinion were most common in cases involving criminal rights, courtrooms, and juries. Over three-quarters of the Rehnquist Court's direct mentions of public opinion reflected a generally positive view of public opinion.

This chapter briefly outlined fifteen models to help explain which Supreme Court decisions agree with American public opinion, and which do not. The remaining chapters test these fifteen models. Chapter nine then offers an empirical linkage model of public opinion and judicial policy-making.