NOTE

GIVING PUBLIC OPINION THE PROCESS THAT IS DUE: WHAT THE SUPREME COURT CAN LEARN FROM ITS EIGHTH AMENDMENT JURISPRUDENCE

I. INTRODUCTION

Justice David H. Souter announced his retirement from the Supreme Court in April 2009, handing President Barack Obama his first opportunity to shape the high court. A month later President Obama nominated Sonia Sotomayor to fill the open seat. During the confirmation process, Republican opposition criticized Sotomayor for a statement she made during a 2001 speech: “I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.” Critics pointed to Sotomayor’s remark as evidence of her philosophical bias. Public dissemination of the statement created a political backlash, which, while not in the magnitude of past confirmation battles, caused headaches for the Obama administration.

That Sotomayor was even questioned about this statement illustrates the modern politicization of judicial appointments. “The judicial selection process and the federal judiciary itself both have long histories of politicization. But the trend toward having the Senate explicitly judge judicial nominees on the basis of their judicial ideologies and philosophies is a relatively recent phenomenon.”

5. See infra notes 21, 49-51 and accompanying text.
philosophy; or, conversely, legal philosophy based on ideology. Thus, this Note will argue that the politicization of judicial appointments corresponds with an attendant politicization of judicial decision making, particularly in highly controversial cases, such as those interpreting the Eighth and Fourteenth Amendments. Significantly, “observers of the Supreme Court generally have argued that membership change is the primary source of change in collective voting behavior and case outcomes.”

Because every Justice comes to the bench with inherent biases, Justice Sotomayor’s arrival on the bench will affect the political undertones of the Court’s legal analysis.

This Note will further demonstrate that the modern Court, like Congress and the executive, often responds to fluctuations in public opinion when resolving political issues. While the Court justified invocations of popular sentiment in Eighth Amendment analysis by setting forth “evolving standards of decency,” the Court does not have a comparable constitutional standard when deciding Fourteenth Amendment cases. It is unlikely that the Justices can completely discount public opinion, but they can—and should—provide a constitutional justification for considering such political factors.

Our politicization story began fifty-five years ago when the Supreme Court handed down a decision that shook the core of American society and fundamentally recast its political and constitutional underpinnings. That electrifying decision, declaring “[s]eparate educational facilities are inherently unequal,” sparked public debate not only on racial issues, but also on the role of the Court and its impact on our everyday lives. The Court’s intervention here did not come as a surprise, as historically we have seen that “[t]here is virtually no political question in the United States that does not sooner or later resolve itself

8. Lawrence Baum, Membership Change and Collective Voting Change in the United States Supreme Court, 54 J. Pol. 3, 6 (1992). For example, “the rise in the Court’s support for civil liberties claims during the Warren Court and the subsequent decline in support during the Burger and Rehnquist Courts have been ascribed primarily to Court appointments.” Id.


10. See Baum, supra note 8, at 5 (Voting behavior can be affected when “[o]ne or more members leave the body and are replaced by members with different policy positions in the issue area. . . . The positions of Supreme Court justices can be expected to reflect primarily the justices’ personal policy preferences, but these positions may be shaped by other forces such as the positions of colleagues and perceptions of public opinion.”).

11. See infra note 222 and accompanying text.

12. See Michael Murakami, Desegregation, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 18, 18-19 (Nathaniel Persily et al. eds., 2008) (“[T]he unanimous decision delivered on May 17, 1954, immediately captured the attention of elected officials, legal commentators, and ordinary citizens alike. Everyone understood that the Court was committing the nation to a new and historic course when it . . . ruled segregation in the public schools unconstitutional.”).

Rather, as this Note will demonstrate, Brown caused a political, social, and judicial upheaval. Once the Court began intervening so directly into Americans’ lives, politicians, interest groups, and the public became more actively engaged in the judicial appointment process, subjecting the Court to intense political pressures and creating ideological tension among the Justices. “Swing” Justices, who already straddle the liberal-conservative divide, arguably feel these pressures most acutely, which in politically volatile areas of law, such as equal protection and substantive due process, engenders legal uncertainty.

Part II of this Note will describe the politicization of the Supreme Court and explain that the judicial appointment process has always been political, but that the nature of the politics has changed. Part III will look at the historical and modern role of public opinion in the Court’s decision making. Part IV will argue that swing Justices, who play the decisive role in politically controversial cases, are the most attune to fluctuations in public opinion. Part V will explore the dangers of explicit judicial invocation of, and implicit reliance on, public opinion when deciding divisive Fourteenth Amendment issues without a clear constitutional standard for courts to follow. This Note will conclude by asserting that the Court should formulate and apply a standard comparable to the Eighth Amendment’s “evolving standards of decency” when invoking public opinion in Fourteenth Amendment cases.

II. POLITICIZATION OF THE SUPREME COURT

What legal scholars and political scientists typically refer to as the politicization of the Supreme Court is not remarkable in itself. To a large extent, politics have always dominated the nomination and confirmation process. Americans first witnessed this in 1795 when anti-Federalist
forces defeated George Washington’s nominee for Chief Justice. More than a century later, in 1916, the nation saw it in the contentious Louis Brandeis hearings, in what one scholar described as “the most bitter and most intensely fought [confirmation battle] in the history of the Court.” Americans observed it once again in 1987 with the highly publicized Robert Bork debacle. Clearly, the politics of judicial selection is nothing new. What is remarkable—and alarming—is the politicization of judicial decision making, arguably beginning with Brown, which transformed the nature of the confirmation process and opened the door to a series of other politically charged decisions. During this period the Court more overtly embraced public opinion in its jurisprudence.

A. Nature of Political Battles Over Supreme Court Nominees

Historically, the confirmation process has reflected the political battles of the day. For example, regional conflict consumed late eighteenth-century and early nineteenth-century politics. Presidents of that era felt obligated to replace a Justice from one region with a Justice...
from the same region.\textsuperscript{25} Then, as a wave of European immigrants brought religious tensions to the forefront of American political life, the tradition of a “‘Catholic seat’” and a “‘Jewish seat’” emerged.\textsuperscript{26} Thereafter, a preoccupation with racial, gender, and ethnic diversity on the Court developed.\textsuperscript{27} Today the increasing polarization of political parties has largely divided Americans ideologically, instead of along regional, religious, or racial lines.\textsuperscript{28} (Note that the composition of the current Court includes six Catholic Justices, two Jewish Justices, and two Justices from Trenton, New Jersey.)\textsuperscript{29} Traditionally,

presidents had sought nominees who shared their ideological goals, but they didn’t go to great lengths to analyze how an appointee would rule as a justice. That changed as the Supreme Court became more involved in social issues. Presidents began seeking nominees they thought would reflect their own positions.\textsuperscript{30}

\textbf{B. Transformation of the Judicial Appointment Process}

The Court’s activist stance in \textit{Brown}, and later in \textit{Roe v. Wade},\textsuperscript{31} prompted the most recent—and most transparent—transformation of judicial appointments.\textsuperscript{32} No less significant to this transformation was

\begin{itemize}
  \item \textsuperscript{25} \textsuperscript{Id.}
  \item \textsuperscript{26} \textsuperscript{Id. at 338.}
  \item \textsuperscript{27} RICHARD DAVIS, ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS 48-49 (2005).
  \item \textsuperscript{28} \textsuperscript{See} TOOBIN, supra note 24, at 338.
  \item \textsuperscript{30} \textsuperscript{See} GREENBURG, supra note 21, at 40; \textit{see also} MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 344 (2005) (arguing that the nomination and confirmation process is “[t]he mechanism by which the Supreme Court gets in line with the rest of the political system”). Tushnet asserts that “presidents and justices know where the nation is and what it will tolerate” and that “over the medium run what happens to the Court will depend on what the people choose when they elect a president and a Senate.” \textsuperscript{Id.}
  \item \textsuperscript{31} 410 U.S. 113, 153 (1973) (holding that abortion is a liberty interest protected by the Due Process Clause).
  \item \textsuperscript{32} \textsuperscript{See} WITTES, supra note 17, at 60 (“The courts now intervene in a breathtaking array of democratic decisions and reserve the power to regulate questions of social policy at the core of Americans’ sense of autonomy and identity. That change began before \textit{Brown}, but \textit{Brown} crystallized it, and \textit{Roe} later dramatically reinforced it.”).
\end{itemize}
the 1913 ratification of the Seventeenth Amendment, which provided for
the direct election of senators.33 It is no coincidence that after 1913,
Senate began playing a more substantial role in judicial confirmation
hearings, especially as Supreme Court decisions became entrenched in
public debate.34 Because the people could now hold their senators
electorally accountable, senators were forced to pay attention to policies
that concerned their constituents.35 One principal concern that arose after
Brown was the Court’s perceived usurpation of policy areas traditionally
reserved to congressional purview.36 While public debate surrounding
controversial decisions handed down by the Court “is not just a
contemporary phenomenon,”37 the polemic nature of judicial
nominations is a more recent development.

33. U.S. Const. amend. XVII, cl. 1. “[S]ince the ratification of the Seventeenth
Amendment . . . the states cannot control their own creation, the central government.” George
Steven Swan, The Political Economy of Congressional Term Limits: U.S. Term Limits, Inc. v.
Thornton, 47 ALA. L. REV. 775, 822-23 (1996) (citations omitted). Specifically, ratification
“insulated Senators from state legislative reprisals.” Id. at 786; see also Michael J. Gerhardt,
Toward a Comprehensive Understanding of the Federal Appointments Process, 21 HARV. J.L.
& PUB. POL’Y 467, 489 (1998) (“One obvious effect of the Seventeenth Amendment was to make the
Senate’s constitutionally imposed duties, such as the confirmation of presidential nominees, subject
to popular review, comment, and reprisal.”). But see Mark R. Brown, Ballot Fees As Impermissible
states define the qualifications of the Senate’s electors—be they members of the various state
legislatures or the population at-large”). Arguably then, under the Seventeenth Amendment, states
have retained a certain degree of influence over the Senate. See id.

34. The Brandeis hearings became a significant byproduct of the ratification of the
Seventeenth Amendment. WITTES, supra note 17, at 47-48. As “the first public, investigative
hearings conducted on a nominee by the Judiciary Committee,” his hearings “began the opening up
of what had previously been a closed and secretive Senate process.” Id. at 48. The next “critical shift
in the confirmation process began with Brown and established a new status quo as the Court’s
aggressiveness increased over the subsequent two decades.” Id. at 60.

35. See, e.g., Michael J. Klarman, Majoritarian Judicial Review: The Entrenchment Problem,
85 GEO. L.J. 491, 504 n.60 (1997); see also Barry Friedman, Dialogue and Judicial Review, 91
MICH. L. REV. 577, 621 (1993) (arguing that the Seventeenth Amendment was “the most significant
structural move toward . . . majoritarianism”).

36. See WITTES, supra note 17, at 81-82. Today the courts “have their hands in a mind-
boggling array of political decisions in which they would not have involved themselves in the past,”
including affirmative action, medical marijuana, and the so-called right to die. Id. at 82. Critics of
djudicial activism argue that the Supreme Court is a countermajoritarian institution and, as such, is
ill-suited for this policy-making role. See Barry Friedman, The History of the Countermajoritarian
(discussing the origins of and problems associated with the Court’s perceived countermajoritarian
role).

37. MICHAEL J. PERRY, WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME
COURT 3 (1999).
The claim at the heart of today’s controversy is substantially the same claim that was at
the heart of most earlier controversies about constitutional rulings by the Court—
namely, that in the guise of interpreting the Constitution, the Supreme Court is actually
The first Supreme Court nominee after Brown was John Marshall Harlan, nominated by President Eisenhower in 1955. His nomination “marked the first time the Senate sought live testimony from a nominee... about his view of specific cases and about his judicial philosophy.” The “segregationists” took center stage during Harlan’s confirmation hearings, hoping to limit the reach of Brown by weeding out nominees sympathetic to desegregation. However, “[t]he norm against asking ‘a man what he will do’ was still so strong, and the endeavor of probing a nominee’s substantive views on a pending case therefore so disreputable, that they made some effort to mask what they were doing.” Ironically, “[t]heir questions appalled the liberals of their day, including some who... would go on to adopt their questioning tactics.” President Richard Nixon’s threat to upend the Warren Court legacy by nominating conservative Justices to the bench prompted the liberal senators to change their tune. The “effort to mask” the nature

usurping prerogatives that under the Constitution belong to one or more other branches or agencies of government.

Id. at 4.

38. See Witte, supra note 17, at 60; The Oyez Project, John M. Harlan, http://www.oyez.org/justices/john_m_harlan2 (last visited Mar. 31, 2010).

39. Witte, supra note 17, at 60. “For most of American history, the Senate considered Supreme Court nominees without soliciting their input. Politicians considered it an intolerable affront to judicial independence to ask a nominee how he would vote on a matter; to answer any such question was unthinkable.” Id. at 60-61.

40. Id. at 65-68; see also Bradford Snyder, How the Conservatives Canonized Brown v. Board of Education, 52 RUTGERS L. REV. 383, 400 (2000) (“Harlan’s nomination ignited a swift southern backlash. No name... was more anathema to the ears of the southern segregationists than that of John Marshall Harlan. Harlan’s grandfather and namesake had authored the famous dissent in Plessy v. Ferguson in which he wrote: ‘Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.’ Although the elder Harlan’s dissent was not even cited in Brown, the reaction to his grandson’s Supreme Court nomination was predictable.” (citations omitted)).

41. Witte, supra note 17, at 65. Southern senators did not question Harlan specifically about desegregation but instead focused on political opinions that would reveal his social philosophy. “Instead of focusing on desegregation itself, [Southern senators] attacked Harlan’s relationship with a group advocating closer ties with England and his having studied at Oxford, painting him as favoring world government.” Id.; see also Snyder, supra note 40, at 401 (“They even accused Harlan, an extremely prominent Wall Street lawyer, a Second Circuit judge who had upheld several Smith Act convictions, and eventually the most conservative member of the Warren Court, of harboring ‘Communist sympathies.’”).

42. Witte, supra note 17, at 75.

43. Id. at 76-78. During his first term, President Nixon nominated six individuals to the Supreme Court, four of whom the Senate confirmed. Id. at 76. The philosophy of Nixon’s nominees triggered a complete switch in senatorial tactics—liberals, like the Southern senators, began actively questioning judicial nominees. Id.

44. Id. at 65.
of the questioning was abandoned as liberals, too, began actively probing judicial candidates. 45

But the true watershed moment was Roe, which forever changed the tenor of confirmation hearings. 46 More than a decade passed, however, before the ripple effects of that decision became readily apparent. The anti-abortion movement had not yet galvanized itself by the nomination of John Paul Stevens in 1975. 47 Because religious conservatives were still not a potent political force in 1981, President Ronald Reagan ignored their opposition to Sandra Day O’Connor. 48 Everything changed in 1987 when President Reagan nominated Robert Bork, the patron saint of the right-to-life movement. 49 A Democratic majority in the Senate defeated Bork largely because of his narrow views on a constitutional right to privacy. 50 Bork’s failed nomination definitively pushed abortion to the forefront of American politics—all nominees since Bork have been questioned about Roe and privacy rights, 51 including Sonia Sotomayor. The following is an excerpt from a back-and-forth about privacy rights between Senator Tom Coburn (R-OK) and Sotomayor during her confirmation hearings. Senator Coburn noted:

45. Id. at 76 (“They did this, the record makes abundantly clear, quite consciously, and for a simple reason: They now had a lot to protect in the aggressive liberalism of the Warren Court.”). Some question the propriety of senators’ modern questioning tactics in judicial confirmation hearings. See, e.g., Neal Kumar Katyal, Legislative Constitutional Interpretation, 50 DUKE L.J. 1335, 1342 (2001) (noting that confirmation hearings could be a forum for senators to instruct nominees and sitting Justices on constitutional interpretation through the advice and consent power). “Solemn discussions about constitutional law during Supreme Court confirmation hearings may cause even the more political senators to rise above their baser motives.” Id.

46. See GREENBURG, supra note 21, at 221 (“The landmark decision that is both a rallying cry and a dividing line, that is passionately viewed as either a key protector of women’s rights or a lawless exercise in judicial overreaching, that has reshaped the nation’s political parties and has been a core issue in everything from school board elections to presidential contests, that has become the ultimate touchstone in the ongoing conflict over culture and values throughout America, has for more than two decades consumed Supreme Court nominations and confirmation proceedings.”).

47. Id. at 222.

48. Id.

49. Id. at 223 (“Roe and the issue of abortion became more prominent in the later Reagan years, when the administration began urging the Supreme Court to overturn the decision. Groups on both sides of the issue organized to fight.”).

50. See Reva B. Siegel, Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA, 94 CAL. L. REV. 1323, 1409 (2006) (“Robert Bork had with regularity publically questioned Griswold, [and] Roe . . . . Bork’s expressed skepticism about the constitutional foundations of sex discrimination and privacy case law drew fire during his confirmation hearings and played a crucial role in the Senate’s refusal to confirm him to the Supreme Court.”).

51. See GREENBURG, supra note 21, at 223.
You’ve been asked a lot of questions about abortion. And you’ve said that Roe v. Wade is settled law. Where are we today? What is the settled law in America about abortion?

JUDGE SOTOMAYOR: I can speak to what the court has said in its precedent. In Planned Parenthood versus Casey, the court reaffirmed the core holding of Roe versus Wade, that a woman has a constitutional right to terminate her pregnancy in certain circumstances. In Casey, the court announced that in reviewing state regulations that may apply to that right, that the court considers whether that regulation has an undue burden on the woman’s constitutional right. That’s my understanding of what the state of the law is.

SEN. COBURN: So let me give you a couple of cases. Let’s say I’m 38 weeks pregnant and we discover a small spina bifida sac on the lower sacrum, the lower part of the back, on my baby, and I feel like I just can’t handle a child with that. Would it be legal in this country to terminate that child’s life?

JUDGE SOTOMAYOR: I can’t answer that question in the abstract, because I would have to look at what the state of the state’s law was on that question and what the state said with respect to that issue.

While Sotomayor refused to answer Coburn’s hypothetical conclusively, Republicans, as the minority party in Congress, clearly could not derail Sotomayor’s nomination on this issue.

Interest groups have also jumped into the fray. “Interest groups . . . use the same tools to influence judicial appointments as they do in opposing or supporting any piece of legislation.” Groups often encourage their members to “write, call, and lobby” congressmen in support of their agendas. After President George W. Bush nominated John Roberts to the Court, NARAL Pro-Choice America organized an opposition campaign and mobilized its members to contact their senators “to urge them to oppose his confirmation.”

54. David R. Stras, Understanding the New Politics of Judicial Appointments, 86 TEX. L. REV. 1033, 1062 (2008) (reviewing WITTES, supra note 17, and GREENBURG, supra note 21 (“The prominence and influence of external forces, most notably organized interest groups, have . . . grown over the past twenty years, further politicizing the judicial appointments process.”)).
55. Id. at 1074.
56. Id.
57. Id.
groups also launched opposition strategies after Sotomayor’s nomination, including the Family Research Council, the Judicial Confirmation Network, and the Southern Baptist Convention, which focused on the controversial New Haven firefighters case\(^{58}\) and Sotomayor’s “wise Latina” statement.\(^{59}\) “These [interest group] efforts have apparently been effective in influencing senators.”\(^{60}\)

### III. Role of Politics and Public Opinion in Supreme Court Decision Making

As the public (and interest groups) became more engaged in the issues before the Supreme Court, so did the political branches.\(^{61}\) Then, once Congress and the President focused their policy agendas on assessments of public opinion—particularly regarding constitutional issues and the Justices appointed to the bench—so too did the Court.\(^{62}\) “Few dispute that public opinion is reflected in the choices of the Court.”\(^{63}\) Indeed, the Supreme Court could be called a reactionary force that responds to the ebb and flow of the political tide.\(^{64}\) More questionable is “[t]he mechanism by which [this reflection] takes place”—either indirectly or directly.\(^{65}\) One theory is that public opinion indirectly affects judicial decision making through popular elections.\(^{66}\) A

---

58. Ricci v. DeStefano, 530 F.3d 87 (2d Cir. 2008) (affirming in a three-paragraph opinion the lower court’s rejection of white firefighters’ Title VII claim), \(\text{rev'd, 129 S. Ct. 2658 (2009).}\)


60. Stras, supra note 54, at 1063.

61. See supra Part II.B.

62. See infra Part III.A-C.


64. See, e.g., TOOBIN, supra note 24, at 340 (“T]he Court is a product of a democracy and represents, with sometimes chilling precision, the best and worst of the people.”); see also Thomas W. Merrill, The Making of the Second Rehnquist Court: A Preliminary Analysis, 47 ST. LOUIS U. L.J. 569, 620-22 (2003) (explaining the external strategic model, which posits that the Court aligns itself with political institutions and the general public); TUSINET, supra note 31, at 344 (arguing that the politicized nomination and confirmation process aligns the Court with the political system).

65. McGuire & Stimson, supra note 63, at 1020.

66. See id. McGuire posits that “elections determine the composition of Congress and the White House, whose members in turn select the justices. Presidents and Senators, who necessarily reflect majority preferences, are motivated to select justices with whom they share an ideological affinity.” Id. Some scholars theorize that the Supreme Court serves a majoritarian role, representing “numerically large, economically and politically dominant majorities.” See Thomas R. Marshall, The Supreme Court and the Grass Roots: Whom Does the Court Represent Best?, 76 JUDICATURE 22, 24 (1992); see also Neal Devins, Tom Delay: Popular Constitutionalist?, 81 CHI.-KENT L. REV. 1055, 1067 (2006) (arguing that the Court is more likely than Congress to heed majoritarian preferences, as “there is strong evidence suggesting that the Supreme Court may be a more accurate
second theory holds that there is “a direct causal connection between public preferences and Supreme Court policy.” Specifically, under this theory it is argued that, even within a countermajoritarian framework, “the justices’ protection of minority interests tends to occur only when public opinion supports such outcomes.”

This second theory has been tempered by the proposition that while public opinion might influence individual Justices over time, it does not necessarily determine the outcome of particular cases. In other words, if Supreme Court decisions are in line with popular preferences, it is not because the Court reflects public opinion, but rather because the Court shapes it. In this view, most would agree that the Court wields enormous power over our everyday lives. Beginning in the mid-1950s, Chief Justice Earl Warren steered the Court—and the country—toward a new social reality, redefining seemingly inherent values and shaping a new public consensus. But whether Supreme Court decisions shape or

---

67. McGuire & Stimson, supra note 63, at 1020.
68. Another theory is that the Court takes a countermajoritarian approach, responding “to small, unpopular, or politically impotent minorities who have little other effective access to the political arena.” Marshall, supra note 66, at 24; see also Lawrence Friedman, Public Opinion and Strict Scrutiny Equal Protection Review: Higher Education Affirmative Action and the Future of the Equal Protection Framework, 24 B.C. THIRD WORLD L.J. 267, 271 (2004) (arguing that “the judiciary serves a democracy-reinforcing function by, among other things, preventing political majorities from using lawmaking processes to discriminate against certain individuals”).
69. McGuire & Stimson, supra note 63, at 1020. Scholars debate “the degree to which mass opinion actually moves the Court in one direction or another.” Id. at 1020-21. Some note “the general correspondence between public opinion and judicial outcomes,” while others ask “whether the Court’s liberalism follows the ebb and flow of public mood, after controlling for its indirect effects.” Id.
70. Id. at 1021 (“That the votes of a given member of the Court are influenced by mass opinion does not demonstrate—at least not directly—that the Court’s cases are decided any differently as a consequence.”).
71. See, e.g., Erwin Chemerinsky, The Supreme Court, Public Opinion, and the Role of the Academic Commentator, 40 S. TEX. L. REV. 943, 955 (1999) (“The Supreme Court’s rulings have enormous impact on people in the most important, and sometimes the most intimate, aspect of their lives.”).
72. Tushnet, supra note 31, at 343 (“[T]he real story of the Warren Court was that it got ahead of the political consensus for a while and then the consensus caught up.”). Tushnet also asserts that while an emerging fiscal conservatism characterized the Rehnquist Court, a comparable cultural conservatism never materialized. Id. at 10. He credits “the patterns occurring in American politics generally” with conservatives’ failures to significantly scale back and upheave the Warren Court legacy. Id. In other words, the Rehnquist Court stayed in line with public opinion fiscally and socially.
reflect popular preferences, it is evident that public opinion historically has been a factor in judicial decision making, which is a trend that continues today. As will be discussed in Part V, this trend has had a telling effect on politically volatile areas of constitutional law, namely equal protection and substantive due process.

A. Public Opinion Has Historically Been a Factor in Judicial Decision Making

That public opinion has an effect on judicial decision making is not a recent phenomenon. For example, in United States v. Hudson, Justice William Johnson invoked public opinion in holding that federal courts lacked the authority to create criminal common law, reasoning that the public would not accept the Court’s intervention in that area. The Steel Seizure case is another example of the Court’s reliance on public opinion, at least according to William Rehnquist who, as a law clerk to Justice Robert H. Jackson, concluded that popular sentiment influenced the Court’s handling of that case. Newspapers and the public followed the case closely from the very beginning. The government’s [initial] position—that the President had a wide-ranging inherent power to deal with emergencies, and that the Bill of Rights


75. 11 U.S. (7 Cranch) 32 (1812).

76. Id. at 32; see also Editorial, Can the Supreme Court Guarantee Toleration?, New Republic, June 17, 1925, at 85, 87 (“To a large extent the Supreme Court, under the guise of constitutional interpretation of words whose contents are derived from the disposition of the Justices, is the reflector of that impalpable but controlling thing, the general drift of public opinion.”).

77. Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure), 343 U.S. 579, 585 (1952) (holding that the president does not have the power to seize private property absent an enumerated or statutory authority).


79. See William H. Rehnquist, Constitutional Law and Public Opinion, 20 Suffolk U. L. Rev. 751, 765 (1986) (“From beginning to end, the case and its progress through the courts was not only a national event, but very much a local event in Washington, and the case was covered to a fare-thee-well by the Washington daily newspapers.”).
limited Congress but not the President, shocked almost every observer of the Washington scene.\textsuperscript{80} The case’s speedy progression from the district court to the Supreme Court, the public’s ambivalence about the Korean War, and President Harry Truman’s low approval rating also indicate that public opinion influenced the outcome, especially considering that eight of the Justices had been appointed by Democratic presidents.\textsuperscript{81} Ultimately, the outcome was one that “would not have [been] predicted simply by reading the relevant cases and assessing what was thought to be the dominant jurisprudential outlook of the court which decided the case.”\textsuperscript{82}

An early draft of Justice Jackson’s much-acclaimed concurrence in \textit{Steel Seizure} cautioned that congressional authority should serve as a check on presidential power during certain crises.\textsuperscript{83} Justice Jackson’s basic point was that if Congress cannot rally to serve as that check, then the public will have no choice but to turn to the executive, who could seize the opportunities afforded by this shift in a way detrimental to the American system of government.\textsuperscript{84} Interestingly, a comparable situation emerged from the failure of the political branches in the 1950s to resolve escalating racial issues, compelling the Warren Court to step in and end school segregation.\textsuperscript{85} Ever since, when it comes to protecting—and creating—individual rights, the public has largely relied on the Supreme Court rather than lawmakers.\textsuperscript{86} This reliance is one motivator behind the Court’s increased use of public opinion in its judicial decision making. Ironically, even though the Court might have admirable intentions in factoring public opinion into its analysis, shifts in popular preferences might produce transitory outcomes over the long run. Such transience would ultimately be more detrimental to the public than would the

\begin{enumerate}
\item \textsuperscript{80} Id. Justice Rehnquist noted that the government quickly realized its mistake in making this argument and changed its position. \textit{Id}.
\item \textsuperscript{81} See \textit{id.} at 766-67. This point is significant because President Truman was a Democrat. Biographical Directory of the United States Congress, Truman, Harry S., http://bioguide.congress.gov/scripts/biodisplay.pl?index=T000387 (last visited Mar. 31, 2010).
\item \textsuperscript{82} Rehnquist, \textit{supra} note 80, at 768.
\item \textsuperscript{83} See Adam J. White, \textit{Justice Jackson’s Draft Opinions in the Steel Seizure Cases}, 69 ALB. L. REV. 1107, 1123 (2006).
\item \textsuperscript{84} \textit{Id}.
\item \textsuperscript{85} See \textit{supra} notes 12-13 and accompanying text.
\item \textsuperscript{86} Patrick M. Garry, \textit{Liberty from on High: The Growing Reliance on a Centralized Judiciary to Protect Individual Liberty}, 95 KY. L.J. 385, 423 (2006) (“The increasing role of the judiciary in American politics is not the sole work of the courts, but rather has been accomplished with at least the passive acquiescence of the public.”). Garry asserts that the public’s loss of faith in the democratic process contributed to the Court’s assumption of a legislative role. \textit{Id} at 424.
\end{enumerate}
Justices ignoring their opinion when deciding individual cases.87 The people need and expect consistent legal analysis from the Court.

B. “Reliable” Method for Measuring Public Opinion Established

Historians typically cite three eras where the federal government broadened its protection of the American people: Reconstruction, the New Deal, and the Civil Rights Era of the 1960s.88 During Reconstruction and the New Deal, the political branches took the reins, while the Supreme Court limited their initiatives.89 But during the Civil Rights Era, “the Court arguably took the leading role.”90 Although Brown is often credited with triggering the modern politicization of judicial decision making,91 the Court’s intervention in social policy arguably predates that landmark decision. The Court’s decision in United States v. Carolene Products Co,92 has been pointed to as a credible benchmark.93 The Court applied a low standard of judicial review (rational basis) to the economic regulation at issue in that case, but Justice Harlan Fiske Stone suggested in a footnote that other types of laws—such as legislation aimed at “discrete and insular minorities”—might require a heightened standard of judicial review.94 But regardless of where credit is due, it has become the assumed responsibility of the Court “to safeguard the procedural norms of democratic decision making and to protect the substantive rights of at least certain political and social

87. See infra note 236 and accompanying text.
89. Id. (“Indeed, the Court served as a major obstacle to Congress’ protecting its people, restrictively reading congressional power to protect individual rights during the first two eras.”).
90. Id. Zietlow noted that even though the Court created desegregation policy, “federal legislation was necessary to insure the promise of equality that the Court had articulated in Brown.” Id. Moreover, “[t]he only time in history that the Court has adopted a deferential approach to Congress’ power to enact civil rights legislation was during the 1960s, a time when the Court had also embraced its own role as protector of ‘discrete and insular minorities.’” Id. at 510-11.
91. See WITTES, supra note 17, at 60.
92. 304 U.S. 144, 148 (1938) (holding a federal law prohibiting the interstate shipment of certain milk products under the Commerce Clause constitutional).
93. See Barnum, supra note 73, at 663-64. Barnum also points out that “the Court’s decisions on school segregation, interracial marriage, and abortion, although apparently compatible with the trend of public opinion, were nevertheless opposed by a majority of Americans at the time they were handed down.” Id. at 663.
94. Carolene Prods., 304 U.S. at 152 & n.4. For an explanation of the meaning of Justice Stone’s famous “Footnote Four,” see TOOBIN, supra note 24, at 209 (“In cases about economic or property rights, the justices would defer to the political process. But when it came to laws that appeared to be targeted at racial minorities or other ‘discrete and insular minorities,’ the Court would apply ‘more searching judicial scrutiny.’”).
Accordingly, the Court has immersed itself in “conflicts over racial segregation, race-based affirmative action, sex-based discrimination, homosexuality, abortion, and physician-assisted suicide.”

In 1935, a few years prior to Carolene Products, George Gallup and Elmo Roper established a new method for surveying public opinion. Their quota-sampling model incorporated government data and election figures to poll a representative sample of Americans that would ideally “reflect the views” of the population at large. Several studies indicate that individual Justices increasingly factored public opinion into their decision making after Gallup and Roper developed their polling technique, which is arguably a reliable indicator of popular preferences. In the context of judicial decision making, polls are more reliable than other assessment mechanisms, such as “the judge’s impression of what public sentiment may be, the judge’s own opinion as a proxy, or the judge’s own unscientific poll.” But critics argue that polls are quintessentially unreliable, explaining that poll questions do not

95. Barnum, supra note 73, at 663-64. But see John Hart Ely, Toward a Representation-Reinforcing Mode of Judicial Review, 37 Md. L. Rev. 451, 456 (1978) (suggesting that Footnote Four places the “focus not on whether this or that substantive value is unusually important or fundamental, but rather on whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted.”). The Court’s intervention in these areas has colored the political discourse. See, e.g., Transcript: Final Presidential Debate, CBSNEWS, Oct. 16, 2008, http://www.cbsnews.com/stories/2008/10/16/politics/2008debates/main4525254.shtml; see also The Situation Room (CNN television broadcast June 26, 2008), transcript available at http://transcripts.cnn.com/TRANSCRIPTS/0806/26/sitroom.02.html (providing the reactions of 2008 presidential candidates Barack Obama and John McCain to the Supreme Court’s decision in District of Columbia v. Heller).

96. Perry, supra note 37, at 15 (“Several of the most divisive moral conflicts that have beset us Americans in the period since the end of World War II have been transmuted into constitutional conflicts—conflicts about what the Constitution of the United States forbids—and resolved as such.”). 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.”). Gallup and Roper’s new model “allowed cheaper, faster, and more accurate nationwide polls than those in earlier years. For the first time nationwide polls included questions on Supreme Court decisions.” Id.

97. See Barry Cushman, Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s, 50 BUFF. L. REV. 7, 14-16, 18-19 (2002), for an account of the creation of Gallup and Roper’s polling technique.

98. Id. at 14; see also Thomas R. Marshall, Public Opinion and the Rehnquist Court 2 (2008) (“[U]ntil 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.”). Gallup and Roper’s new model “allowed cheaper, faster, and more accurate nationwide polls than those in earlier years. For the first time nationwide polls included questions on Supreme Court decisions.” Id.

99. See, e.g., Marshall, supra note 98, at 36 tbls.2.1 & 2.2, 37 tbl.2.3 (comparing nationwide public opinion polls with Supreme Court decisions).

100. See Cushman, supra note 97, at 14-16, 18-19 (detailing creation of Gallup and Roper’s new polling technique).

precisely reflect the legal issues before the Court. Nevertheless, it is undisputable that polls play an important role in American politics.

Technological innovations have also contributed to the effect that public opinion and politics have on the Supreme Court. Significantly, television first became available during the period when Gallup and Roper developed their polling model. This development—particularly after the introduction of C-SPAN—heightened public awareness of the Supreme Court. Today, political candidates know that their constituents are attuned to the decisions handed down by the Court and actively campaign on the type of Justices they would appoint to the bench. Their emphasis on the makeup of the Court and the resultant politicization of the appointment process has trickled down into the inner workings of the Court itself.

C. Modern Trend of Looking to Public Opinion in Judicial Decision Making

Unlike the executive and legislative branches, the judicial branch is not electorally accountable to the public. The Justices effectively have life tenure, subject of course to impeachment. Consequently, some scholars argue that any effect public opinion has on individual judicial decisions is marginal. They liken its impact to the influence that

102. See Barnum, supra note 73, at 654 n.6 (“[T]he items used in opinion surveys do not always precisely paraphrase the legal issues addressed by the Court. Thus, the extent of agreement or disagreement between the Court and the public is not always entirely clear.”).

103. Polls' rise in influence coincided with the countermajoritarian approach taken by the Court after Carolene Products Co. See supra note 97 and accompanying text (citing studies that judges increasingly factored public opinion into their decision making after Gallup and Roper established their polling technique in 1935). The Court decided Carolene Products in 1938. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

104. See Television History—The First 75 Years, Brief History of TV, http://www.tvhistory.tv/History%20of%20TV.htm (last visited Mar. 31, 2010) (noting that the first mechanical television sets were sold to the public between 1928 and 1934); see also supra text accompanying note 97.

105. See, e.g., Marilyn Duff, C-SPAN Helps Viewers Bypass Liberal Spin of Major Media, HUM. EVENTS, Feb. 17, 1995, at 12 (“Those who testified in [Clarence Thomas'] defense, as well as those who cast doubt on the credibility of Anita Hill, were . . . allowed to have their say . . . on C-SPAN. The American public saw the truth, responded to their senators and Thomas was confirmed.”); see also Chemerinsky, supra note 71, at 950 (“The educational role of the media and commentators is important because the public generally has relatively little knowledge about the Court, its processes, or even the Constitution.”).

106. See supra note 96.

107. U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

108. See Roesch, supra note 73, at 392 (“Judges are not weathervanes, and public opinion appears to have only a minor influence in the decision-making process.”); see also William Mishler & Reginald S. Sheehan, The Supreme Court as a Countermajoritarian Institution? The Impact of
Justices’ own political tendencies have on their judicial philosophies.\textsuperscript{109} Even several of the Justices themselves have, over the years, disavowed the notion that public opinion has—or should have—any influence on their decision making. For example:

Justice Douglas described judges as strong amid the winds of political change. Chief Justice Burger wrote that “legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.” Justice Powell agreed, noting that “the assessment of popular opinion is essentially a legislative, not a judicial, function.” Justice Frankfurter also wrote that courts are unlike representative bodies because they “are not designed to be a good reflex of a democratic society.”\textsuperscript{110}

Nevertheless, Justice Rehnquist acknowledged in a speech in the mid-1980s that because the Justices are not isolated from current events, they cannot completely ignore public opinion on political, social, and constitutional issues.\textsuperscript{111} Even if public opinion has only a marginal influence in individual cases, that influence can be consequential in the aggregate.\textsuperscript{112} In fact, in an empirical study of the effect of public opinion on judicial decision making, Thomas Marshall found that “[a]t 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

\textit{Public Opinion on Supreme Court Decisions}, 87 AM. POL. SCI. REV. 87, 88 (1993) (noting that opinion studies tend to focus on specific policy issues and individual Court decisions). This focus assumes, in effect, that the impact of public opinion is direct and immediate—that the decisions of justices on pending cases are influenced by relevant public opinion polls seen in the morning paper. A more realistic assumption is that public opinion, if it is important, influences the Court as a result of gradual, almost imperceptible changes in the attitudes and beliefs of individual justices as they adapt, consciously or not, to long-term, fundamental trends in the ideological temper of the public.

Mishler & Sheehan, \textit{supra}, at 88.


110. \textit{Id.} at 386 (citations omitted).

111. \textit{See} GREENBURG, \textit{supra} note 21, at 26 (highlighting a speech given by Justice Rehnquist about reasons presidents largely have failed to transform the Supreme Court); \textit{see also} Rehnquist, \textit{supra} note 79, at 768 (conceding that Justices and other judges might unconsciously be influenced by public opinion).

The judges of any court of last resort... work in an insulated atmosphere in their courthouse where they sit on the bench hearing oral arguments or sit in their chambers writing opinions. But these same judges go home at night and read the newspapers or watch the evening news on television; they talk to their family and friends about current events... Judges, so long as they are relatively normal human beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs.

\textit{Id.}

112. \textit{See} Roesch, \textit{supra} note 73, at 392.
opinions per term,\[113\] doubling the number of direct mentions made by the Warren and Burger Courts.\[114\] It is no coincidence that the Court increasingly incorporated public opinion into its decisions after the development of the Gallup and Roper polling technique. The Court’s post-Carolene Products approach evolved almost simultaneously alongside this polling innovation and was indicative of the alarming role that public opinion would play in the Court’s substantive due process and equal protection analysis.\[115\] As will be discussed in Part IV, this role is particularly pronounced among the swing Justices on the Court.

1. Reasons Justices Might Heed Public Opinion

The Court is indisputably affected by changes in public opinion, but no one Justice attaches the same weight to popular mood shifts. There are general reasons the Court as a whole might consider popular sentiment. One scholar suggests that Supreme Court Justices are more likely than Congress to heed popular preferences because the Court is not controlled by interest groups or political agendas.\[116\] Other scholars argue that the Court depends on public support for its legitimacy, so the

113. MARSHALL, supra note 98, at 4.

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,” [sic] “public trust,” or “public attitudes and beliefs”).

Id. Each of the fourteen Justices who served during Rehnquist’s tenure as Chief Justice had at least one direct mention. Id. at 5.

114. Id. at 5; see Mishler & Sheehan, supra note 108, at 88 (noting that concrete evidence is lacking about the relationship between earlier Court decisions and public opinion because “scientific opinion polls are of relatively recent origin” (citation omitted)); see also Robert A. Dahl, Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker, 6 J. PUB. L. 279, 284 (1957) (“For the greater part of the Court’s history . . . there is simply no way of establishing with any high degree of confidence whether a given alternative was or was not supported by a majority or a minority of adults or even of voters.”).

115. See MARSHALL, supra note 98, at 43 (arguing that in light of Justice Stone’s famous footnote in Carolene Products, “courts should take a critical look at laws or policies that infringe upon Bill of Rights or Fourteenth Amendment protections for unpopular or controversial groups”); see also United States v. Carolene Prods. Co. 304 U.S. 144, 152 n.4 (1937). Marshall cautions courts to ignore majority public opinion in these cases. MARSHALL, supra note 98, at 43. But see Mishler & Sheehan, supra note 108, at 88 (arguing that “public opinion studies [tend] to focus on the decisions of the Court only in a few landmark cases,” meaning that the “studies are limited in what they can tell us about the relationship of broader trends in public opinion and the myriad, more typical cases decided by the Court with little fanfare or publicity”).

116. See Devins, supra note 66, at 1062 (“Against the backdrop of increasing partisanship in Congress . . . there is reason to think that the Supreme Court will steer a more centrist course than Congress or the White House. The Supreme Court, in other words, better represents median voters than does the Congress, whose energy is focused on the interest groups and partisans who dominate party politics and party primaries.”).
Justices, like politicians, take a results-oriented approach.\textsuperscript{117} This legitimacy theory posits that Justices modify their own views to match those of the general public so that their policy decisions will be enforced.\textsuperscript{118} One critic of this theory argues that the Court’s legitimacy is actually “based on the perception and reality that it does \textit{not} decide cases based on the personal interests of the Justices or based on external lobbying and pressures.”\textsuperscript{119}

Heeding public opinion is also part and parcel of certain canons of constitutional construction. For example, when interpreting the text of a constitutional provision, judges can inquire “what norm [the Framers] (probably) understood, or would have understood, the provision to communicate.”\textsuperscript{120} However, “[o]ne can [also] inquire what norm the provision in question is now taken to represent—or what norm it shall hereafter be taken to represent.”\textsuperscript{121} One way judges discern these norms is by looking to measurements of public opinion, such as polling data, state legislative action, or decisions made by sentencing juries.\textsuperscript{122}

Vanity is a reason individual Justices might pay close attention to public opinion.\textsuperscript{123} Justice Anthony Kennedy has a particular “sensitivity to evolving social trends.”\textsuperscript{124} Kennedy’s “concern for his public persona” was recounted by one of his former law clerks, who said that his boss worried about how decisions would be perceived and how they would be treated by the media.\textsuperscript{125} It likewise has been suggested that the

\begin{itemize}
\item \textsuperscript{117} See Roesch, supra note 73, at 379, 390-91.
\item \textsuperscript{118} See Merrill, supra note 64, at 620 (“Justices behave strategically by modifying their preferences in light of the views of other political institutions and the general public. They do so, it is assumed, because they want their policy preferences to stick—to be respected and enforced by other power centers in society.”).
\item \textsuperscript{119} Chemerinsky, supra note 71, at 947 (emphasis added). Arguably then, the Court’s decisions are more likely to be enforced if the Justices do not take public opinion into account.
\item \textsuperscript{120} Perry, supra note 37, at 26.
\item \textsuperscript{121} Id. at 27 (emphasis added).
\item \textsuperscript{122} See Atkins v. Virginia, 536 U.S. 304, 314-15, 316 n.21 (2002) (citing state legislative action and polling data); Coker v. Georgia, 433 U.S. 584, 596 (1977) (noting that the actions of sentencing juries are a “significant and reliable . . . index” of the values of the public).
\item \textsuperscript{123} See Merrill, supra note 64, at 628-29. Merrill argues that “[h]aving a good reputation translates into tangible benefits, such as expense-paid appearances at seminars held in posh resorts, and intangible benefits, such as awards, honors, and praise from editorial writers and other opinion leaders.” Id. at 629.
\item \textsuperscript{124} Lisa K. Parshall, Redefining Due Process Analysis: Justice Anthony M. Kennedy and the Concept of Emergent Rights, 69 ALB. L. REV. 237, 242 (2005) (arguing that this sensitivity is why Justice Kennedy has not voted to overrule \textit{Roe v. Wade}).
\item \textsuperscript{125} Tusini\textasciitilde{e}, supra note 30, at 176 (“Kennedy ‘would constantly refer to how it’s going to be perceived, how the papers are going to do it, how it’s going to look.’” (quoting Jeffrey Rosen, The Agonizer, NEW YORKER, Nov. 11, 1996, at 82, 86)).
\end{itemize}
fallout from *Bush v. Gore*\(^{126}\) acutely affected Kennedy because the public viewed the result as politically motivated:

> Of the five justices in the majority, Kennedy had the hardest time with the aftermath of *Bush v. Gore* . . . . There would be, it turned out, two Anthony Kennedys on the Supreme Court—the one before December 12, 2000, and the one after—and his transformation was surely one of the most unexpected legacies of this epochal case.\(^{127}\)

Whatever the reason, it is clear that the Court in general and the Justices individually do, to a certain extent, heed public opinion in their decision making. This trend evolved as lawmakers and the public became more engaged in the issues before, and knowledgeable of the actors on, the Court. The cause and effect are circuitous: The Court carved out a niche for itself in creating and protecting individual rights; the people felt they should have a say in what those rights should be and looked to their lawmakers for support; electorally accountable senators became more engaged in the judicial confirmation process; judicial nominees were subjected to very public screening procedures and forced almost out of necessity to know where public opinion fell on highly charged issues; the Justices became, perhaps even subconsciously, accountable to the court of public opinion; and the Court felt compelled to create and protect individual rights in accord with popular preferences.

2. Examples Where Supreme Court Decisions Reflect Public Opinion

Thomas Marshall conducted an expansive analysis of public opinion polls during the Rehnquist Court era and concluded that a majority of Supreme Court decisions accorded with popular preferences.\(^{128}\) "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."\(^{129}\) Marshall found that about three of every five Rehnquist

---


127. TOOHIN, supra note 24, at 182.

128. MARSHALL, supra note 98, at 3. Marshall notes that “[w]hen 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. The justices could gauge public attention and interest from news reports, public statements, or interest group activities.” Id. at 16.

129. Id. at 3 (“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.”).
Court decisions accurately reflected polling data. He documented 111 poll-to-decision matches between 1986 and 2005, including decisions on the merits, denials of certiorari, and denials of injunctive relief. A majority of Americans agreed with the Court’s five-to-four decision in *Grutter v. Bollinger*, which held that the Equal Protection Clause did not prohibit the University of Michigan Law School from using race as a factor in admissions. The Court’s decisions in *Boy Scouts of America v. Dale*, *Bray v. Alexandria Women’s Health Clinic*, *Kansas v. Hendricks*, and *Troxel v. Granville* also reflected public opinion. Marshall describes fifteen models that could explain this link between Supreme Court jurisprudence and public opinion, some of which focus on public opinion itself, others on popular judicial theories (such as judicial restraint), the Justices’ backgrounds, the public’s reactions to Court decisions, and political realignment.

Most direct mentions of public opinion were seen in criminal cases; the second highest number of mentions came in substantive due process cases. Excluding denials of certiorari, the top two categories of Rehnquist-era cases that matched public opinion were “criminal rights, courts, police” at twenty-eight percent and “privacy, morality, abortion” at twenty percent—issues submerged in public debate. “Overall, nearly four-fifths of the Rehnquist Court’s direct mentions of

130. Id. at 35.
131. Id. at 27, 29. A poll-to-decision match describes a case that reflects the results of a poll that directly addressed the particular issue of that case. Id. at 26-27.
132. Id. at 168 app. 1.
134. 530 U.S. 640, 656 (2000) (holding that the First Amendment prohibits New Jersey from requiring Boy Scouts of America to retain a homosexual assistant scoutmaster in its organization).
135. 506 U.S. 263, 266, 277-78 (1993) (holding that the right to abortion does not preclude anti-abortion protesters from organizing demonstrations that block access to abortion clinics).
136. 521 U.S. 346, 356-57 (1997) (holding that Kansas’s Sexually Violent Predator Act satisfies substantive due process requirements because it requires a finding of dangerousness either to one’s self or to others as a prerequisite to involuntary confinement).
138. MARSHALL, supra note 98, at 165-67 app. 1.
139. Id. at 14-15. For example, one model posits that “the distribution and intensity of public opinion affect the Supreme Court’s level of agreement with public opinion.” Id. at 15. A second model contends that the Supreme Court has historically been “extremely deferential to federal laws and policies.” Id. at 16. A third model maintains that because the Court has traditionally deferred to federal policy, it has not been “as deferential toward challenged state and local laws and policies.” Id. at 16-17. Other examples focus on the Court’s “routine customs and norms” and the role of interest groups and political parties. Id. at 17-18.
140. Id. at 8.
141. Id. at 36 tbl.2.1.
142. Id.
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.\(^{143}\) Because individual Justices are likely to take public opinion into account when deciding cases, popular preferences have played, and will continue to play, a significant role in politicized areas of constitutional law.\(^{144}\)

3. Examples Where Supreme Court Has Explicitly Relied on Public Opinion

*Atkins v. Virginia*\(^{145}\) is a perfect example of the Court’s overt reliance on public opinion.\(^{146}\) A national consensus “reflected in [the] deliberations” of “the American public, legislators, scholars, and judges” influenced the *Atkins* Court’s reasoning and ultimately controlled the outcome.\(^{147}\) Thirteen years earlier, the Court, relying on state statutes and public opinion surveys, had found that there was no national consensus against imposition of the death penalty on the mentally retarded.\(^{148}\) The *Atkins* Court observed that much had changed since *Penry v. Lynaugh*, noting a “dramatic shift in the state legislative landscape.”\(^{149}\) In 1989, only two states prohibited execution of the mentally retarded.\(^{150}\) Responding to public outcry over *Penry* and high profile executions, state legislatures across the country enacted statutes prohibiting the death penalty in these circumstances.\(^{151}\) “It [was] not so much the number of these States that [was] significant, but the consistency of the direction of change.”\(^{152}\) The majority also cited polling data submitted in an amicus brief as evidence supporting its contention that most Americans believe the mentally retarded should not be subject to the death penalty.\(^{153}\) As will be explained in Part V, it

---

143. Id. at 9.

144. Id. ("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.").


146. MARSHALL, supra note 98, at 6-7.

147. 536 U.S. at 307.

148. *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989). Note that in *Penry*, Justice O’Connor was a member of the majority, id. at 307 (showing that Justice O’Connor delivered the opinion of the Court, except for Part IV-C), and later was a member of the six-to-three majority in *Atkins*, which relied on the shift in public opinion to prohibit the execution of the mentally retarded. *Atkins*, 536 U.S. at 305, 321 (showing that Justice Stevens delivered the opinion of the Court, joined by Justices O’Connor, Kennedy, Souter, Ginsburg, and Breyer).

149. 536 U.S. at 310.

150. 492 U.S. at 334.


152. Id. at 315.

153. Id. at 316 n.21.
makes sense to invoke public opinion as a factor in Eighth Amendment cases, which are decided based on evolving standards of decency.

Planned Parenthood of Southeastern Pennsylvania v. Casey reaffirmed a woman’s right to terminate a pregnancy. It also rejected Roe v. Wade’s trimester framework and established an undue burden test to determine whether state regulations effectively prevent women from seeking pre-viability abortions. In the Court’s plurality opinion, Justice O’Connor suggested that under certain circumstances, social and political pressures should be a factor in the Court’s decision making. According to Marshall, Justice O’Connor argued that

in extremely important cases the Court should consider public opinion in deciding whether to overturn precedents. 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.

While this essentially boils down to simple application of stare decisis, the situation is more delicate when dealing with politically charged issues such as substantive due process.

In his majority opinion in Roper v. Simmons, Justice Kennedy buttressed his holding by finding that there was a national consensus against imposing the death penalty on juvenile offenders. In dissent, Justice O’Connor argued that there was no national consensus. In analyzing the case according to evolving standards of decency, she and Justice Kennedy evidently read the same statistics differently. Justice Kennedy also brought international opinion into the analysis, which

---

155. Id. at 845-46.
156. Id. at 872-74.
157. Id. at 854-69; see also Corinna Barrett Lain, Furman Fundamentals, 82 WASH. L. REV. 1, 72 (2007) (“The Court can be an agent of change, but when it does more than validate an existing consensus, it risks halting— even reversing— change that is already in progress.”); Roesch, supra note 73, at 397 (“Stare decisis also serves as a very real constraint on judicial decision-making.”).
158. MARSHALL, supra note 988, at 12-13.
159. See 505 U.S. at 861 (“In a less significant case, stare decisis analysis could, and would, stop at the point we have reached. But the sustained and widespread debate Roe has provoked calls for some comparison between that case and others of comparable dimension . . . .”); Robert J. Pushaw, Jr., Partial-Birth Abortion and the Perils of Constitutional Common Law, 51 HARV. J.L. & PUB. POL’Y 519, 549 (2008) (“[T]he plurality concluded that overruling Roe would upset important reliance interests, and therefore preserved its core holding while modifying or rejecting certain peripheral rules (for example, those regarding waiting periods) to strike a better social policy balance.”).
161. Id.
162. Id. at 588 (O’Connor, J., dissenting).
involves a determination of popular preferences, but on a global scale. Justice O’Connor agreed that the Court may consider foreign and international law and that there is a global consensus against imposing capital punishment on juveniles. But for Justice O’Connor, consideration of national opinion should take precedence over consideration of international opinion. Nevertheless, both Justice Kennedy and Justice O’Connor clearly demonstrated their inclination to heed public sentiment—at least in the Eighth Amendment context.

In cases like Planned Parenthood and Roper, “public confidence considerations may serve as a limiting factor—barring the Court from a certain course of action—or may be a prompting factor—calling upon the Court to either withdraw from an erroneous precedent or revisit its interpretation in light of new public perceptions and attitudes.” In Planned Parenthood, public opinion considerations operated in conjunction with stare decisis to preserve the fundamentals of Roe; while in Roper, an emerging national and international consensus prompted the Court to abandon its holding in Stanford v. Kentucky.

IV. PUBLIC OPINION AND THE JURISPRUDENCE OF THE SWING JUSTICE

Public opinion affects all of the Supreme Court Justices by varying degrees. But popular sentiment more substantially impacts swing Justices, who wield enormous leverage in divisive cases. A “swing” Justice has been described as a Justice who “‘mov[es] between the liberal and conservative factions.’” He or she is likely “to resolve [a]
Moreover, swing Justices often author concurring opinions, which “have sometimes exercised a greater impact on subsequent case law than the majority opinions they accompanied.”

Prominent swing Justices of the twentieth and twenty-first centuries include Justices Powell, O’Connor, and Kennedy.

A. Studies Suggest Swing Justices Are More Inclined to Heed Public Opinion than Brethren

Several studies indicate that in the context of judicial decision making, public opinion affects swing Justices more acutely than their brethren. One scholar posits that “justices with relatively more intense or firmly held ideologies should be less susceptible to the influence of public opinion than Justices whose attitudes or ideologies are less intense.” Thus, Justices with moderate views—swing Justices—are more likely to respond to public opinion because they are not firmly attached to either a conservative or liberal predilection. Justices O’Connor and Kennedy, for example, lacked definitive judicial preferences and “embraced doctrinal formulas that allowed them to take into account elite opinion, elected government pressures, and the desires of the American people.”

172. See generally JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. (Charles Scribner’s Sons 1994) (accounting the life and jurisprudence of Supreme Court Justice Lewis Powell, who served on the bench from 1972 to 1987).
175. See Michael R. Dimino, Sr., The Worst Way of Selecting Judges—Except All the Others That Have Been Tried, 32 N. Ky. L. Rev. 267, 272 (2005) (“Studies indicate, though inconclusively, that the appointed Justices on the Supreme Court, and in particular the swing Justices, are affected by public opinion, though they certainly have little financial reason to placate the public.”).
177. Id. at 178-79.
178. Devins, supra note 66, at 1061-62; see also Merrill, supra note 64, at 629-30 (suggesting that Justices O’Connor and Kennedy are more sensitive to external forces than the other Justices). “Political scientists have also theorized that moderate Justices are more likely to be influenced by
Justice O’Connor’s performance during her early years on the Court suggested she would be a reliable conservative. But her allegiance to the conservative cause waned after Justice Powell retired from the Court. Her shift in judicial philosophy suggests that a swing Justice is often the product of the times, created by external factors and not necessarily by a clearly defined jurisprudence. One of those external factors is the transformation of the core makeup of the Republican Party, which changed dramatically in the aftermath of Roe. Justices O’Connor and Kennedy “were perhaps the last representatives of an older, country club Republicanism, keenly interested in keeping the size of the national government down and limiting government regulation of businesses, but not all that interested in the social issues that animated the core constituencies of the modern Republican Party.” This disenchantment with the Republican Party arguably led to the development of their centrist approaches to constitutional analysis since they could no longer relate to the conservative agenda and had never been staunchly liberal. Consequently, it is clear that the politicization of the Court, heralded by the outcry over Roe, shaped the role of the modern swing Justice.

1. Effect of Public Opinion on Justice Powell

Justice Powell was less in tune with public opinion than Justices O’Connor and Kennedy. In his expansive analysis, Marshall ranked changes in public opinion and have developed statistical tests tending to support this proposition.”

Id. at 69-70. See Greenburg, supra note 21, at 124. Justice O’Connor was committed to the Republican Party, becoming active in Arizona state politics as a legislator and later as a state judge. Id. at 11-12.

180. See Biskupic, supra note 173, at 181-82 (“Powell had set the equilibrium: he had cast the key vote and written the opinion in the seminal Bakke case that allowed affirmative action in higher education. He was the decisive vote for the death penalty but with safeguards. By the time he retired, he seemed to be the fifth justice keeping abortion rights in place.”).

181. See Greenburg, supra note 21, at 217 (“The shifting dynamics of the institution affected [O’Connor] and pushed her to the middle, with fellow centrist Kennedy. The two were moderates partly because both were pragmatic and approached each case on its own.”).

182. Tushnet, supra note 30, at 70. See also Merrill, supra note 64, at 576 (arguing that “the failed nomination of Robert Bork, the barely successful nomination of Clarence Thomas, and the adoption of the Civil Rights Act of 1991 revealed intense opposition to the conservative agenda on abortion, other privacy issues, and issues of race and gender discrimination”). Merrill asserts that “[t]his demonstration of hostile public opinion may have been enough to persuade the Court—or more accurately, its three moderate conservatives—either to abandon the conservative coalition altogether (Souter), or at least to steer clear of controversial rulings on social issues as much as possible (O’Connor and Kennedy).” Id.

183. Marshall, supra note 98, at 78 tbl.5.1.
the fourteen Rehnquist Court Justices in order of their overall agreement with public opinion. Justice Powell tied for ninth on that list with Justice Ruth Bader Ginsburg, while Justices O’Connor and Kennedy ranked fourth and sixth, respectively. Even though Justice Powell was often the fifth vote in divisive cases, he probably did not consider himself a factor in the politicization of the Court. He shied away from politics, later pointing to the failed Robert Bork nomination as evidence of the danger of mixing politics with the judicial appointment process.

“I am concerned,” he wrote privately, “that many in the public will think the Supreme Court is simply another political institution.”

It has been suggested that Justice Powell believed the Court should shape, rather than reflect, public opinion. For example, he signed onto the majority opinion in *Roe* to “anticipate popular sentiment. . . . By leaping over the current legislative muddle, the Court would achieve—quickly, cleanly, and without wrenching divisions—the solution toward which the country as a whole was clearly aimed.” But as Justice Powell grew in experience, his judicial outlook leaned toward a “presumption in favor of legislative acts, a sense of deference to popular choices.”

Justice Thurgood Marshall charged that, in deciding

---

186. *Id.*
187. *Id.* Note that this ranking is limited to the Rehnquist Court era and does not take into account how often Justice Kennedy has been in accord with public opinion during the Roberts Court. *Id.* Also, note that this ranking demonstrates how on average the Justices have agreed with public opinion; it does not chronicle that agreement over the course of their respective tenures. Over the course of her Supreme Court career, Justice O’Connor shifted from a conservative to a more centrist approach. See infra notes 197-207 and accompanying text. It is conceivable, then, that she agreed with public opinion more often during her later years on the bench.
188. JEFFRIES, *supra* note 172, at 554.
189. *Id.*
190. *Id.* (“What appalled Powell in the debates over Robert Bork was not that the nominee might lose, but that the Supreme Court might be tarnished. . . . Powell deplored the role of the ‘special interest groups,’ the use against a judicial nominee of the ‘massive media and mail campaigning that goes on in presidential elections,’ and the ‘racial bloc voting’ that doomed Bork in the South.” (citations omitted)).
191. *Id.* at 352.
192. *Id.* at 425. He eventually loosened his commitment to judicial restraint, a principle he had modeled after Justice John Harlan. *Id.* “The principle [of judicial restraint] declined into an attitude—not a rigid ban on judicial innovation, but a presumption in favor of legislative acts, a sense of deference to popular choices and values, and an habitual hesitation to substitute his own views and inclinations.” *Id.* Moreover, “Powell’s ingrained courtesy and ability to listen also underlay his most often remarked judicial attribute—an instinct for moderation and compromise. Genuine respect for the views of others directs the mind toward the common ground.” *Id.* at 561.
Milliken v. Bradley,193 for which Powell provided the fifth vote, “his colleagues had given in to the strident public opposition to busing.”194

Contrary to Justice Marshall’s accusation, Justice Powell’s role as swing Justice was not characterized by the same level of adherence to public opinion as later swing Justices.195 Perhaps one reason Powell was not as affected by public opinion in this role was because he was not the product of the same politicization as were Justices O’Connor and Kennedy. After all, he joined the Court before Roe, and left soon after the Bork nomination, which marked a turning point in the questioning of judicial nominees.196

2. Effect of Public Opinion on Justice O’Connor

During the course of her Supreme Court career, “O’Connor had become the justice to watch. . . . With the Court divided 4-4 on critical issues, her vote often determined the outcome of important cases. Lawyers crafted their arguments to appeal especially to her, knowing that as O’Connor went, so went the Court.”197 Ultimately, “[f]ew associate Justices in history dominated a time so thoroughly or cast as many deciding votes as O’Connor—on important issues ranging from abortion to affirmative action, from executive war powers to the election of a president.”198 Learning from her experience as a state legislator, she “developed an incremental approach, taking her cues from the country and pushing it ever so slightly. She would neither drive the culture of the nation, nor seriously upset it.”199 By often providing the fifth vote and writing concurring opinions that served to limit the majority’s holding, Justice O’Connor succeeded in shaping many politically divisive decisions.200

194. JEFFRIES, supra note 172, at 315. Justice Marshall noted that he did not mean that the Justices necessarily followed public opinion polls. Id. at 316.
195. See supra notes 175-84 and accompanying text.
197. GREENBURG, supra note 21, at 20.
198. TOOBIN, supra note 24, at 7.
199. BISKUPIC, supra note 173, at 334 (“O’Connor arrived in Washington knowing how to count votes. The divided Court—and divided, polarized nation—played to her strength as a consensus builder and gave her a way to be ‘constructive,’ as she might say. Once she found the middle, she never left it.”).
200. See, e.g., GREENBURG, supra note 21, at 44 (noting that Justice O’Connor “had a ‘troublesome propensity to file concurring opinions seeking to dilute the force of opinions condemning’ racial quotas”).
The politicization of the judicial appointment process and the more pronounced ideological split among the Justices unsettled Justice O’Connor. As the executive and legislative branches fought over judicial appointments and produced polarizing nominees, Justice O’Connor escaped the political brouhaha and looked outside the fray to decide constitutional questions. “She saw herself as a balanced person who offered the reasonable compromise in important cases.” Her “cautious instincts . . . were remarkably similar to those of the American people.” In fact, “[s]he had an uncanny ear for American public opinion, and she kept her rulings closely tethered to what most people wanted or at least would accept.” Of course, her votes were not one hundred percent on par with public opinion. A particularly controversial blight on her record was Bush v. Gore: “[O’Connor] had continually shown an awareness of the public response to the Court as an institution. In her opinions, she typically explained why the Court ruled as it did. . . . Now, in the most controversial case of her tenure, she said nothing. She explained nothing.” But overall, Justice O’Connor reliably played the swing role on the Court, passing that mantle to Justice Kennedy when she retired in early 2006. “Months after O’Connor had left the Court for good, Kennedy said he found himself missing her. . . . Kennedy had become the lone moderate, the Justice who sided with the conservatives sometimes and liberals others.”

3. Effect of Public Opinion on Justice Kennedy
Since Justice O’Connor retired from the Court, Justice Kennedy has played the role of swing Justice. “In a great majority of the ideologically charged cases that reach the court, the crucial swing vote belongs to Justice Anthony M. Kennedy . . . [who] ‘may in fact be closest to the median national voter.’” Justice Kennedy’s analytical method has been described as a “middle-of-the-road, split-the-difference approach to
deciding cases,” and his jurisprudence reflects “sensitivity to evolving social trends,” as evidenced by his refusal to overturn Roe and his defense of gay rights in Lawrence v. Texas. Justice Kennedy generally does not appear comfortable in either the conservative or liberal camps. In fact, he “spent his first term trying to straddle the divide between the Court’s two blocs—especially on the divisive abortion and civil rights cases.”

The political fallout from Bush v. Gore, as well as Justice Kennedy’s extensive travels and exposure to foreign and international law, have been credited with “transform[ing]” Justice Kennedy’s judicial philosophy. Justice Kennedy is a man very much aware of his public persona and concerned with his legacy. Justice Kennedy’s performance on the Court after the addition of two assuredly conservative Justices proves that he is not openly wedded to the Republican cause. One-third of the cases handed down in 2006 and 2007 “were decided by votes of 5-4—a level of division unprecedented in the Court’s recent history.” Of those twenty-four cases decided by a five-to-four vote, “Kennedy was in the majority in every single one.”

V. INCORPORATING PUBLIC OPINION INTO FOURTEENTH AMENDMENT DECISIONS

The Founding Fathers never contemplated a two-party system, but such a system nevertheless emerged, ineluctably defining the nature of American governance. While this story begins with the executive and legislative branches, it does not end there. “Except for short-lived transitional periods when the old [political] alliance is disintegrating and the new one is struggling to take control of political institutions, the Supreme Court is inevitably a part of the dominant national alliance.”

209. GREENBURG, supra note 21, at 85.
210. See Parshall, supra note 124, at 238-43.
211. See GREENBURG, supra note 21, at 85.
212. Id.
213. TOOBIN, supra note 24, at 182.
214. TUSHNET, supra note 30, at 176.
215. TOOBIN, supra note 24, at 331.
216. Id. at 333.
217. See Dahl, supra note 114, at 293 (“National politics in the United States . . . is dominated by relatively cohesive alliances that endure for long periods of time. One recalls the Jeffersonian alliance, the Jacksonian, the extraordinarily long-lived Republican dominance of the post-Civil War years, and the New Deal alliance shaped by Franklin Roosevelt. Each is marked by a break with past policies, a period of intense struggle, followed by consolidation, and finally decay and disintegration of the alliance.”).
218. Id.
Although the Court might not be “an agent of the alliance,”219 it typically does not steer too far from the major policies of the party in power.220 Thus, it is not surprising that the Court considers such political factors as public opinion. In fact, “it is an essential characteristic of the institution that from time to time its members decide cases where legal criteria are not in any realistic sense adequate to the task.”221

The area of constitutional law where the Court most often takes public opinion into account is in criminal cases.222 In *Weems v. United States*,223 “the Court acknowledged the value of ‘progressive,’ ‘enlightened’ public opinion”224 in interpreting “cruel and unusual punishment.”225 That acknowledgment “opened the door for [the] ‘evolving standards of decency’ approach” adopted in *Trop v. Dulles*.226 There, the Court noted that the nature of Eighth Amendment jurisprudence requires more than a cursory examination of the plain language of the Constitution or a historical perspective.227 Because the Amendment is ambiguous,228 the Court held that cases and controversies arising under that Amendment must be decided based on “evolving standards of decency.”229 Therefore, when the Court determines whether a particular punishment is cruel and unusual, it analyzes how public

219. *Id.* “The Supreme Court is not, however, simply an agent of the alliance. It is an essential part of the political leadership and possesses some bases of power of its own, the most important of which is the unique legitimacy attributed to its interpretations of the Constitution,” which would be threatened were the Court to steer too far from the major policies of the dominant alliance. *Id.*

220. *Id.* at 293-94.

221. *Id.* at 280.

222. See *Marshall*, supra note 98, at 8; see also *Roesch*, supra note 73, at 401 (noting that the Court’s Eighth Amendment cases have long been in line with public opinion).

223. 217 U.S. 349, 367 (1910) (holding that the provision forbidding cruel and unusual punishment in the Philippine Bill of Rights must be interpreted in accordance with the Eighth Amendment to the U.S. Constitution).

224. Brian W. Varland, *Marking the Progress of a Maturing Society: Reconsidering the Constitutionality of Death Penalty Application in Light of Evolving Standards of Decency*, 28 HAMLINE L. REV. 311, 316 (2005) (citing *Weems*, 217 U.S. at 378 (noting that the Eighth Amendment is “progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice”)).

225. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).


228. *Id.* at 100-01 (“[T]he words of the [Eighth] Amendment are not precise, and . . . their scope is not static.”); see also *Roesch*, supra note 73, at 401 (“The terms cruel and unusual are inherently subjective. Nor is there sufficient evidence of the Framers’ intent in using those words to be useful in giving substance to the Amendment. As a result, the Court has considered public opinion in determining whether a punishment is cruel and unusual.” (citations omitted)).

229. *Trop*, 356 U.S. at 101 (“The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”).
opinion has evolved regarding that punishment. The less socially acceptable a punishment, the more likely it is to be struck down.

Cases involving the interpretation and application of ambiguous constitutional language like “cruel and unusual punishment” are “political” in nature.\textsuperscript{230} Such cases typically “involve alternatives about which there is severe disagreement in the society, as in the case of segregation.”\textsuperscript{231} The situation is compounded by the fact that precedent and expert opinion support both sides of controversial issues.\textsuperscript{232} Consideration of a political issue does not, however, mandate a political solution. The Court should base its decisions on constitutionally defined standards and not on mere determinations of public opinion, especially when deciding divisive Fourteenth Amendment cases. In Eighth Amendment cases, the Court “use[s] . . . public opinion to give substance to a standard by which a practice . . . is legally assessed.”\textsuperscript{233} The Court determines whether a punishment is cruel and unusual according to evolving standards of decency. But in the Fourteenth Amendment context, the Court invokes public opinion “in order to decide the legal status of a particular practice.”\textsuperscript{234} The Court does not examine public opinion according to a particular standard. Reliance on evolving standards of decency in Eighth Amendment analysis is constitutionally delineated.\textsuperscript{235} Incorporation of public opinion into Fourteenth Amendment analysis lacks a comparable constitutional hook.

\textbf{A. Problems with Relying on Public Opinion in General}

Judicial reliance on public opinion is risky, due largely to institutional needs of the three branches of government, unreliable polling data, an ill-defined methodology, and political turnover. Most significantly, the Supreme Court’s use of public opinion undermines the precedential value of its decisions, which causes problems for lower courts and the public.

\begin{itemize}
\item \textsuperscript{230} Dahl, supra note 114, at 280. Dahl explains that these “are usually cases where competent students of constitutional law, including the learned justices of the Supreme Court themselves, disagree; where the words of the Constitution are general, vague, ambiguous, or not clearly applicable.” \textit{Id}.  
\item \textsuperscript{231} \textit{Id}. Dahl argues that “the Court is a national policy-maker” and “cannot act strictly as a legal institution.” \textit{Id}. at 281. Instead, the Court “must . . . choose among controversial alternatives of public policy by appealing to at least some criteria of acceptability on questions of fact and value that cannot be found in or deduced from precedent, statute, and Constitution.” \textit{Id}.  
\item \textsuperscript{232} \textit{Id}. at 280.  
\item \textsuperscript{233} Roesch, supra note 73, at 413 (emphasis added).  
\item \textsuperscript{234} \textit{Id}. at 412 (quoting Wojciech Sadurski, \textit{Conventional Morality and Judicial Standards}, 73 Va. L. REV. 339, 353 (1987)). “Examples include the legality of abortion and euthanasia.” \textit{Id}.  
\item \textsuperscript{235} See supra notes 223-29 and accompanying text.
\end{itemize}
The questionable tenability of public opinion as a factor in judicial decision making raises legitimate stare decisis concerns. The Court upends sacrosanct legal norms by inserting itself into the political process and not formulating a sound legal doctrine for lower courts to follow. Assuming that the Court should play a role in social policy making and that “judicial review of legislation is viewed as a tool of social engineering,” then “stare decisis is essential if courts are to have a maximum impact in achieving social reforms.” One noted example is the application of Brown v. Board of Education. While “the resolution of a single case does little to advance far-reaching goals such as racial integration, . . . . in order to implement [ambitious] social programs . . . the Court must be able to commit the lower courts and later Supreme Courts to a course of action.” This is impossible when the Court structures its reasoning—even partly—on shaky legal ground. A concern arises that “recalcitrant individuals will evade the ruling in the hope that by the time they are brought into court, the law will have changed.” Or, in this case, the concern is that public opinion will have changed. “Anything that serves to weaken the force of precedent . . . threatens both judicial power generally and the power to implement constitutional norms specifically.”

Furthermore, judicial invocation of public opinion threatens constitutionally inviolable principles like separation of powers and checks and balances. The Constitution commits to Congress the authority to make the law, to the executive the duty to enforce the law, and to the judiciary the power to interpret the law. But the Constitution does not clearly define inter-branch boundaries, making it possible, and perhaps inevitable, that one branch will impinge upon another’s authority. For example, the Warren Court forever altered our social landscape by engaging in equal protection and criminal rights issues in the face of congressional inaction. However, just as congressmen should be wary of undertaking judicial functions, the

237. Id.
238. Id.
239. Id.
240. Id.
241. U.S. CONST. arts. I, II & III.
242. See id. (illustrating the absence of any precisely stated inter-branch boundaries).
244. See Owen M. Fiss, The Supreme Court, 1978 Term—Foreword: The Forms of Justice, 93 HARV. L. REV. 1, 10 (1979) (“[Legislatures] are not ideologically committed or institutionally suited
Court needs to strike a careful balance between legal policy making and judicial overreaching:

[W]hat you have [now] is the court undoing precedent in such a way as to really shake the foundations. And I think that’s not good for the Supreme Court.

Let the legislative branch, let even the executive branch, be the ones who reflect public opinion. But they’re making opinion. They’re making law rather than holding fast to what we’ve understood to be laws in these United States.

To me, that’s shaking our constitutional government to the ground.  

Invocation of public opinion also presents logistical concerns. While polls are arguably a reliable indicator of popular sentiment, they are handicapped by certain quirks that lessen their value. For example, polling results can vary according to even slight changes in the wording of questions. More generally, “[e]verything from variations in the survey methodology, such as the choice of the target population, the sampling design used, the questions asked, and the statistical analyses used to interpret the data can skew the results.” Other problems include people not knowing much about the issues relevant to legal policy and respondents structuring their answers so they do not reflect badly on themselves. No less significant is the potential for bias—“imagine the public outcry if the Court cited a Fox News poll and ignored a competing CNN poll reaching a different conclusion.”

245. Fox News Sunday Roundtable (Fox News Network television broadcast July 1, 2007) (transcript on file with the Hofstra Law Review); see also Dahl, supra note 114, at 280 (arguing that “accept[ing] the Court as a political institution would solve one set of problems at the price of creating another”).

246. See Roesch, supra note 73, at 381.


248. See id.


250. See Kaplow & Shavell, supra note 247, at 1351 n.946. But see Marshall, supra note 66, at 23 (“Pollsters frequently write poll items to tap issues in Supreme Court disputes. Major nationwide polls also routinely report, or at least archive, poll results . . . for major demographic groups.”). Marshall argues that it is possible to rely on poll results to determine whose attitudes the Court best represents. Id.

Moreover, the Court has not fashioned a would-be instruction manual for lower courts on how and when to factor public opinion into their constitutional analysis. The Justices addressed the subject at length during oral argument for *Atkins*, questioning counsel on the appropriate mechanisms for measuring popular sentiment.\(^{252}\) When counsel for petitioner argued that there was a consensus against the execution of the mentally retarded, Chief Justice Rehnquist asked, “What is your definition of a consensus?”\(^{253}\) Counsel fumbled through his response, but as the discussion progressed and other Justices interjected with questions, a potential solution emerged:

[QUESTION:] You’re not talking about polls if you’re talking about public sentiment, are you?

MR. ELLIS: It seems to me, Your Honor, that . . . the polling information, which was quite scanty then and is now quite full . . . is part of the picture.

[QUESTION:] Well, wouldn’t you expect if people feel that way, it would—it would be manifested in legislation?

MR. ELLIS: And increasingly it is.

[QUESTION:] Yes, but are you saying that somehow polls are to be considered in addition to legislation?

MR. ELLIS: Polls, it seems to me, Your Honor are a way of . . . viewing the legislation, of seeing whether or not the consensus the legislation appears to reveal is in fact . . . .\(^{254}\)

Accordingly, the Court incorporated polling data and evidence of state legislative action into its majority opinion.\(^{255}\) Chief Justice Rehnquist in dissent took offense to the majority’s use of polling data.\(^{256}\)

A similar invocation of societal trends and public consensus in *Lawrence v. Texas* partly justifies Chief Justice Rehnquist’s indignation. In that case, Justice Kennedy notes “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”\(^{257}\) To support this assertion, his opinion chronicles the history of state sodomy laws and


\(^{253}\) Id.

\(^{254}\) Id.


\(^{256}\) Id. at 325-28 (Rehnquist, C.J., dissenting).

references favorable international treatment of gay rights.\textsuperscript{258} It should be noted that Chief Justice Rehnquist’s \textit{Atkins} dissent and the \textit{Atkins} majority agree that the Court can rely on state legislative action in determining public opinion.\textsuperscript{259} But \textit{Lawrence} neither piggybacks on \textit{Atkins} nor imparts a discernable precedent for lower courts to follow.\textsuperscript{260} “\textit{Lawrence} has sparked numerous questions and a heated debate. . . . [It] sharply draws into question the appropriate methodology to be used in adjudicating substantive due process claims.”\textsuperscript{261}

Membership change on the Court can also pose problems. The average American President appoints two Justices per term.\textsuperscript{262} “Presidents are not famous for appointing Justices hostile to their own views on public policy nor could they expect to secure confirmation of a man whose stance on key questions was flagrantly at odds with that of the dominant majority in the Senate.”\textsuperscript{263} Consequently, the values of the Justices are likely to reflect those of the political party in power. So not only is the Court more reliant on public opinion, but it is also more vulnerable to election outcomes and unpredictable shifts in public opinion over the course of congressional and presidential administrations.\textsuperscript{264} Conservative Justices appointed by conservative presidents, and liberal Justices appointed by liberal presidents, arguably will not waver in their analysis.\textsuperscript{265} But moderate swing Justices put off by judicial politicking might respond to this shift. It will be interesting to see whether Justice Sotomayor will be reliably liberal or whether she will follow in Justices O’Connor’s or Kennedy’s footsteps.

\textbf{B. Incorporating Public Opinion into Equal Protection Cases}

The Equal Protection Clause provides that no \textit{State} can “deny to any person within its jurisdiction the equal protection of the laws.”\textsuperscript{266} But what happens when the Court’s interpretation of this Clause results in unequal treatment? That is the danger when the judiciary follows public opinion in equal protection cases—the result is unequal treatment that might not be apparent in a specific case, but that instead manifests

\begin{itemize}
\item \textsuperscript{258} \textit{Id.} at 568-77.
\item \textsuperscript{259} \textit{Atkins}, 536 U.S. at 314-15, 322-23.
\item \textsuperscript{260} The majority in \textit{Lawrence} does not cite \textit{Atkins v. Virginia} in its discussion of societal trends. See \textit{Lawrence}, 539 U.S. at 568-77.
\item \textsuperscript{261} Parish, \textit{supra} note 124, at 250-51.
\item \textsuperscript{262} See \textit{Dahl}, \textit{supra} note 114, at 284.
\item \textsuperscript{263} \textit{Id.}
\item \textsuperscript{264} See \textit{id.} at 284-85.
\item \textsuperscript{265} See \textit{supra} note 30 and accompanying text.
\item \textsuperscript{266} U.S. CONST. amend. XIV, § 2 (emphasis added).
\end{itemize}
over a period of time involving multiple cases. Take the Court’s desegregation, integration, and affirmative action decisions.

In *Swann v. Charlotte-Mecklenburg Board of Education*, the Court approved the use of busing “to eliminate from the public schools all vestiges of state-imposed segregation.” Then, three years later, the Court limited the reach of *Swann* in *Milliken v. Bradley*, holding that *Brown* did not justify the busing of public school students across fifty-three district lines in Detroit absent evidence of *de jure* segregation. In dissent, Justice Thurgood Marshall observed, “[t]oday’s holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution’s guarantee of equal justice than it is the product of neutral principles of law.” Indeed, a Gallup poll conducted before the Court decided *Milliken* found that “only 9 percent of blacks and 4 percent of whites favored busing children outside of their own neighborhoods.”

In *Grutter v. Bollinger*, the Court, in a five-to-four decision, upheld the University of Michigan Law School’s affirmative action program, finding that “the Equal Protection Clause does not prohibit the Law School’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.” Just four years later—after two new Justices had joined the bench—the Court proscribed public school assignment plans designed to achieve racial integration and found that racial balancing is not a compelling state interest. Justice Stephen G. Breyer penned a powerful dissent in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1* denouncing the plurality’s approach as “legally unsound” and warned of dire consequences:

268. Id. at 15. “In these circumstances, we find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation.” Id. at 30.
270. Id. at 745.
271. Id. at 814 (Marshall, J., dissenting).
274. Id. at 343.
277. Id. at 858.
Yesterday, the plans under review were lawful. Today, they are not. Yesterday, the citizens of this Nation could look for guidance to this Court’s unanimous pronouncements concerning desegregation. Today, they cannot. Yesterday, school boards had available to them a full range of means to combat segregated schools. Today, they do not.278

Justice Breyer considered the Court’s decision politically driven,279 a charge supported by the conservative make-up of the bench and polling data.280

Justice Breyer argued that Parents Involved in Community Schools departed significantly from earlier desegregation cases, including Brown.281 He characterized the Court’s holding as judicial overreaching, listing numerous consequences that could spring from that decision.282 He chastised the plurality:

[A]s a judge, I do know that the Constitution does not authorize judges to dictate solutions to these problems. Rather, the Constitution creates a democratic political system through which the people themselves must together find answers. And it is for them to debate how best to educate the Nation’s children and how best to administer America’s schools to achieve that aim. The Court should leave them to their work.283

Justice Breyer’s point here essentially boils down to a classic federalism and separation of powers argument, a la James Madison.284

Madison argued that “[i]t is of great importance . . . to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be

278. Id. at 865-66; see also Linda Greenhouse, In Steps Big and Small, Supreme Court Moved Right: A 5-4 Dynamic, With Kennedy as Linchpin, N.Y. TIMES, July 1, 2007, at A1 (“It was that decision that prompted Justice Breyer’s highly unusual declaration from the bench . . . ‘It is not often in the law that so few have so quickly changed so much.’” (quoting Oral Opinion of Justice Breyer at 19:53, 32:54-33:01, Parents Involved, 551 U.S. 701 (No. 05-908), available at http://www.oyez.org/cases/2000-2009/2006/2006_05_908/opinion)).

279. See supra note 278 and accompanying text.

280. See Lydia Saad, Black-White Educational Opportunities Widely Seen as Equal, GALLUP, July 2, 2007, http://www.gallup.com/poll/28021/Black-White-Educational-Opportunities-Widely-Seen-Equal.aspx (asking Americans, “In general, do you think that black children have as good a chance as white children in your community to get a good education, or don’t you think they have as good a chance?”). Three-quarters of Americans believe that black children do have an equal opportunity to get a good education. Id. While the poll did not specifically address the issue in Parents Involved in Community Schools, it “can provide some clues about how the decision is being perceived.” Id.

281. 551 U.S. at 857-58 (Breyer, J., dissenting).

282. Id. at 858-63.

283. Id. at 862.

united by a common interest, the rights of the minority will be insecure." Madison’s theory “was that although at a local level one ‘faction’ might well have sufficient clout to be able to tyrannize others, in the national government no faction or interest group would constitute a majority capable of exercising control.” But Madison did not factor the two-party political system or the politicization of the Court into his analysis. The incidental liberal-conservative split of the modern Court and its reliance on “majority” public opinion runs afoul of core constitutional principles.

Politicians all too often are distracted by lobbyists and moneyed interests. In fact, “there may be political pressures to encourage our representatives to pass laws that treat the majority coalition on whose continued support they depend in one way, and one or more minorities they feel they do not need in a less favorable way.” Justice Robert H. Jackson once opined that “nothing opens the door to arbitrary action so effectively as to allow . . . officials to pick and choose only a few to whom they will apply legislation . . . . Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.” The brilliance of the American system of checks and balances is that the Court can overturn discriminatory laws. The Court should protect minorities from majority rule even when the public favors discrimination. Countermajoritarian principles cannot be achieved by blind allegiance to party politics and public opinion, especially when lower courts are left without clear precedent to follow. The only way to ensure that the laws are equal in operation is to apply them equally. Haphazard invocation of public opinion is not an option.

C. Incorporating Public Opinion into Substantive Due Process Cases

In adhering to, alluding to, or even considering, public opinion, the Court has been inconsistent with its approach to privacy law—

285. Id. at 254.
286. Ely, supra note 95, at 460.
287. The first official political parties arose after the federal Constitution was written and ratified. See RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 310, 320, 327, 336 (1990).
288. Ely, supra note 95, at 458.
290. See, e.g., Gail L. Heriot, Strict Scrutiny, Public Opinion, and Affirmative Action on Campus: Should the Courts Find a Narrowly Tailored Solution to a Compelling Need in a Policy Most Americans Oppose?, 40 HARV. J. ON LEGIS. 217, 222 (2003) (“It is established that the Supreme Court owes no deference to legislatures or other lawmaking authorities when it reviews racially discriminatory laws. It owes even less deference to public support for such laws.” (citation omitted)).
particularly regarding abortion. “It has instituted vague, arbitrary, and inconsistent standards for abortion legislation, and then changed them, repeatedly, in more than twenty-seven cases over thirty-three years.”

The Court first recognized an individual right to privacy in a landmark decision striking down a Connecticut law that prohibited the use of contraceptives. “Griswold v. Connecticut” is a classic example of the Warren Court’s penchant for reaching a result deemed fair (and sensible to most Americans), then trying to find some constitutional justification for it. Subsequent decisions asserting a right to privacy—beginning with Roe—accelerated the politicization of judicial appointments and magnified the ideological split among the Justices that spilled over into their decision making. While both the liberal and conservative coalitions are arguably guilty of cherry-picking results, it is the swing Justice’s perception of the political landscape that most severely muddies the Court’s substantive due process analysis.

Justice Antonin Scalia once observed that “[t]he picking and choosing among various rights to be accorded ‘substantive due process’ protection is alone enough to arouse suspicion . . . .” There, Justice Scalia was referring to the retroactive application of a tax statute, but his remarks are equally applicable in the right to privacy context. Stenberg v. Carhart, striking down a Nebraska law that criminalized partial-birth abortion without providing a health exception, and Gonzales v. Carhart, upholding the federal Partial-Birth Abortion Act of 2003, are textbook examples. Both Stenberg and Gonzales were

---

293. Pushaw, supra note 159, at 531. (“Justice Douglas’s ‘penumbral’ reasoning was so transparently fictional that it generated widespread ridicule, and Justice Goldberg’s analysis similarly turned the Ninth Amendment on its head. Not surprisingly, these constitutional rationales were swiftly abandoned. Nonetheless, the right to privacy endured . . . .” (citations omitted)).
294. See supra note 46 and accompanying text.
295. See supra Part IV.
296. United States v. Carlton, 512 U.S. 26, 41 (1994) (Scalia, J., concurring); see also Dahl, supra note 114, at 291 (“[I]n an earlier day it was perhaps easier to believe that certain rights are so natural and self-evident that their fundamental validity is as much a matter of definite knowledge, at least to all reasonable creatures, as the color of a ripe apple.”).
297. Carlton, 512 U.S. at 27.
298. See, e.g., Pushaw, supra note 159, at 549 (“[T]he [Casey] plurality may well have captured the position of the crucial bloc of middle-of-the-road Americans: allow laws that express moral concerns about abortion by discouraging it and by ensuring that pregnant women weigh their options carefully and with full information, but ultimately leave the decision to each woman.”).
300. Id. at 929-30.
302. Id. at 132-33.
five-to-four decisions: Justice O’Connor provided the fifth vote in *Stenberg*\(^{303}\) while Justice Kennedy, who dissented in the former case,\(^{304}\) authored the majority opinion in *Gonzales*.\(^{305}\)

In *Stenberg*, Justice O’Connor noted in a concurring opinion that several states had “enacted [partial-birth abortion] statutes more narrowly tailored” than the Nebraska law, laying out a model for Nebraska to follow.\(^{306}\) Justice Kennedy countered in dissent that this is a decision better left to the collective wisdom of state legislatures, claiming that “the Court substitute[d] its own judgment for the judgment of Nebraska and some 30 other States.”\(^{307}\) He also pointed out that “[t]he State’s constitutional authority is a vital means for citizens to address these grave and serious issues, as they must if we are to progress in knowledge and understanding and in the attainment of some degree of consensus.”\(^{308}\) Arguably, “the most telling aspect of *Stenberg* is that the Justices issued eight separate opinions. This fragmentation reinforces the conclusion that *Stenberg*, like all abortion cases, reflects the personal views of the justices rather than any law rooted in the Constitution.”\(^{309}\)

While the Court struck down a state statute criminalizing partial-birth abortion in *Stenberg*, it upheld a similar federal statute in *Gonzales*.\(^{310}\) Politics can explain this disparate treatment. A 2003 Gallup poll found that two-thirds of Americans favored criminalizing partial-birth abortion.\(^{311}\) While the *Gonzales* Court did not explicitly rely on public opinion, it is worth noting that this case was decided after Chief Justice Roberts and Justice Samuel Alito joined the bench.\(^{312}\) “[B]ecause judicial opinions about abortion reflect politics and ideology, the party of the nominating President can be quite influential.”\(^{313}\) The Court likely felt comfortable departing from *Stenberg* because the decision “articulated the mainstream American view: allow women to choose abortion in the early period of pregnancy, but recognize the government’s interest in expressing its citizens’ moral condemnation of

---

304. *See id.* at 956.
305. *See Gonzales*, 550 U.S. at 132.
307. *Id.* at 979 (Kennedy, J., dissenting).
308. *Id.* at 957 (Kennedy, J., dissenting).
312. *See supra* note 276.
313. *Pushaw, supra* note 159, at 542.
partial-birth abortion.” Such implicit adherence to public opinion threatens the integrity of the Court and the soundness of substantive due process doctrine just as much as overt reliance. Ultimately, “Gonzales cannot easily be squared with Stenberg . . . . Justice Kennedy’s attempts to distinguish Stenberg were strained and unconvincing.”

VI. CONCLUSION

That Supreme Court Justices will bring inherent biases to the bench is a foregone conclusion. But in recent years such biases have become more overtly political and have crept more forcibly into the Court’s legal analysis. Justices appointed post-Brown and post-Roe are byproducts of the regrettable politicization of the judicial selection process. Pundits and public officials all too often relegate Court opinions to political fodder, essentially forcing the Justices to take stock of popular sentiment, particularly in Eighth and Fourteenth Amendment cases. But problems arise when the Court even partly justifies Fourteenth Amendment decisions on its perception of public opinion. First, the politicization of judicial decision making upends stare decisis and upsets the separation of powers—principles entrenched in American republicanism. Second, polling data is not consistently reliable, especially when Americans are asked about complicated constitutional issues that come before the Court. Third, the Court has not fashioned a clear methodology for considering public opinion in Fourteenth Amendment cases. Instead, its patchwork reasoning subverts judicial integrity and muddles the political process. It is difficult for lower courts to apply this hodgepodge of Supreme Court decisions to new liberty claims. Finally, the party in power shapes the ideological composition of the Court, tying the Justices’ incorporation of public opinion to the prevailing political wind and exaggerating the role of the swing Justice.

The optimum solution would be to take public opinion completely out of the equation, but that does not comport with political reality. Rather, the Court should establish a constitutional framework in Fourteenth Amendment analysis comparable to the Eighth Amendment’s “evolving standards of decency.” It would be more difficult to accuse

314. Id. at 569-70; see also supra note 118 and accompanying text (suggesting that one reason the Court heeds public opinion is to legitimize its decisions).
315. Pushaw, supra note 159, at 568.
316. See, e.g., Daniel O. Conkle, Three Theories of Substantive Due Process, 85 N.C. L. REV. 63, 133-45 (2006). Conkle argues that the Court should develop a national consensus standard in substantive due process jurisprudence:
   Although it does not provide a bright-line test, the requirement of a contemporary
technical consensus does provide an objective standard that limits the Supreme Court’s
the Justices of politicking if they could be held strictly accountable for invoking public opinion. First, de-politicizing the Court’s decision making would restore judicial integrity and preserve the federal balance. Second, the problem of unreliable polling data could be resolved by keeping polls out of the legal framework entirely. As Justice Rehnquist noted in his Atkins dissent, because polling data is unreliable, other factors such as state legislative action would be more indicative of the public mood. Third, lower courts would have one standard to apply and would not issue incongruous decisions. Finally, the Court’s reasoning—at least with respect to public opinion—would not be contingent upon election results, so the power of the swing Justice would also be curtailed relative to other Court members.

* J.D. candidate, 2010, Hofstra University School of Law. I would like to thank my family and friends for their loving support throughout law school. This Note would have been impossible without the assistance of Professor Eric Lane, my Notes and Comments Editor, Sean Masson, and the entire membership of Volume 38 of the Hofstra Law Review.