

Crowd Control: The Majoritarian Court and the Reflection of Public Opinion in Doctrine

Benjamin J. Roesch[†]

I. INTRODUCTION

The judicial branch of the federal government has historically had an uneasy relationship with public opinion. Like the executive and legislative branches, the judiciary depends on public support for its legitimacy. But unlike the political branches, the judiciary is not electorally accountable to those whose support it requires. To the contrary, one of its defining attributes is the duty to thwart political expressions of popular will that run afoul of the Constitution. Nevertheless, it has been noted that “the arguments of appellate judges in the Common Law world necessarily rest, according to some legal scholars, on community consensus about extralegal values.”¹ In other words, the often counter-majoritarian judiciary must produce results acceptable to the general public over the long term in order to maintain its legitimacy. Professor Chemerinsky has posited that the judiciary’s legitimacy actually hinges on both the general acceptability of the results it produces and the relative consistency of the methods by which those results are reached.²

Traditionally, scholarly and judicial commentary on the influence of public opinion on the federal judiciary has followed two courses. Some commentators and jurists argue that judicial independence requires that public opinion have no influence on judicial decision-making. Another group of scholars advocates an indirectly influential role for public opinion in limited contexts. These scholars believe judges should refer to “objective” measures of public opinion as guidelines when deciding questions of statutory interpretation and delineating the Eighth Amendment’s prohibition on “cruel and unusual punishment.”

Recent developments in empirical research suggest that these positions take too limited a view of public opinion as an influence on judicial decision-

[†] J.D. 2004, University of Michigan Law School; B.A. 2001, University of Wisconsin-Eau Claire. The author is an associate at Lane Powell, LLC. He would like to thank Laura Fitzgerald for comments on an early draft of this article, and Adriaan Lanni and Wesley Kelman for their comments. This Article represents the author’s views only.

1. Wojciech Sadurski, *Conventional Morality and Judicial Standards*, 73 VAL. REV. 339, 340 (1987).

2. Erwin Chemerinsky, *The Supreme Court, Public Opinion, and the Role of the Academic Commentator*, 40 S. TEX. L. REV. 943, 947 (1999).

making. The research suggests that the “judicial isolation” model conflicts with reality—the influence of public opinion may be inevitable. This Article will examine this evidence, which suggests that many judges are influenced—at least marginally—by public opinion. Because the judiciary is the one branch of the federal government committed to a transparent decision-making process, this Article sets out to determine how public opinion affects the judicial decision-making process in various contexts. The mechanics of this apparent influence have significant consequences for how we conceive of the relationship between public opinion and judicial outcome and whether this apparent influence is in fact a threat to judicial independence.³

One might expect public opinion to exert its influence through the judiciary’s interaction with the political branches into which democracy channels it, and it is to these interactions that this Article turns first in its inquiry into the mechanics of public opinion’s apparent influence on judicial outcomes. But political controls, such as Congressional control over jurisdiction and budget, are blunt instruments. The political costs of threatening reprisal through these means for individual decisions make their use ineffective as a means to influence the judiciary on a case-by-case basis. Presidential refusal to execute the judiciary’s rulings is a more precise—but rarely invoked—constraint. Formal political constraints ultimately fail to explain public opinion’s influence on individual cases.

The Article next turns to more informal influences on judicial decisions. These constraints include the role of *stare decisis* and the appellate process, as well as concerns about the jurist’s individual reputation and that of the judiciary as a whole. Public opinion may reinforce several of these constraints, but seems to have most of its influence where these constraints leave jurists with discretion. Public opinion thus appears to operate in much the same sphere as the judge’s own political ideology, which, according to the “attitudinal” model of judicial decision-making, the judge may promote within the scope of the discretion afforded by precedent.

Because consideration of both formal and informal constraints and attitudinal models of decision-making yields unsatisfying answers, the Article turns from influences external to the judicial decision-making framework and examines the framework itself. In an attempt to understand the apparent influence of public opinion, this Article imagines what a principled incorporation of public opinion into the various analyses might look like. That is, the Article speculates what American jurisprudence would look like if public opinion were an explicit, rather than mysterious, influence on judicial

3. Of course, there are certain judicial tasks, such as sentencing, where searching outside the courtroom for public opinion is inappropriate. In other circumstances, however, principles of democratic government suggest that public opinion could be a legitimate consideration in formulating rules of law. In many of these contexts, judicial doctrine is constructed in such a way as to all but guarantee the correlation of outcomes and public opinion.

outcomes, beginning with an examination of one case where the Court did consider public opinion polls as part of its legal analysis. This thought experiment ultimately suggests another explanation for the correlation of public opinion and judicial output.

The Supreme Court's citation of opinion polls in *Atkins v. Virginia*⁴ suggests that polls may be useful evidence of public opinion if public opinion had a legitimate place in legal analysis. The use of opinion polls as evidence of public opinion would expand the universe of issues about which there may be judicially knowable public opinion, and represent a significant step towards the potential principled incorporation of public opinion into judicial decision-making. Although the court's use of opinion polls was unfortunate because the polls were not subject to examination and criticism by expert witnesses in the trial court, polls are potentially important and powerful evidence of public opinion. The criticisms leveled at the court's use of opinion polls in *Atkins*, moreover, suggests that public opinion can be measured accurately enough to be of use to judges.

The traditional "spectrum of deference"⁵ suggests it is possible to make a reasoned evaluation of the appropriateness of public opinion as an influence in various judicial contexts. The spectrum is based on a realistic evaluation of the relative institutional advantages of the judiciary and Congress, and affords Congress varying degrees of deference depending on the various functions implicated by the decision-making context. Although the considerations are not identical when the question is the consideration of public opinion rather than deference to the will of a political branch, an examination of the values underlying our government and the judiciary's institutional abilities will illuminate when and how the judiciary may reflect public opinion.

For example, Professor Eskridge has argued that public values ought to and do influence the process of statutory interpretation.⁶ *Atkins* suggests that public opinion, which may amount to something less than Eskridge's public values, might influence statutory interpretation depending on the strength of the preference and the strength of other traditional indicators of statutory meaning.

Federal common law is another potential context for the consideration of public opinion. Although the common law does not always directly reflect public preferences, democratic principles suggest that public opinion could be relevant to determining common law rules. The common law context illuminates several instances where public opinion should not be considered—in most cases where the rule may affect the public's tax burden, or where public opinion is adverse to a minority or individual who does not enjoy constitutional

4. 536 U.S. 304 (2002).

5. See generally Rachael E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002).

6. See William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1051 (1989).

protection related to the rule of law to be decided.

Public opinion could also theoretically play a role in constitutional adjudication. Perhaps ironically, determining whether legislation is within Congress's power under the Interstate Commerce Clause—in which the Court grants Congress substantial deference—proves to be an inappropriate doctrine for incorporating public opinion. The reason is twofold. First, there is no reason to believe that the public has any inherent advantage over the judiciary in determining whether an activity substantially affects interstate commerce. Second, the Court's Commerce Clause jurisprudence serves merely to channel public opinion to the constitutionally appropriate decision-maker—a determination for which the popularity of the legislation in question seems irrelevant. Nevertheless, public opinion fits surprisingly well into other constitutional doctrines.

The vindication of national opinion over a majority in a smaller constituency may justify consideration of public opinion in the Court's Fourteenth Amendment jurisprudence. Doctrinal developments in *Lawrence v. Texas*⁷ suggest that public opinion could become a legitimate and explicit consideration in the substantive due process arena. In the course of striking down Texas's law against homosexual sodomy only seventeen years after upholding the states' ability to prohibit such conduct in *Bowers v. Hardwick*,⁸ the *Lawrence* Court engaged in analysis that bore striking similarities to its Eighth Amendment analysis in *Atkins*. The *Lawrence* Court thus pointed to a doctrinal place for public opinion in its substantive due process jurisprudence. Because similar developments have not occurred in the Court's equal protection jurisprudence, this Article reserves judgment regarding the fit of public opinion into equal protection doctrine.

The examination of how public opinion might fit into various judicial doctrines suggests where and how public opinion may influence outcomes. In most instances, the correlation of public opinion and judicial outcomes is the result of the process by which judges routinely make decisions rather than an influence external to the decision-making process. This influence therefore need not be viewed as a threat to judicial independence. Current doctrine is, across the board, well designed to reflect public opinion.

This Article proceeds as follows: Part II identifies several instances where there is agreement that public opinion must not play a role in judicial decision-making, and examines the competing judicial traditions regarding the role of public opinion in constitutional adjudication. Part III then surveys evidence that public opinion influences judicial decision-making, and concludes that public opinion may have a marginal effect. It next attempts to explain how this influence operates, but finds both political and informal intra-judicial

7. 539 U.S. 558, 571-72 (2003).

8. 478 U.S. 186, 186 (1986).

constraints inadequate to account for public opinion's influence on the judiciary. Finally, it examines the use of opinion polls in *Atkins* to determine the meaning of "cruel and unusual punishment." Part IV examines judicial decisional tools themselves to explain the apparent effect of public opinion on judicial decision-making. It first outlines the traditional spectrum of deference, which serves as an example for the context-specific analysis of whether public opinion could be appropriate as a doctrinal consideration in various contexts. It next examines whether public opinion could be a legitimate consideration in various contexts, including statutory interpretation, common law-making, and several constitutional contexts. The Article concludes by examining the tendency of various doctrines to reflect public opinion, and the effect of recent jurisprudence on the public opinion-mirroring ability of those doctrines.

II. THE DEBATE OVER PUBLIC OPINION IN JUDICIAL DECISION-MAKING

A. *Public Opinion as Anathema to Judicial Independence*

There is widespread agreement that in certain cases, public opinion should not play any role in a judge's decision. For example, determinations of whether probable cause exists to try a defendant should not be influenced by public outcry that the defendant is guilty.⁹ Nor should public animus influence individual sentencing decisions.¹⁰ A recent example of these dangers is illuminating.

In 1995, Federal District Judge Baer of the Southern District of New York presided over a high profile drug prosecution. After a hearing where Judge Baer found the testimony of defense witnesses credible and the testimony of police officers "incredible," he excluded large quantities of drugs and a confession, ruling that they were obtained in violation of the defendant's Fourth and Fifth Amendment rights.¹¹

The public and political responses were immediate. The *New York Times* ran several editorials condemning the ruling.¹² Members of Congress spoke publicly about impeachment, and some even asked President Clinton to add his

9. See Hon. William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751 (1986).

10. Jury sentencing is one forum where public opinion is channeled for sentencing purposes. In capital cases juries make several findings and recommend a sentence of death before a judge may impose a death sentence. But few would argue that broad public distaste for the crime or the defendant in of itself justifies capital punishment upon the returning of a guilty verdict.

11. See Monroe H. Freedman, *A Symposium on Judicial Independence: The Threat to Judicial Independence by Criticism of Judges-A Proposed Solution to the Real Problem*, 25 HOFSTRA L. REV. 729, 739-740 (1997).

12. See Hon. Carl E. Stewart, *Contemporary Challenges to Judicial Independence*, 43 LOYOLA L. REV. 293, 298 (1997).

voice to the criticism.¹³ In the meantime, Judge Baer granted a rehearing on the suppression motion. President Clinton declined to comment on the case pending the results of the rehearing.¹⁴ According to the New York Times, a group of Circuit Court judges, and several commentators, the message to Judge Baer was clear: reverse yourself, or risk losing your job,¹⁵ despite the convention against impeaching federal judges because of their decisions.¹⁶

After rehearing the motion, Judge Baer reversed his original decision and admitted the evidence, citing newly-introduced police reports as additional evidence that compelled him to change his mind.¹⁷ But critics claim that this additional evidence could not have been a sufficient ground for reversal, and may have even hurt the prosecution's case by creating additional inconsistencies with the officers' testimony.¹⁸ Judge Baer was in a no-win situation. There was negative publicity about his original decision to exclude the evidence, and there would be a negative public reaction to a change of position based on his decision to include the evidence—both of which could undermine public confidence in the impartial nature of the judiciary.¹⁹

The late Chief Justice Rehnquist wrote about the effects of public opinion on the judicial decision-making process, concluding that “[n]o judge can conscientiously say in so many words, ‘I gave you my best judgment when I decided that the Constitution meant thus and so, but since the public overwhelmingly disagrees with my interpretation of the Constitution, I will therefore change my mind.’”²⁰ On its face, this statement appears to reject public opinion as a consideration in constitutional adjudication, a position consistent with much of Rehnquist's jurisprudence.

In these contexts, capitulation to contrary public opinion would signal the end of judicial independence. But a careful consideration of public opinion in certain cases does not necessarily indicate an erosion of judicial independence. Commentators and jurists have long acknowledged the influence of public opinion without concluding that the judiciary has abdicated its responsibility of independent judgment.

B. Competing Judicial Views on the Propriety on Considering Public Opinion

Commentators and jurists have long recognized the effect of public opinion on the judiciary in circumstances where it is not a threat to judicial

13. *See id.*

14. *See id.* at 299.

15. *See id.*; Freedman, *supra* note 11, at 739-40.

16. *See* James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 B.Y.U. L. REV. 1037, 1110.

17. *See* Freedman, *supra* note 11, at 738-39.

18. *See* Freedman, *supra* note 11, at 740.

19. *See* Stewart, *supra* note 12, at 302.

20. *See* Rehnquist, *supra* note 9, at 752.

independence. The Chief Justice Rehnquist, drawing on his experience as a law clerk to Justice Jackson, concluded that public opinion had a significant influence on the Court's disposition in the "Steel Seizure" case.²¹ In 1952, President Truman, fearing that a reduction in steel production would hinder the Korean War effort, ordered federal officials to seize and operate several steel production facilities during a strike.²² Steel companies brought suit and obtained an injunction from the district court enjoining the President from seizing the steel mills.²³ The government obtained a stay from the court of appeals²⁴ and appealed directly to the Supreme Court, which granted certiorari and heard arguments nine days later.²⁵ The Court rejected the government's argument that the seizure was justified by certain powers given to the President under Article II of the Constitution.²⁶

The timing of the government's "inherent power" argument was not good, as support for both the Korean War and President Truman was at its nadir.²⁷ Chief Justice Rehnquist suggested that the tides of public opinion, accelerated and intensified by the rapid movement of the case through the federal judicial system, influenced the Court's decision.²⁸

Acknowledging public opinion's influence and incorporating it into doctrine are separate propositions, however. Chief Justice Rehnquist repeatedly dissented from opinions taking public opinion into account, stating that public opinion was constitutionally irrelevant.²⁹ Justice Scalia agreed with Rehnquist's theory, commenting on "[h]ow upsetting it is, that so many of our citizens. . . think that we Justices should properly take into account their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus."³⁰

Chief Justice Rehnquist also drew considerable support for his position from a longstanding belief among the public that judges do not—and must not—consider public opinion in making decisions.³¹

21. See Rehnquist, *supra* note 9, at 752.

22. See Rehnquist, *supra* note 9, at 752 at 754 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583 (1952)).

23. See *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 567 (D.D.C. 1952); Rehnquist, *supra* note 9, at 756 (citing M. MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE—THE LIMITS OF PRESIDENTIAL POWER* 108-110 (1977)).

24. See *Sawyer v. United States Steel Co.*, 197 F.2d 582, 585 & n.1 (D.C. Cir. 1952).

25. See Rehnquist, *supra* note 9, at 760 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 567, 573-77 (D.D.C. 1952), *aff'd* 343 U.S. 579 (1952)).

26. See Rehnquist, *supra* note 9, at 762.

27. See Rehnquist, *supra* note 9, at 766-67.

28. See Rehnquist, *supra* note 9, at 765.

29. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 963 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) (rejecting the proposition that "[e]ither the demise of opposition or its progression to substantial popular agreement apparently is required to allow the Court to reconsider a divisive decision").

30. See *id.*, at 1000 (Scalia, J., concurring in part and dissenting in part).

31. See *Wilson*, *supra* note 16, at 1070 (noting two competing sub-traditions, one incorporating and one

Moreover, many jurists share this view of the judiciary and of their own work. Justice Douglas described judges as strong amid the winds of political change.³² Chief Justice Burger wrote that “legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.”³³ Justice Powell agreed, noting that “the assessment of popular opinion is essentially a legislative, not a judicial, function.”³⁴ Justice Frankfurter also wrote that courts are unlike representative bodies because they “are not designed to be a good reflex of a democratic society.”³⁵

Support for public opinion as a factor in judicial decision-making among U.S. Court of Appeals judges is mixed. Of thirty-five judges surveyed in 1981, only one responded that public opinion was “a very important” factor, while eight said that it was “moderately important” and twenty-two said that it was “not important.”³⁶ Judge Tacha of the Tenth Circuit declared that public opinion should have no influence whatsoever in articulating ideal judicial procedure.³⁷

Justice Story wrote that “[i]t is not for judges to listen to . . . popular appeal.”³⁸ Chief Justice Taney also addressed the role of public opinion in *Dred Scot v. Sanford*,³⁹ concluding that current public opinion was irrelevant to constitutional interpretation.

Strictly denying the influence of public opinion is problematic in several respects, however. First, it does not appear to reflect reality. Evidence discussed below suggests that public opinion influences judicial decision-making, even if only at an unconscious level.⁴⁰ Second, in some circumstances, public opinion could be a legitimate consideration for a policy-making court.

There is also a tradition of recognizing public opinion in certain constitutional contexts. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Justice Souter cited divided public opinion as a reason to uphold the central holding in *Roe v. Wade*.⁴¹ According to Justice Souter, the Court should refrain from reversing its watershed cases until substantial public opinion for

hostile to public opinion).

32. See *Craig v. Harney*, 331 U.S. 367, 376 (1947).

33. See *Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting).

34. See *id.* at 443 (Powell, J., dissenting).

35. See *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring).

36. J. Woodford Howard, Jr., *COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM* 165 (1981).

37. See Hon. Deanell Reece Tacha, *Independence of the Judiciary for the Third Century*, 46 *MERCER L. REV.* 645, 646 (1995) (noting “prevailing political winds have no effect”).

38. See *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 713 (1819) (Story, J., concurring).

39. 60 U.S. 393 (1856).

40. In fact, unconscious influence may be more problematic. One of the judiciary’s institutional strengths is its reflective and deliberative nature. To the extent that factors outside of judge’s cognizance influence the decision, this advantage is lost.

41. 410 U.S. 113 (1973); see *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992).

the decision becomes unfavorable.⁴²

Justice Souter's incorporation of public opinion into constitutional doctrine is also firmly grounded in judicial tradition. In 1812, the Court held in *United States v. Hudson*⁴³ that the federal courts lacked the power to make criminal common law. In the decision, Justice Johnson stated that

[a]lthough this question is brought up now for the first time to be decided by this Court, we consider it as having been long since settled in public opinion. In no other case for many years has this jurisdiction been asserted; and the general acquiescence of legal men shews the prevalence of opinion in favor of the negative of the proposition.⁴⁴

Fifth Circuit Judge Stewart, while maintaining that judges must operate without a "fear of reprisal for resisting the popular will,"⁴⁵ leaves some room for judges to consider public opinion. Stewart points to *Dred Scott* as a monstrous result of allowing public opinion to influence a decision.⁴⁶ On the other hand, the Court's decision in *Brown v. Board of Education*⁴⁷ was extremely unpopular in many regions, but is now widely recognized as the correct decision.

The difference may lie in one of Judge Stewart's maxims of judicial decision-making: when considering public opinion, a judge should not try to avert controversy in advance by deciding a certain way.⁴⁸ Justice Taney in *Dred Scott*, now universally regarded as one of the worst decisions ever handed down by the Supreme Court, apparently thought that by denying citizenship to slaves and nullifying the Missouri Compromise he would avert a Civil War. Instead, the decision embarrassed the Court and did nothing to prevent the struggle between the states.

Judge Stewart further acknowledges that judges care about public opinion. According to Judge Stewart, judges want to know how their decisions affect people, and they are able to gauge this by assessing public reaction to their decisions.⁴⁹ Stewart notes, however, that judges should not be "unduly concerned" by public opinion.⁵⁰

42. See *Casey*, 505 U.S. at 867 ("To overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question").

43. 11 U.S. 32 (1812).

44. See *Hudson*, 11 U.S. at 32.

45. See Stewart, *supra* note 12, at 306; See also Gordon Bermant & Russell R. Wheeler, *Federal Judges and the Judicial Branch*, 46 MERCER L. REV. 835, 860 (1995) ("Decisional independence is the *sine qua non* of judicial independence").

46. See Stewart, *supra* note 12, at 307.

47. 347 U.S. 483 (1954).

48. See Stewart, *supra* note 12, at 306.

49. See Stewart, *supra* note 12, at 301.

50. See Stewart, *supra* note 12, at 302.

Chief Justice Rehnquist also acknowledged that public opinion may influence the judicial decision-making process. In documenting the Court's deliberation and decision in the Steel Seizures case,⁵¹ Rehnquist opined that "public opinion had a considerable influence on the Court."⁵² The Chief Justice conceded that judges are influenced by public opinion, and that it would be unwise for judges to try to isolate themselves from it.⁵³ Rehnquist later clarified, however, that "no judge worth his salt would ever" decide a case in a certain manner simply because the majority of the public desired that resolution.⁵⁴

Moreover, Chief Justice Rehnquist appeared to recognize an implicit amount of discretion within the legal model in general, and seemingly found the influence of public opinion within this limited sphere acceptable. By stating that public opinion may not be the only reason for a decision, Chief Justice Rehnquist called for a principled legal argument in addition to a public opinion justification. This compromise is admittedly vague. Unfortunately, this vagueness is reflective of the general unease about the influence of public opinion.

This "partial integration" model presents several problems. The first stems from the wide range of precedent available to judges seeking to justify a decision based on public opinion. Precedent exists for many, often conflicting, outcomes.⁵⁵ As a result, the constraint of principled arguments may be more imagined than real.

Second, the view that public opinion should operate in the same degree in all types of cases, dependant only on the amount of discretion afforded by precedent, is too simplistic. For example, when the Court is acting in its role as a policy maker in discharging statutory and common law-making functions, democratic values suggest that the public could have a voice in shaping policy. On the other hand, when individual rights are directly implicated, public opinion might have less of a role to play in the decision-making process.⁵⁶

51. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583 (1952).

52. See HON. WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 95 (1987) [hereinafter Rehnquist, *The Supreme Court*]. Chief Justice Rehnquist was a clerk for Justice Jackson at the time.

53. See Rehnquist, *The Supreme Court*, *supra* note 52, at 98.

54. See Rehnquist, *The Supreme Court*, *supra* note 52, at 98.

55. Jeffrey A. Segal & Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of United States Supreme Court Justices*, 40 AM. J. POLIT. SCI. 971, 972 (1996) (noting eighty percent of the constitutional arguments in majority opinions by Justices Rehnquist and Brennan were based on precedent).

56. J. ELY, *DEMOCRACY AND DISTRUST* 68-69 (1980) (footnote omitted). "There are two possible reasons one might look to consensus to give content to the Constitution's open-ended provisions. One might say one was seeking to protect the rights of the majority by ensuring that legislation truly reflect popular values. If that were the purpose, however, the legislative process would plainly be better suited to it than the judicial. This leaves the other possible reason for the reference, to protect the rights of individuals and minority groups against the actions of the majority Now think again about consensus . . . and the message will come clear: it makes no sense to employ the value judgments of the majority as a vehicle for protecting minorities from the

III. THE INTERACTION BETWEEN PUBLIC OPINION AND JUDICIAL OUTCOMES

A. *Evidence of Public Opinion's Influence on Judicial Decision-making*

Despite the ideal judicial set-up where judges act as impartial arbiters in the disputes that come before them, many people, both inside and outside the legal academy, now view the judiciary as something less than completely impartial. As the public's view of judges has evolved, interest in the effect of public opinion on the judiciary has increased. Evidence of such influence is often anecdotal, but a number of studies have also documented the relationship between public opinion and judicial decision-making using concrete statistics.

Many Americans think of judges as "swashbuckling" heroes,⁵⁷ standing against the tide of public opinion to protect individuals and minorities from the tyranny of the majority. Indeed, the Supreme Court itself, the famous *Carolene Products* footnote 4, cast itself in this role by taking as its constituency "discrete and insular minorities," declaring that it would protect such groups from overzealous majorities.⁵⁸

The Warren Court has been praised (by some) for its willingness to ignore severe public criticism in reaching its decisions.⁵⁹ For example, the Court received virulent criticism for a number of its rulings involving desegregation. In the south, billboards calling for the impeachment of the Chief Justice were erected,⁶⁰ and local politicians did their best to resist the Court's decision in *Brown v. Board of Education*.⁶¹ This resistance to the Supreme Court's ruling led, in turn, to another, perhaps more courageous, display of judicial swashbuckling: southern federal district court judges issuing the individual desegregation orders necessary to enforce the High Court's ruling.⁶²

Many of the Warren Court's controversial rulings were, however, supported by public opinion of some sort.⁶³ Specifically, much of the Warren Court's agenda was reflective of the political leanings of the nation's political elite.⁶⁴

value judgments of the majority."

57. Hon. Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 HOFSTRA L. REV. 703, 722 (1997).

58. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); Stewart, *supra* note 12, at 302 (asserting that the judiciary has no constituency).

59. See Stewart, *supra* note 12, at 307.

60. See Stewart, *supra* note 12, at 298.

61. 347 U.S. 483 (1954).

62. See Kaye, *supra* note 57. One such judge, who battled segregation for years, has been hailed as a "judicial hero;" see also Wilson, *supra* note 16, at 1116-17.

63. See Mark A. Graber, *Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship*, 27 LAW & SOC. INQUIRY 309, 311 (2002) (reviewing LUCAS A. POWE, *THE WARREN COURT AND AMERICAN POLITICS* (2000)) ("[S]ubstantial support existed within the dominant national coalition that held power during the 1950s and 1960s for virtually all major judicial decisions handed down while Warren was on the bench.")

64. President Kennedy praised the Court's decision in *Engle v. Vitale*, and Congress encouraged the Justice Department to challenge poll taxes before the Court struck down Virginia's poll tax in *Harper v. Va.*

Accordingly, the Warren Court's rulings were met with significant public support, particularly from those within the federal government.

Although the Warren Court enjoyed broad political support for its desegregation decisions, the public was not always behind the Court. For example, the court was without significant public support for many of its decision granting rights to criminal defendants. Law enforcement officials were uniform in their condemnation of *Miranda v. Arizona*,⁶⁵ which required certain warnings to be given before police could interrogate a suspect in custody. Later the Court limited the scope of *Miranda* in a series of decisions,⁶⁶ perhaps in part as a result of negative public reaction. The Court refused, however, to do away with *Miranda* completely, reaffirming its constitutional status in *United States v. Dickerson*.⁶⁷

Thus, the Warren Court, often regarded as the most liberal, activist, and stereotypically countermajoritarian Court in the post-World War II era, acted consistently with public support and in concert with public opinion. This understanding of the Warren Court should raise questions of whether the countermajoritarian difficulty is as compelling a paradox as scholars have historically found it.⁶⁸

Political scientists have also challenged the conventional wisdom that the appointment and confirmation powers of the President are the sole mechanisms by which politics and popular opinion affected the judiciary. The traditional model, dubbed "judicial replacement," posits that "elite and mass preferences filter indirectly to the Supreme Court via membership replacement."⁶⁹ The judicial replacement model suggests that the Court's rulings realign with the dominant political alliance every four to eight years.⁷⁰

In contrast, the "political adjustment model" hypothesizes that Justices' views are susceptible at the margins to external pressures.⁷¹ The Court, its adherents claim, will not stray too far from elite and popular opinion.⁷² By

Bd. of Elections.

65. 384 U.S. 436 (1966).

66. See, e.g., *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357 (1998) (probation revocation hearings); *Arizona v. Evans*, 514 U.S. 1 (1995) (government official other than police officer at fault); *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (deportation hearings); *United States v. Calandra*, 414 U.S. 338 (1974) (grand jury proceedings).

67. *Dickerson v. United States*, 530 U.S. 428 (2000).

68. See Graber, *supra* note 63, at 311 (describing the countermajoritarian difficulty as "largely legendary"); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part V*, 112 YALE L.J. 153, 156 (2002) (questioning whether the academic focus on the supposed conflict between judicial review and democracy is worthwhile, or at least worth the effort the academy has spent on it).

69. Michael W. Link, *Tracking Public Mood in the Supreme Court: Cross-Time Analysis of Criminal Procedure and Civil Rights Cases*, 48 POL'Y RES. QUARTERLY 61, 62 (1995).

70. See Link, *supra* note 69, at 62.

71. See Link, *supra* note 69, at 63.

72. See Link, *supra* note 69, at 63.

creating too glaring a gap between its decisions and public sentiment, the judiciary risks a loss of legitimacy and effectiveness.⁷³ Thus, the political adjustment model allows for the influence of public opinion on judicial decision-making.

The judicial replacement model is undoubtedly correct in that judicial appointments have the capacity to influence judiciary rulings. Evidence shows, however, that there is a more direct influence of public opinion on judicial decisions. The influence of public opinion is most apparent when the Court appears to make a decision in light of a particular public opinion even when there is no change in the Court's composition.⁷⁴

The Supreme Court appears to be responsive to public opinion as an institution.⁷⁵ If this is so, however, it is because individual justices are influenced. Especially in closely divided cases, an influence on one or two justices may be decisive.⁷⁶ One study examining fifteen Justices since World War II found that seven of the Justices were significantly influenced by public opinion.⁷⁷ The list of Justices significantly influenced by public opinion includes Justices thought of as both "liberal" and "conservative."⁷⁸ The study also found that public opinion's influence occurred at a lag of one to seven years.⁷⁹

Another study produced more sweeping evidence for the impact of public opinion on judicial decision-making. Roy Flemming and Dan Wood concluded that judicial responses to public opinion occur generally.⁸⁰ They also concluded that no Justice is completely unresponsive to public opinion.⁸¹ They also found no "lag" in judicial response to public opinion.⁸²

Michael Link examined the relationship between two types of public opinion—mass and elite opinion—and two types of cases—criminal procedure and civil rights cases.⁸³ Link found that the Supreme Court tends to follow "the contours of elite and mass opinion" in criminal procedure cases.⁸⁴ In civil rights cases, however, Link found a divergence in elite and mass opinion, and

73. See David W. Adamany & Joel B. Grossman, *Support for the Supreme Court as a National Policymaker*, 5 L. & POL'Y Q. 405 (1983).

74. See William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision making: A Micro-Analytic Perspective*, 58 J. OF POL. 169, 170 (1996).

75. See Mishler, *supra* note 74, at 171.

76. See Mishler, *supra* note 74, at 177.

77. See Mishler, *supra* note 74, at 194.

78. See Mishler, *supra* note 74, at 195.

79. See Mishler, *supra* note 74, at 194.

80. Roy B. Flemming & B. Dan Wood, *The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods*, 41 AM. J. POL. SCI. 468, 493 (1997).

81. See Flemming & Wood, *supra* note 80, at 493.

82. See Flemming & Wood, *supra* note 80, at 493.

83. See Link, *supra* note 69, at 61.

84. See Link, *supra* note 69, at 62.

determined that the Supreme Court reflects mass, not elite, sentiment.⁸⁵ Link also found a lag in judicial response to public opinion,⁸⁶ which he explained by observing that the “preferences of collective bodies, such as the Congress and the public, are rarely consensual.”⁸⁷ In the face of uncertainty, therefore, the Court hesitates before acting on public opinion.⁸⁸

Although most studies of public influence on judicial decision-making have focused on the Supreme Court, lower federal courts have not escaped scrutiny. Craig Ducat and Robert Dudley studied more than 200 district court opinions in the post-war era involving questions of presidential power.⁸⁹ They found that “[e]xcept for clear negative rules severely limiting executive control over spending . . . the disposition of presidential power cases in domestic affairs appears to be governed by political tides.”⁹⁰ Presidential success rates, they found, depended on the President’s persuasive power backed by his public prestige.⁹¹ Ducat and Dudley used presidential approval ratings as their proxy for “public prestige.” The results showed that federal district courts tend to constrain presidential power when the president has fallen from favor.⁹²

One point on which all studies agree is the marginal effect of public opinion on individual judicial decisions.⁹³ Judges are not weathervanes, and public opinion appears to have only a minor influence in the decision-making process.⁹⁴ In this manner, public opinion’s influence may be similar to the influence of a judge’s own political leanings on her decisions and opinions. However, even a small influence in individual cases may be significant in the aggregate.

At the very least, there is a significant correlation between public opinions and judicial outcomes. The next logical task is to explain the effect of public opinion on the judicial decision-making process.

85. See Link, *supra* note 69, at 62.

86. See Link, *supra* note 69, at 62.

87. See Link, *supra* note 69, at 66.

88. On this view, the lack or short duration of a lag could be caused by several things. First, public opinion may be clearer on some issues than others. Second, the Justices may be willing to act in the face of more uncertainty on some issues than on others. This may be the case for issues where the public conflict seems intractable and consensus seems unlikely. In such a situation, the Court must act despite a clear indication from the public of its disparate preferences.

89. Craig R. Ducat & Robert L. Dudley, *Federal District Judges and Presidential Power During the Postwar Era*, 51 J. OF POL. 98 (1989).

90. See Ducat & Dudley, *supra* note 89, at 115.

91. See Ducat & Dudley, *supra* note 89, at 116.

92. See Ducat & Dudley, *supra* note 89, at 116. The result, ironically, may be that public opinion causes the non-elected judiciary to prevent the electorally accountable president from acting in a countermajoritarian manner.

93. See Flemming & Wood, *supra* note 80, at 493; Ducat & Dudley, *supra* note 89, at 115 (noting that public opinion only affects decisions in cases not governed by clear rules).

94. See *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 665 (1943) (Frankfurter, J., dissenting) (stating, “[t]he Court has no reason for existence if it merely reflects the pressures of the day”).

B. *Explaining the Influence of Public Opinion*

1. *Formal Political Influences on Judicial Decision-making*

Public opinion is generally channeled through the political branches of the federal government. The interaction between the Court, Congress and the President is perhaps the most logical channel of influence over the judiciary for public opinion. Congress and the President exert several political controls over the judiciary. For example, within constitutional bounds, Congress controls the judiciary's jurisdiction. It also controls the judiciary's budget. Similarly, the Executive branch must implement many judicial decisions before they may be effective. These political controls are largely uncontroversial, perhaps because they are rarely invoked.⁹⁵ Like other acts of the political branches, these controls are fundamentally expressions of public opinion. But the threat of such consequences should have no influence on judicial decision-making in the contexts discussed in Part II.A.

Extra-judicial constitutional interpretation is neither inappropriate nor invalid. Clearly, Congress and the executive branch must regularly engage in constitutional interpretation. But the judiciary ought not to allow strong-arm tactics to influence its outcomes—to do so would be to abdicate its traditional function of judicial review dating from *Marbury v. Madison*.⁹⁶ It is this operation of public opinion that prompts concerns over the potential threat of public opinion to judicial independence. Therefore, separation of powers concerns underlie the rejection of direct influence by the political branches on judicial decision-making.

Article III of the United States Constitution provides that Congress may control the federal courts' jurisdiction.⁹⁷ Indeed, the first Judiciary Act dealt directly with the jurisdiction of both the Supreme and inferior courts. Historically, however, Congress has had only limited success in denying the federal courts, and the Supreme Court in particular, jurisdiction.

Part of the reason for this is political.⁹⁸ It is difficult to muster the "political capital" necessary to pass a bill stripping the federal courts of jurisdiction. Instead, most legislators spend the bulk of their time on "substantive" lawmaking and other activities such as constituent services.

Another part of the difficulty that Congress faces in exerting influence on

95. See, e.g., LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000); CLIFFORD M. LYTLE, *THE WARREN COURT AND ITS CRITICS* (1968); WALTER F. MURPHY, *CONGRESS AND THE COURT: A CASE STUDY IN THE AMERICAN POLITICAL PROCESS* (1962); C. HERMAN PRITCHETT, *CONGRESS VERSUS THE SUPREME COURT 1957-1960* (1961).

96. 5 U.S. 137 (1803).

97. U.S. CONST. art. III. See *Sheldon v. Sill*, 49 U.S. 441, 448-449 (1850).

98. For a discussion of the political difficulties in restraining federal courts, see William G. Ross, *Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail*, 50 *BUFF. L. REV.* 483 (2002).

the federal judiciary through jurisdictional control is the judiciary itself. The Supreme Court has consistently read jurisdiction-stripping statutes as allowing them to maintain some level of involvement in disputes arising under federal law. Nowhere is this more evident than in the *habeas* context.⁹⁹ Although *habeas* represents one of the few instances in which Congress successfully denied the Supreme Court jurisdiction,¹⁰⁰ the Court has consistently read apparently clear statutory language denying it jurisdiction over certain habeas cases to permit review.¹⁰¹ Other constitutional constraints also operate on Congressional power to restrict the federal judiciary's jurisdiction.¹⁰² The Court's own doctrine, therefore, helps it resist these political expressions of public opinion.

Congress also controls the federal courts' budget, and may threaten to reduce its allotment. This may be an important tool for exerting political control over the judiciary.¹⁰³ In practice, however, this tool is generally too blunt to do more than express general displeasure absent specific threats.

The federal courts also depend on the executive branch to enforce its decrees.¹⁰⁴ Today, executive enforcement is taken almost for granted, but there have been times in our nation's history where Presidents have expressed reluctance or exhibited an inability to enforce judicial decrees.¹⁰⁵ For example, the President's potentially limited ability to enforce the Court's decision may have influenced the Court's chosen remedy in *Brown*.¹⁰⁶ Such considerations may be part of the real politik that the Court must engage in from time to time in order to maintain its legitimacy with the public. In reality, however, it has been so long since the President has refused or even seriously threatened to

99. U.S. CONST. art. I, § 9, cl. 2.

100. See *Ex Parte McCardle*, 74 U.S. 506 (1869). In *McCardle*, the Supreme Court held that it lacked habeas jurisdiction when Congress passed a statute stripping it of jurisdiction while the case was pending. *Id.* at 513-517. The Court intimated, however, that this removal of jurisdiction was only constitutional because habeas relief remained open to McCardle through other mechanisms. *Id.*

101. See *Demore v. Kim*, 538 U.S. 510 (2003) (reading the Immigration Act, 8 U.S.C. § 1226(e) ["the Attorney General's discretionary judgment regarding the application of this section shall not be subject to review" and "[n]o court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien"] not to deprive the federal courts of jurisdiction to grant habeas relief to aliens under the Court's "clear statement" rule for withdrawing federal habeas jurisdiction).

102. See *United States v. Klein*, 80 U.S. 128 (1871) (holding a statute purporting to supply a rule of decision by making a presidential pardon conclusive proof of disloyalty during the Civil War unconstitutional, in part because it interfered with the President's pardon power).

103. See John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 977 (2002).

104. Alexander Hamilton, in *Federalist* 78, remarked that the executive "holds the sword of the community."

105. Andrew Jackson, for example, allegedly ignored judicial orders in cases involving Cherokee Indians. See Barry Friedman, *The History of the Counter-majoritarian Difficulty (pt. 1): The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 394-404 (1998). This defiance took place while the debate over judicial supremacy was young. See also Ferejohn & Kramer, *supra* note 103, at 983; CARL BRENT SWISHER, ROGER B. TANEY 550-56 (1935). President Lincoln also ignored a Supreme Court order to release a prisoner. *Id.*

106. See Wilson, *supra* note 16, at 1106-1107.

refuse to enforce a decree of the Supreme Court that non-enforcement is no longer a serious constraint.¹⁰⁷ Ultimately, formal political control exerted by Congress and the President are insufficient to account for the influence of public opinion on the judiciary.

2. *Informal Constraints and the Attitudinal Model*

Informal constraints are those conventions, while not absolutely binding, to which the judiciary generally adheres, and other considerations bearing on its legitimacy and the legitimacy of its decisions.

One type of informal constraint is the judge's individual reputations and that of the judiciary as a whole. Public opinion may influence judges by forecasting the effect that a certain decision will have on their reputation, both with the general public and within the legal community.¹⁰⁸ These reputations must be established and maintained through principled decision-making that reaches acceptable results.¹⁰⁹ Promotion is a dim prospect for most federal judges, meaning professional respect may be the driving force behind the excellence of judicial work product.¹¹⁰

When dealing with the general public, results seem to be what matter in the long term.¹¹¹ Judges sitting in cases where there is significant public opinion must certainly be aware of that opinion, and should be able to predict, with little difficulty, potential public reactions to various rulings.

Reaction from the general public is immediate, intense, and relatively short-lived. Even controversial decisions generally take a back seat in the public mind when other political events intervene. Still, "[a]lthough individual citizens may evince little or no knowledge of or concern for the Court, aggregate shifts in public confidence in the Court reflect rational and calculated

107. See Ferejohn & Kramer, *supra* note 103, at 983 (noting a lack of open defiance since the Eisenhower administration).

108. *But see* Stewart, *supra* note 12 at 306 (arguing that judges should not gauge public opinion in order to avoid controversy in advance by changing their decisions); REHNQUIST, *THE SUPREME COURT*, *supra* note 52, at 192 (1987) (asserting that "no honorable judge" would vote for a certain outcome simply because of public opinion).

109. See generally David Klein & Darby Morrisroe, *The Prestige and Influence of Individual Judges on the U.S. Courts of Appeals*, 28 J. LEGAL STUD. 371 (1999); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295 (1990) (discussing favorably Justice Scalia's impact on the Supreme Court's approach to statutory interpretation).

110. See Ferejohn & Kramer, *supra* note 103, at 980. *But see* Mark A. Cohen, *Explaining Judicial Behavior or What's "Unconstitutional" About the Sentencing Commission?*, 7 J.L. ECON. & ORG. 183, 188-89 (1991) (suggesting that some judges supported sentencing commission to increase their chances at promotion); Mark A. Cohen, *The Motives of Judges: Empirical Evidence from Antitrust Sentencing*, 12 INT'L REV. L. & ECON. 13, 27 (1992) (suggesting that promotion potential explains a significant portion of the variance in corporate criminal antitrust penalties).

111. See Chemerinsky, *supra* note 2, at 947 (noting that in short term, Court's processes help maintain legitimacy when issuing unpopular decisions).

responses to events on the political landscape and to actions taken by the Court.”¹¹² For the Court to retain its public support, therefore, the results, and the reasoning by which those results are supported, need only be *acceptable*.¹¹³ The Court need not acquiesce to every public whim, nor must all of its results be politically popular.

In contrast with the general public, members of the legal community have greater incentive and opportunity to scrutinize judicial opinions. Therefore, academics and practitioners often criticize many decisions not only on the basis of their results, but also for their reasoning. Indeed, in some instances, scholars reject the court’s reasoning, but would have reached the same result in another manner.¹¹⁴ To establish and maintain a reputation among the legal community, therefore, a judge must not only reach an acceptable result, but must reach it in a well-reasoned manner. Furthermore, many members of the legal community may be more of a peer group to the judges than the general public in that they devote more time to the systematic study of judicial opinions. Despite potential charges of elitism, it may not be entirely improper for judges to pay particular attention to this subset of extra-judicial opinion.

The requirement that all judicial decisions be explained in written opinions is closely related to the reputational constraint on judicial decision-making.¹¹⁵ Some political scientists dismiss this constraint as ineffectual, claiming that opinions are mere rationalizations, rather than the judge’s thought process and actual reasoning.¹¹⁶ Several prominent judges and commentators, including Karl Llewellyn and Judges Jerome Frank and Richard Posner, agree.¹¹⁷ These scholars similarly dismiss as anomalies anecdotes about opinions that “wouldn’t write,” that resulted in changed outcomes.¹¹⁸ But this position ignores the effects of opinion writing on a judge’s reputation. Evaluation of these opinions by both the public, and, to a greater extent, the legal community

112. BARBARA PERRY, *THE PRIESTLY TRIBE: THE SUPREME COURT’S IMAGE IN THE AMERICAN MIND* 127 (1999).

113. See Chemerinsky, *supra* note 2, at 947.

114. See Donald Dripps, *Living with Leon*, 95 *YALE L.J.* 906 (1986) (defending the results in *United States v. Leon*, 468 U.S. 897 (1984), while disagreeing with its reasoning); Donald H. Regan, *Rewriting Roe v. Wade*, 77 *MICH. L. REV.* 1569 (1979).

115. See Frederick Schauer, *Giving Reasons*, 47 *STAN. L. REV.* 633, 633 (1995) (arguing that “reasoned elaboration” is the “credo” of judicial decision making).

116. See Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 *NW. U. L. REV.* 251, 267 (1997) (“Legal realists and critical legal scholars have long maintained that opinions are post-facto rationalizations of results dictated by judicial ideology”).

117. See Cross, *supra* note 116, at 267 (citing KARL LLEWELLYN, *THE BRAMBLE BUSH* 74-75 (1951)); Jerome Frank, *What Courts Do In Fact*, 26 *ILL. L. REV.* 645, 653 (1932); Richard A. Posner, *The Jurisprudence of Skepticism*, 86 *MICH. L. REV.* 827, 865 (1988).

118. See Cross, *supra* note 117, at 270. Opinions that refuse to write are those where the judge finds herself in the awkward position of not being able to justify a legal opinion after she has made it. The result is a different outcome. Cross points to *Owen v. Owen*, 500 U.S. 305 (1991), where Justice Scalia and Chief Justice Rehnquist were unable to write an opinion for a unanimous court. Chief Justice Rehnquist ultimately wrote a different (and opposite) opinion in which all but one Justice joined. *Id.*

serves as a very real constraint on judicial decision-making.

Moreover, some scholars have suggested that certain judges enjoy reputations as “prestige judges,” whose opinions are cited more often and with greater reliance, than other judges.¹¹⁹ This is a status to which many judges presumably aspire. Other judges established and have maintained reputations for writing in certain styles,¹²⁰ taking consistent positions, or writing particularly strong majority or dissenting opinions.¹²¹

Stare decisis also serves as a very real constraint on judicial decision-making. Especially at the lower levels, federal judges are often bound by precedent. Although there remains some room for judicial discretion in many cases, precedent often either dictates the outcome, or curtails what discretion remains.¹²² Precedent also remains important at the Supreme Court level, and most judges, both “liberal” and “conservative,” rely on it.¹²³ Recently, however, several notable dissents have accused Supreme Court majorities of either ignoring or paying mere lip service to precedent.¹²⁴ In addition, Court commentators have suggested that the Supreme Court does not consider itself as bound by precedent as it might.¹²⁵

Interestingly, many of the cases where Justices chastise one another for ignoring precedent are among the most politically controversial cases that have generated intense and divided demonstrations of public opinion. In these cases, precedent may have been the subject of prolonged and intense criticism, either of its result or its reasoning, or both.¹²⁶ Criticism of precedent, together with changed circumstances, are among the reasons the Supreme Court gives for

119. See Klein & Morrisroe, *supra* note 109, at 371; Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295 (1990) (discussing favorably Justice Scalia’s impact on the Supreme Court’s approach to statutory interpretation); Joshua P. Davis, *Cardozo’s Judicial Craft and What Cases Come to Mean*, 68 N.Y.U. L. REV. 777 (1993).

120. For a discussion of the Justices’ rhetoric, see Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008 (2002).

121. See generally Michael Mello, *Adhering to Our Views: Justices Brennan and Marshall and the Relentless Dissent to Death as a Punishment*, 22 FLA. ST. U. L. REV. 592 (1995).

122. See Cross, *supra* note 116, at 262 (discussing Steven Burton’s model of judging in “good faith,” where judges have a certain amount of discretion, bounded by the legal model of judicial decision making, in which to exercise their political or ideological preferences); see also STEVEN J. BURTON, *JUDGING IN GOOD FAITH* (1992).

123. One study discovered that eighty percent of the constitutional arguments in majority opinions by Justices Rehnquist and Brennan were based on precedent. See Segal & Spaeth, *supra* note 55, at 972.

124. See *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 993 (1992) (Scalia, J., dissenting); *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

125. See Ronald J. Krotoszynski, Jr., *An Epitaphios for Neutral Principles in Constitutional Law: Bush v. Gore and the Emerging Jurisprudence of Oprah!*, 90 GEO. L.J. 2087 (2002).

126. See *Roe v. Wade*, 410 U.S. 113 (1973). The case has been roundly criticized. See also Claudia Pap Mangel, *Legal Abortion: The Impending Obsolescence of the Trimester Framework*, 14 AM. J.L. & MED. 69 (1988); Don Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979). *Bowers v. Hardwick*, 478 U.S. 186 (1986), has likewise been assailed.

overturning precedent.¹²⁷ Therefore, notice of prolonged and intense criticism is one way in which public opinion and legal scholarship may legitimately influence the Supreme Court's application of *stare decisis*, and one manner in which the Court has explicitly incorporated public opinion into its legal analysis.

In many politically sensitive cases, precedent is unclear. In such cases, there may be more room for public opinion to influence judicial decision-making. One scholar, standing between the disciplines of legal scholarship and political science, has suggested that while precedent constrains a judge (the legal model of judicial decision-making)¹²⁸ who might otherwise decide a case based on political or ideological preferences (the "attitudinal model" of judicial decision-making),¹²⁹ the discretion left by legal constraints varies from case to case, and in some instances may be virtually non-existent.¹³⁰

A final check on judicial decision-making is public perception of the judiciary as an institution.¹³¹ Because perceptions of politically or result-oriented judging might alter people's views, the judiciary works hard to avoid such appearances. Moreover, judicial review can be a politically dangerous power for a judiciary working hard to maintain a public image as a trustworthy, impartial institution. Historically, many of the attacks on the federal courts' power have been politically motivated.¹³² Although the American public consistently has rejected limits on judicial independence,¹³³ federal judges operate in the shadow of these attacks. Despite continued accusations of "judicial activism,"¹³⁴ the judiciary seeks to maintain its image of impartiality.

Of course, politically charged decisions are contentious precisely because there are large numbers of people with strong opinions on both sides of the issue. This means that when political criticism is leveled at the federal judiciary, there will most likely be partisans on the other side of the aisle ready to defend it. The recent case of *Lawrence v. Texas*¹³⁵ illustrates this point. Justice Scalia accused the Court of taking sides in a "culture war" and

127. See *Lawrence*, 539 U.S. at 576.

128. See Cross, *supra* note 116, at 254. "The classic legal model is one of a formalism of neutral principles, in which judges almost scientifically apply analogical reasoning to the Constitution, prior precedents, or statutes to find the proper resolution of a case."

129. See Cross, *supra* note 116, at 253. The attitudinal model holds that judges make decisions based on "individual political ideolog[ies] and the identities of the parties."

130. See Cross, *supra* note 116, at 262.

131. See *Baker v. Carr*, 369 U.S. 186 (1962) (Frankfurter, J., concurring) (noting that the Court's authority rests on the public's confidence in its moral sanction).

132. See Friedman, *supra* note 132, at 755.

133. See Friedman, *supra* note 132, at 758 (listing failed attempts to constrict judiciary's independence).

134. See Jack Wade Nowlin, *The Judicial Restraint Amendment: Populist Constitutional Reform in the Spirit of the Bill of Rights*, 78 NOTRE DAME L. REV. 171 (2002) (proposing a "Judicial Restraint Amendment" to curb judicial activism); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 13-14 (2001).

135. 539 U.S. 558 (2003).

abandonment of the principle of *stare decisis*.¹³⁶ Immediately after the decision was announced, some groups and politicians attacked both the decision and the Court. Attacks on *Lawrence* focused on the controversial social nature of the right recognized by the Court and the potential implications for other rights, particularly for marriage.¹³⁷

Others, however, came to the Court's defense, arguing the decision that *Lawrence* overruled was wrong.¹³⁸ In the wake of the controversy, the Court probably lost little net credibility in the eyes of the general public—the outrage of some being balanced by the enthusiastic support of others.

Politically charged cases such as *Lawrence* and *Bush v. Gore*¹³⁹ may prompt the American public to question the impartiality upon which the judiciary's legitimacy is based. This view is based on the legal model of judicial decision-making, which contends that judges decide cases by applying neutral legal principles.¹⁴⁰ But some scholars, mostly political scientists, have studied the relationship between judges' political leanings and the decisions they make. To the extent that the case before a judge is not directly controlled by precedent, the judge has discretion to advance her political ideology.¹⁴¹ At its most basic level, the "attitudinal model" of judicial decision-making asserts that judges decide cases based on their ideology rather than neutral legal principles.¹⁴² Political scientists assert that it is possible to predict outcomes of cases more accurately by examining the political orientation of the presiding judge than by examining the underlying legal principles.¹⁴³

Legal scholarship has yet to fully assimilate this hypothesis. In large part, this is because legal scholarship is generally predicated on the assumption that judges decide cases solely on the basis of law. One study of the effects of amicus briefs on the Supreme Court concluded that briefs that advance legal arguments have more influence on the Court than those that merely state the amici's position.¹⁴⁴ This indicates that the Court was not conducting a sort of

136. See *Lawrence*, 539 U.S. at 591, 602 (Scalia, J., dissenting).

137. See Ted Olsen & Todd Hertz, *Opinion Roundup: Does Lawrence v. Texas Signal the End of the American Family?*, *Christianity Today* (June 30, 2003) (discussing public reaction to the Court's decision as well as the decisions possible future implications), at <http://www.christianitytoday.com/ct/2003/126/11.0.html> (last visited 1/22/2006).

138. See Cynthia Dailard, *What Lawrence v. Texas Says About the History and Future Of Reproductive Rights*, 6 *Guttmacher Report on Public Policy* No. 4 (October 2003) (cautiously praising the Court's resuscitation of autonomy rights while noting language about the conditions for overturning precedent could be used to overturn *Roe v. Wade*), available at <http://www.guttmacher.org/pubs/tgr/06/4/gr060404.pdf> (last visited 1/23/2006).

139. 531 U.S. 98 (2000).

140. See Cross, *supra* note 116, at 254. "The classic legal model is one of a formalism of neutral principles, in which judges almost scientifically apply analogical reasoning to the Constitution, prior precedents, or statutes to find the proper resolution of a case."

141. See Cross, *supra* note 119, at 262.

142. See Cross, *supra* note 119, at 271-72.

143. See, e.g., Cross, *supra* note 119, at 275 (discussing several such claims).

144. Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme*

head count of those interest groups who care enough about the issue at stake to go to the trouble of filing an amicus brief, although the authors did suggest that the Court might look to the amici as a barometer of public opinion.¹⁴⁵ This, the authors concluded, provided support for the legal model of judicial decision-making, because sheer numbers did not seem to influence the Court.¹⁴⁶ Nor was the Court engaged in mere pandering to interest groups. The study, the authors concluded, provided no support for the attitudinal model.¹⁴⁷

This conclusion may be predicated on too strong a view of the attitudinal model. In its simplest possible form, the attitudinal model seems to assume that judges' political preferences are set and not capable of being shifted, bolstered, or weakened.¹⁴⁸ However, this interpretation is an oversimplification of the attitudinal model, and also ignores the life experiences of most people. Instead, to the extent that they are cognizant of their ideology's influence at all, judges might engage in more strategic analyses, advancing their political agendas by considering how other government institutions will respond to a decision. Examples include whether Congress will "overturn" its interpretation of a statute or whether the President will provide only lackluster enforcement of a constitutional right.¹⁴⁹ Unfiltered public opinion—public opinion *not* expressed through elected officials—may also play a role in this strategic decision-making. Indeed, there are a variety of ways that public opinion may interact with a judge's political leanings and influence the ultimate disposition of the case and the opinion.

For example, public opinion may also serve to re-enforce a judge's prior political or ideological leanings. It need not change that judge's decision to have several important consequences. Favorable public opinion might cause the judge to write a more strongly worded opinion than she otherwise would have. This, in turn, may limit the discretion of other judges who would have otherwise decided the case another way and provide subsequent judges with similar political leanings with favorable language to move precedent further in the direction she desires. Alternately, if public opinion runs against the judge's ideological leanings, the judge might curtail the language in her opinion to make it acceptable. Public opinion may cause the judge to argue more forcefully when discussing the case with other judges if she is sitting on a panel. Whether public opinion serves to moderate or embolden judicial rhetoric, the decision's legacy will be more reflective of majoritarian preferences.

In the end, this "explanation" is also unsatisfactory because it posits that

Court, 148 U. PA. L. REV. 743, 750 (2000).

145. See Kearney & Merrill, *supra* note 144, at 786.

146. See Kearney & Merrill, *supra* note 144, at 786.

147. See Kearney & Merrill, *supra* note 144, at 750.

148. See Kearney & Merrill, *supra* note 144, at 779.

149. See Kearney & Merrill, *supra* note 144, at 782.

public opinion influences judicial decisions through processes that are not observable. But judicial decision-making is characterized by its transparency—the judiciary’s decisions must be explained in written opinions. If one of the goals of legal scholarship is to understand and improve judge-made law, it should endeavor to reduce as much of the decision-making process as possible to terms that may be articulated in written opinions. Legal scholars must look elsewhere to explain the correlation between public opinion and judicial outcomes. This Article therefore turns to a case in which the court explicitly considered public opinion, using poll results as evidence, in reaching its decision.

c. Actual Interaction: Atkins v. Virginia and the Use of Public Opinion Polls

The Supreme Court’s Eighth Amendment jurisprudence has long been its primary point of explicit interaction with public opinion. The Eighth Amendment states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”¹⁵⁰

The terms cruel and unusual are inherently subjective.¹⁵¹ Nor is there sufficient evidence of the Framers’ intent in using those words to be useful in giving substance to the Amendment.¹⁵² As a result, the Court has considered public opinion in determining whether a punishment is cruel and unusual.¹⁵³ In *Trop v. Dulles*,¹⁵⁴ a plurality stated that “[t]he amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society” in holding that denationalization was cruel and unusual punishment for desertion from the armed forces.¹⁵⁵

Traditionally, the Court has measured this nation’s “evolving standards of decency” by looking to “objective” manifestations of public opinion, for example, legislative actions at the federal and state level, and jury verdicts.¹⁵⁶ But in *Atkins v. Virginia*,¹⁵⁷ the Court cited several other sources of information on public opinion in concluding that the execution of mentally challenged individuals violates constitutional standards.

In 1996, Daryl Renard Atkins was convicted of abduction, armed robbery,

150. U.S. CONST. amend. VIII.

151. See Tracey E. Robinson, *By Popular Demand? The Supreme Court’s use of Public Opinion Polls in Atkins v. Virginia*, 14 GEO. MASON U. CIV. RTS. L. J. 107, 109 (2004).

152. See *Furman v. Georgia*, 408 U.S. 238, 258 (1972) (noting the dearth of evidence regarding the Framers’ intent for the “cruel and unusual punishments” clause).

153. See *Weems v. United States*, 217 U.S. 349, 378 (1910) (observing that the definition of cruel and unusual punishments “may acquire meaning as public opinion becomes more enlightened by a humane justice”).

154. 356 U.S. 86 (1958).

155. See *Trop v. Dulles*, 356 U.S. at 101.

156. See *Atkins v. Virginia*, 536 U.S. 304, 323 (2002) (Rehnquist, C.J., dissenting).

157. See *Atkins*, 536 U.S. at 307.

and capital murder after he and another man used a semiautomatic handgun to abduct their victim and take the money on his person.¹⁵⁸ They then forced their victim to drive to an ATM machine and withdraw an additional \$200.¹⁵⁹ Finally, they took him to an isolated location where he was shot eight times and killed.¹⁶⁰

During the trial's penalty phase, the state proved two aggravating factors—future dangerousness and the vileness of the offense.¹⁶¹ The defense relied primarily on the testimony of a forensic psychologist, who had evaluated Atkins before trial and concluded that he was “mildly mentally retarded.”¹⁶² The jury ultimately sentenced Atkins to death.¹⁶³ Because the U.S. Supreme Court had held in *Penry v. Lynaugh*¹⁶⁴ that the execution of mentally retarded individuals did not violate the Eighth Amendment's prohibition on cruel and unusual punishment,¹⁶⁵ Atkins' situation appeared dire.¹⁶⁶

Despite having held that executing mentally retarded individuals constitutional only thirteen years earlier, the Supreme Court granted Atkins' petition for certiorari.¹⁶⁷ The majority noted that a number of states had prohibited the execution of mentally retarded individuals in the interim,¹⁶⁸ and ultimately concluded that “it is fair to say that a national consensus has developed against” such executions.¹⁶⁹

In making its decision, the Court seemingly expanded the universe of relevant public opinion. While the Court examined the traditional measures of public opinion,¹⁷⁰ it also drew support from previously untapped sources. In a footnote, the Court noted that “[a]dditional evidence makes it clear that this legislative judgment reflects a much broader social and professional consensus.”¹⁷¹ For example, the Court stated that professional and religious

158. *See id.*

159. *See id.*

160. *See id.*

161. *See Atkins v. Virginia*, 536 U.S. 304, 323 (2002).

162. *See Atkins* 536 U.S. at 307. Atkins had a full scale I.Q. of 59.

163. *See id.* The jury's original recommendation of the death sentence was reversed due to a misleading verdict form. At the second hearing the Commonwealth presented expert testimony disputing whether Atkins was mentally retarded. *Id.*

164. 492 U.S. 302 (1989).

165. *See Penry*, 492 U.S. at 328-340.

166. The Virginia Supreme Court upheld Atkins' death sentence. *Atkins v. Commonwealth*, 534 S.E.2d 312, 318 (Va. 2000), *rev'd sub nom. Atkins v. Virginia*, 536 U.S. 304 (2002).

167. *See Atkins v. Virginia*, 533 U.S. 976 (2001) (No. 00-8452).

168. *See Atkins v. Virginia*, 536 U.S. at 313-14.

169. *See Atkins*, 536 U.S. at 316. The court also noted “the consistency of the direction of change” to disallowing such executions. *Id.* at 315. The strength of this “national consensus” has been challenged. *See also* Jamie Hughes, *For Mice or Men or Children? Will the Expansion of the Eighth Amendment in Atkins v. Virginia Force the Supreme Court to Re-Examine the Minimum Age for the Death Penalty?*, 93 J. CRIM. L. & CRIMINOLOGY 973, 1002 (2003) (comparing *Atkins* with the national consensus found in other Eighth Amendment cases and concluding that “*Atkins* establishes a new definition of ‘national consensus’”).

170. *See Atkins*, 536 U.S. at 313-16.

171. *See id.* at 316 n. 21.

organizations disfavored the practice, and that other countries also condemned it.¹⁷² The Court also wrote that “polling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong.”¹⁷³

Chief Justice Rehnquist dissented, taking issue with the majority’s departure from the Court’s usual Eighth amendment practice of discerning the “evolving standards of decency” from objective indicators of public opinion, namely, legislative enactments and jury verdicts.¹⁷⁴ Rehnquist also observed that potential methodological problems with the polls cited by the majority could not be illuminated through expert evidence and the full adversarial process because they were cited for the first time on appeal.¹⁷⁵ He warned that many aspects of the polls required further evaluation, noting that “[e]verything from variations in the survey methodology, such as the choice of a target population, the sampling design used, the questions asked, and the statistical analyses used to interpret the data can skew the results.”¹⁷⁶ Justice Scalia also condemned the majority’s reliance on public opinion polls, deeming their results irrelevant to the inquiry.¹⁷⁷ Much like Rehnquist, Justice Scalia favored confining any inquiry into evolving standards of decency to “a consensus of the sovereign states that form the union, not a nose count of Americans for and against.”¹⁷⁸

There are several reasons to prefer “objective” evidence of national feelings regarding criminal punishment. First, it is easier to identify. The potential pitfalls of polls pointed out by Chief Justice Rehnquist and noted above are not present, as each state’s legislation presents the Court with a simple yes or no answer. Second, the political branches are generally considered to be better at discerning and reacting to public opinion than the judiciary branch.¹⁷⁹ Much of this perception stems from the fact that, unlike “political” officials, judges’ jobs do not hinge on their ability to react to public opinion.¹⁸⁰ But it does not necessarily follow that they cannot discern public opinion as well as other office-holders with an equally broad constituency.¹⁸¹ If proper standards are applied for admitting public opinion polls into evidence and jurists are properly educated on evaluating their validity and selecting between competing evidence, judges may be able to discern public opinion sufficiently well to rely upon it.

172. *See id.*

173. *See Atkins v. Virginia*, 536 U.S. 304, 316 (2002).

174. *See id.* at 324.

175. *See id.* at 326.

176. *See Atkins*, 536 U.S. at 326.

177. *See id.* at 347.

178. *See Atkins v. Virginia*, 536 U.S. 304, 346 (2002).

179. *See Atkins*, 536 U.S. at 346.

180. *See Sadurski*, *supra* note 1, at 350.

181. *See Sadurski*, *supra* note 1, at 347 (arguing that nation-wide elections are not good barometers of public opinion on specific issues).

Third, the ultimate outcome of political debate over any given issue may represent a “better” public opinion than a survey whose respondents may not have carefully considered the issue.¹⁸² In the course of the public debate, some people will refine their views and perhaps change their minds on the central issue. But if there has been a public debate, the public presumably will have been educated, and a greater number of survey respondents will be able to give an informed opinion. To the extent that survey results differ from the legislative result, whether the survey result represents the views of a majority of the public or merely a powerful minority can fairly be questioned.

Atkins did not signal a new willingness to consider public opinion in Eighth Amendment jurisprudence. Public opinion, observed through “objective” measures, has been the touchstone of Eighth Amendment jurisprudence for decades. Instead, the decision merely expanded the universe of acceptable evidence of public opinion to include polls.¹⁸³ The Court’s willingness to consider public opinion polls may be a sign the court would consider public opinion explicitly in aspects of federal jurisprudence other than the Eighth Amendment.

Professor Robinson has castigated the *Atkins* Court for missing an opportunity to instruct lower courts on the proper procedure for admitting and considering public opinion polls.¹⁸⁴ Because the majority took judicial notice of the polls, apparently without critical analysis of potential methodological problems,¹⁸⁵ this criticism is fair. But Chief Justice Rehnquist’s dissent provides an excellent list of considerations that could inform lower courts’ incorporation of public opinion polls as evidence.¹⁸⁶ Moreover, the *Atkins* Court’s recognition of polls as a useful supplement to “objective” measures of public opinion suggests that they may also be relevant as considerations in other contexts where democratic principles would be furthered by public input in the decision-making process.

In *Roper v. Simmons*,¹⁸⁷ the Court held that the execution of juvenile defendants violated the Eighth Amendment. The evidence from *Atkins*’ footnote 21 received disparate treatment. The views of religious groups were conspicuously absent. While this absence was perhaps understandable in *Lawrence*’s substantive due process context, it represents an about-face from *Atkins*, which like *Roper* was an Eighth Amendment challenge to capital punishment for a vulnerable group. Opinion polls were also omitted from *Roper*. As in *Lawrence*, the best explanation for this again seems to be the refusal of the majority to subject itself to the methodological criticisms of Chief

182. See Robinson, *supra* note 151, at 140 (quoting The Federalist No. 10, 81 (James Madison)).

183. See Hughes, *supra* note 169, at 1006.

184. See Robinson, *supra* note 151 at 143.

185. See Robinson, *supra* note 151 at 143.

186. See *Atkins v. Virginia*, 536 U.S. 304 at 326 (2002) (Rehnquist, C.J., dissenting).

187. 125 S. Ct. 1183 (2005).

Justice Rehnquist. The *Roper* Court did, however, consult professional opinions regarding differences between juveniles and adults as they related to the penal objectives of retribution and deterrence.¹⁸⁸ Justice Kennedy also devoted substantial space to a discussion of international opinion and practice, and then to a defense of that discussion.¹⁸⁹

It is therefore unclear whether *Roper* represents a retreat from the position that opinion polls are relevant in defining our nation's "evolving standards of decency." Ultimately, however, such integration is unnecessary for the reflection of public opinion in judicial outcomes.

IV. TOWARD AN UNDERSTANDING OF A PUBLIC OPINION-REFLECTING FUNCTION OF JUDICIAL PROCESSES

Until now, this Article's inquiry into the mechanics of the influence of public opinion on judicial decision-making has conceptualized public opinion as an external pressure. Of course, there has been no explicit and concrete incorporation of public opinion into the judicial decision-making process outside of *Atkins*, and this Article does not advocate expanding the *Atkins* experiment. But an examination of how public opinion—in the form of opinion polls—*might* be incorporated into various judicial decision-making structures reveals that these structures themselves, rather than the operation of public opinion as an external, extra-doctrinal influence, may best explain the correlation between public opinion and judicial outcomes.

A. *A Model for the Principled Judicial Integration of Public Opinion*

The Article therefore turns to the inquiry suggested by *Atkins*, namely, the contexts in which public opinion could conceivably be incorporated into doctrine. The context specific inquiry required for the integration of public opinion has long been part of the American legal tradition. The Court, in determining how much, if any, deference to afford Congressional judgments in various contexts, has undertaken an analysis of its relative institutional strengths and weaknesses and the constitutional roles played by each branch of the government.

1. *The Spectrum of Deference*

Traditionally, the Court has afforded varying levels of deference to different types of Congressional and executive branch action.¹⁹⁰ This "spectrum of

188. See *Roper*, 125 S. Ct. at 1195-98.

189. See *Roper*, 125 S. Ct. at 1198-99.

190. See generally Rachael E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002).

deference” provides a useful framework for analyzing the potential for integrating considerations of public opinion into judicial decision-making.

At one end of the spectrum are political questions.¹⁹¹ The Court has refrained, on both constitutional and prudential grounds, from deciding these issues, on the grounds that they lie completely within the discretion of the political branches.

Similarly, the Court’s statutory interpretation jurisprudence seeks only to reflect Congressional intent. This intent may be expressed in the clear language of the statute, the legislative history, or divined through various canons of statutory interpretation. This deference reflects a basic and uncontroversial understanding that the Court does not judge the wisdom of Congressional enactments, only their meaning, and, when constitutional concerns are implicated, their validity.

Moving along the spectrum, substantial deference has traditionally been afforded the political branches on matters of policy and in cases where they are institutionally advantaged in gathering and evaluating facts.¹⁹² For instance, the scope of the “necessary and proper” clause has traditionally been within Congress’s interpretive power.¹⁹³ Substantial deference has also been afforded to Congress’s determination of what substantially affects interstate commerce for purposes of its Constitutional power under the Interstate Commerce Clause.¹⁹⁴ Regulations must only bear a rational relationship to a legitimate government purpose,¹⁹⁵ and the Court has made it clear that it will not examine the wisdom of the government’s purpose.¹⁹⁶ In recent years, the Supreme Court has granted substantially less deference to congressional findings, as the Court began to review more carefully Congress’s findings regarding the purported effects of regulated activity on interstate commerce.¹⁹⁷ This deference is accorded to congressional judgments because Congress possesses a superior ability to investigate facts, and Congress’s heightened responsiveness to public opinion places it in a superior position to make policy.¹⁹⁸

At the opposite end of the spectrum from political questions are cases directly implicating fundamental rights.¹⁹⁹ In these cases, the political branches

191. See Barkow, *supra* note 190, at 239.

192. See Barkow, *supra* note 190, at 301 (citing *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 175-76 (1980) (noting that rational basis review reflects belief that it is not for federal courts to decide what is wise economic or social policy)).

193. See Barkow, *supra* note 190, at 322; *M’Culloch v. Maryland*, 17 U.S. 316, 324-25 (1819).

194. See Barkow, *supra* note 190, at 309.

195. See *U.S. v. Lopez*, 514 U.S. 549 (1995).

196. See *Fritz*, 449 U.S. at 175-76.

197. See Barkow, *supra* note 190, at 312 (“ . . . that deference seemed to come to a halt in *Lopez*”).

198. See Sadurski, *supra* note 1, at 350.

199. See Wilson, *supra* note 16, at 1040 (“Some constitutional rights, however, are so important that the Court should resist public opinion”).

are afforded no deference, and the potential for countermajoritarian behavior is at its zenith. The Court has developed various doctrines to determine whether state actions infringing on fundamental rights or creating constitutionally suspect classes are acceptable exercises of state power.²⁰⁰

Finally, the Court sometimes creates federal common law. This occurs where federal law must govern, but no federal law applies.²⁰¹ Without textual guidance, the Court establishes a rule of law based on its own judgment.

The spectrum of deference is not directly applicable to determining whether and how much influence public opinion might potentially have in judicial decision-making. Instead, it merely demonstrates the Court's ability to engage in realistic assessments of its relative institutional advantages and disadvantages. The same sort of systematic assessment should be conducted to determine when and to what extent public opinion could be considered by federal judges in legal decisions.

2. *The Theoretical Framework for the Integration of Public Opinion*

Examining several contexts in which the judiciary makes legal determinations, the next portion of the Article asks whether democratic principles underlying our government would be furthered by consideration of public opinion. This part also asks whether there might currently exist an appropriate doctrinal place for public opinion in those areas where it could be a proper consideration.

a. *The Common Law*

The federal courts are authorized to preempt state common law with federal common law in limited instances—where there is a uniquely federal interest and either a “significant conflict” exists between otherwise applicable state law and the federal policy or the application of state law would “frustrate specific objectives of federal legislation.”²⁰² This may happen either in specific instances of conflict or when the uniquely federal interest requires a uniform rule.²⁰³

According to Professor Ferejohn, the judiciary routinely makes political decisions in the course of creating substantive federal law.²⁰⁴ In the common law context,²⁰⁵ where the judiciary actively creates federal law, democratic

200. See *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (holding that racial classifications “are constitutional only if they are narrowly tailored to further compelling government interests”).

201. See *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); *Boyle v. United Tech. Corp.*, 487 U.S. 500 (1988).

202. See *Boyle*, 487 U.S. at 506, 507.

203. See *Boyle*, 487 U.S. at 508.

204. See generally Ferejohn & Kramer, *supra* note 103.

205. While *Tompkins v. Erie R.R. Co.* reined in the federal courts' ability to make common law, they still

values suggest that the people should have a voice in determining what that law is.²⁰⁶ But the electorate is involved only indirectly in selecting federal judges. Perhaps the best way for the judiciary to reflect public policy preferences is through judicial notice of public opinion. If consequentialism has any force, then public opinion should be a consideration in creating federal law.²⁰⁷

Thus, where the Court must make policy without guidance from Congress, consideration of public opinion could be an appropriate way to ensure that the government reflects popular preferences. Courts engage in “judicial legislation” with enough regularity that if the Court ignores public opinion, a significant subset of American law will be formulated without reference to the preferences of the electorate. Of course, Congress may amend or repeal federal common law through legislation if the Court has misconstrued the public mood, but this may erode the Court’s public image and result in unnecessary legislation and an inefficient government.

The Court should not jettison other common lawmaking methods, such as evaluating the uniquely federal interest, significant conflict with the operation of state law, and the need for a uniform rule.²⁰⁸ Public opinion could play a supplemental role where there are no principled reasons why popular preferences should not be adopted.²⁰⁹ Nor will there always be significant public debate or opinion about policy created by federal common law. In such a case, the Court need not consider it.

Of course, consideration of public opinion would not be equally appropriate in all common law cases. In some circumstances, the public will be directly interested in the outcome of litigation that requires the Court to make federal common law. Common law that implicates the tort liability of the government or its contractors, for instance, directly affects the tax liability of individual citizens, who have a pecuniary interest—if a minor one—in the Court’s ruling.²¹⁰

In such cases, claimants represent a “discrete and insular minority,” whose interests may not be adequately accounted for in public opinion. Although the Court cannot protect their interests through constitutional law in common law cases, if ordinary tools of common law-making indicate that the rule should

create common law in substantive areas governed by federal law where no statute governs. See Hon. Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

206. See Friendly, *supra* note 205, at 46.

207. See Wilson, *supra* note 16, at 1047.

208. See *Boyle v. United Tech. Corp.*, 487 U.S. 500, 507 (1988). In formulating the rule of law, the federal interest at stake seemed to be of paramount importance to the *Boyle* Court. *Id.* at 511-13.

209. In cases where public opinion may be financially self-interested, such as a preference for apportioning liability between a government and a private actor in such a way that the tax burden would not be adversely affected, the Court should give less weight to the opinion. Alternatively, if the Court does not believe that the issue has been adequately discussed for the public to have an informed opinion, a result adverse to public opinion may stimulate productive debate, even if the decision is ultimately overruled through legislative action.

210. See *Boyle*, 487 U.S. at 511-12 (“The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself”).

favor the “discrete and insular minority,” a rule of law enunciated by a well-reasoned opinion may protect otherwise vulnerable minorities in several ways. First, reversal requires legislative action, which in turn requires the burdensome effort of getting the issue onto the legislative agenda. Second, and more importantly, the Court’s opinion facilitates a public discourse where the majority must articulate acceptable reasons to override a principled judicial rule through legislative action.

Professor Eskridge, in arguing for public value analysis in statutory interpretation, notes that because common law rules have been subjected to critical analysis by commentators and jurists, they are thought to represent good policy, and “represent public values.”²¹¹ For Professor Eskridge, “public values” are those “legal norms and principles that form fundamental underlying precepts for our polity—background norms that contribute to and result from the moral development of our political community.”²¹² But this does not suggest that historical trial-and-error and critical commentary are necessarily the only legitimate instruments by which the common law may come to reflect public values. Nor, in contexts such as common lawmaking and statutory interpretation, is it clear that public sentiment must reflect the deep commitment of Professor Eskridge’s definition of “public values” to be legitimate as decisional tools for courts making policy.

When there is no reason to suspect that the public may be self-interested or motivated by animus against or favoritism towards one party or the other, democratic principles suggest that consideration of public policy preferences may not be inappropriate when the court makes common law.

b. Statutory Interpretation

Cases requiring statutory interpretation might also be appropriate for the consideration of public opinion. In filling in legislative gaps and interpreting ambiguous text, the Court should recall that Congress is the electorate’s agent.

Professor Eskridge argues that public values have historically influenced statutory interpretation.²¹³ Moreover, interpretations should be “dynamic,” striving for horizontal consistency, which is coherence of the present decision with other sources of law such as other statutes and common law decisions in the law.²¹⁴ Under this framework, expressions of public values through the Constitution, the common law, and other statutes exert a “gravitational” pull on the Court’s statutory interpretation.²¹⁵

Professor Eskridge examines traditional “objective” measures of public

211. See William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1051 (1989).

212. See Eskridge, *supra* note 211, at 1007-1008.

213. See Eskridge, *supra* note 211, at 1010-17.

214. See Eskridge, *supra* note 211, at 1013.

215. See Eskridge, *supra* note 211, at 1018-19.

values—the Constitution, statutes, and the common law.²¹⁶ His suggestions for improving public value analysis focus on existing tools of statutory interpretation to discern public values from these sources more accurately. Several considerations militate for a more expanded analysis of public policy preferences in the context of statutory interpretation. For instance, all relevant public opinion may not be codified or reflected in current legislation or judicial interpretation of legislation. In addition, there may not always be satisfactory objective measures by which to bring statutes into horizontal conformity. Public policy preferences may be nuanced in such a way that objective measures may not reveal how public value speaks to a narrow issue. Finally, it is unclear why public sentiment must rise to the level of Eskridge’s “public value” to have a legitimate effect on policy decisions.

The use of direct measures of public policy preferences would address each of these problems. The parties to litigation where public opinion may be relevant have an incentive to uncover and present evidence of public preferences on the relevant issues. Such evidence, viewed in the context of objective measures, may create a more accurate picture of public policy preferences than the objective measures alone. Of course, the use of direct evidence of public preferences also invites criticism that the judiciary is infringing on the legislature’s function. The district courts need not conduct an entire trial to determine the public values that should apply in evaluating the meaning of the statute at issue. Rather, evidence could be presented at a single hearing, and the principle embodied in Federal Rules of Evidence 403 and 702 could be used aggressively to prevent unscientific and excess evidence of public opinion.²¹⁷ Moreover, because public opinion does not occupy a central role in statutory interpretation under this scheme, parties will not have an incentive to present much evidence.

Criticism that judicial consideration of public opinion would usurp Congress’s constitutional role also is answered at least in part by the role of public sentiment analysis in the process of statutory interpretation. Public opinion in statutory interpretation would be used to supplement and as a check on established methods of statutory interpretation.²¹⁸

Consideration of public opinion should not supplant clear language in the text of a statute. Because Congress is at least theoretically cognizant of the canons of statutory construction when drafting law, these interpretive rules also have priority over public opinion. This Article does not suggest that considerations of public opinion could supplant these rules, but supplement and

216. See Eskridge, *supra* note 211, at 1009.

217. FED. R. EVID. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence”).

218. See Eskridge, *supra* note 211, at 1065.

inform their application.²¹⁹ As Professor Eskridge noted, public sentiment's influence is dependant on the latitude within legislative guidance through text and history and the strength of the public value.²²⁰ Public opinion simply becomes part of the "context" of the statute at issue.

The result is a sensible scheme of channeling public opinion on policy matters. Where public opinion directly contradicts clearly expressed Congressional intent, the standard rules of statutory construction uphold the intent and public opinion is channeled into the political branches for resolution. When public opinion coincides with Congress's expressed intent, nothing changes. But when the ordinary tools of statutory construction fail to reveal clear Congressional intent, aligning current law with public opinion may eliminate the need for Congress to revisit the issue. Alternatively, if the Court misapprehended public opinion, Congressional action to correct the law will be much easier than a similar correction to constitutional law. As a result, the Court may consider a slimmer margin of public opinion adequate to act on in this context and in common lawmaking than in constitutional adjudication.

C. Interstate Commerce Clause Jurisprudence

When determining whether Congress has exceeded its power under the Interstate Commerce Clause,²²¹ the Court does not determine whether the policy is wise, only whether it regulates the instrumentalities of, persons or things in, and activities that substantially affect interstate commerce.²²² Viewed in this light, the Court's commerce clause jurisprudence serves a channeling purpose, directing public opinion to the constitutionally appropriate decision maker.²²³ This, in turn, depends on questions of fact. Unlike the Eighth Amendment's prohibition of cruel and unusual punishment and the definition of "obscenity" for First Amendment purposes, there is no obvious reason why public opinion is relevant to the question of whether an activity "substantially affects" interstate commerce. (The first two categories of regulations are relatively uncontroversial). The court need not know whether public opinion supports the policy in order to perform this task. In fact, cases implicating structural constraints on the federal government may present the best case for ignoring public opinion about the substantive policy at stake. For instance, regardless of the doctrinal merits of *Lopez* and *Morrison v. United States*,²²⁴ the Court properly disregarded positive public sentiment towards the

219. See Eskridge, *supra* note 211, at 1065.

220. See Eskridge, *supra* note 211, at 1018.

221. U.S. CONST. Art. I, § 8, cl. 3.

222. See *United States v. Lopez*, 514 U.S. 549, 581 (1995) (noting general agreement that prohibiting guns on school grounds is wise policy but states may choose best way to achieve goal).

223. See *Lopez*, 514 U.S. at 581.

224. 529 U.S. 598 (2000) (striking down civil remedy of federal Violence Against Women Act as beyond Congress's interstate commerce clause power).

laws that it struck down as regulating noncommercial intrastate activities with no substantial affect on interstate commerce. But it is precisely this disregard that imbues the Court's Commerce Clause jurisprudence with its potential for countermajoritarian outcomes.

Nevertheless, the Court has forged a doctrine which requires the invalidation of popular acts of Congress in only rare instances. Even under *Lopez* and *Morrison*, only the regulation of entirely intrastate noncommercial activity with no substantial affect on interstate commerce lies outside of Congress's purview. Despite the increased likelihood of countermajoritarian outcomes under *Lopez* and *Morrison* relative to the rest of the Court's post-New Deal Commerce Clause jurisprudence, those cases leave wide, if not unlimited, room for federal regulation.

Moreover, the Court eliminated some of *Lopez*'s countermajoritarian potential by taking a broad view of the phrases "economic activity" and "substantially affects interstate commerce" in *Gonzalez v. Raich*.²²⁵ In *Raich*, the Court held that the local and personal cultivation and use of marijuana for medical purposes as allowed by California's Compassionate Use Act was economic activity according to the dictionary definition of "economic."²²⁶ Moreover, the Court seemingly reinstated the deference, abrogated in *Lopez* and *Morrison*, to Congressional findings in the Controlled Substances Act that all growth and consumption of marijuana affects interstate commerce and must be regulated under the comprehensive scheme of the CSA.²²⁷ In short, *Raich* was a step back from a strain of Commerce Clause jurisprudence more likely than its immediate predecessors to result in unpopular outcomes. In addition, the decision came while both majority and dissent disclaimed any influence on the outcome of their personal views of the wisdom of the CSA.²²⁸

d. Individual Rights Under the Fourteenth Amendment

Cases directly implicating individual rights seem to present the least compelling case for considering public opinion. This seems inherent to the nature of rights—they exist specifically to restrain potentially oppressive majorities.²²⁹ Professor Sadurski points to two situations in which courts might refer to public policy. The first situation is where the court uses public policy "in order to decide the legal status of a particular practice."²³⁰ Examples include the legality of abortion and euthanasia. It is this use of public policy with which this Part is concerned. The second, which this Part does not

225. 125 S. Ct. 2195 (2005).

226. *See id.* at 2211.

227. *See id.* at 2208.

228. *See id.* at 2201.

229. *W. Va. Bd of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Justice Jackson put it this way: "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of public controversy. . . ."

230. *See Sadurski, supra* note 1, at 353.

address, is the use of public opinion to give substance to a standard by which a practice, such as potentially obscene speech, is legally assessed.²³¹

The Court affords the political branches little to no deference in these cases, and the same concerns militate against considering public opinion in restricting rights. But what if public opinion supports *extending* the scope of a constitutional right? It is not clear that public opinion favorable to expanded personal liberties must be channeled into the amendment process. For instance, in situations to which Congress's Commerce Clause power extends, amendment may be unnecessary to vindicate societal values.²³² But the Commerce Clause is not unlimited in scope, and state constitutional amendment may be cumbersome. The task of passing a constitutional amendment is daunting.²³³

One potential justification for the consideration of public opinion is the vindication of national public opinion in some instances when it disfavors the actions of a majority in a smaller jurisdiction.²³⁴ Such a justification for the invocation of public opinion should raise federalism-based concerns. But if, as this Article argues, this is precisely the operation of current substantive due process doctrine, then the invocation of public opinion does not affect enough doctrinal change to make the doctrine objectionable on federalism grounds if it was acceptable before. If anything, the following discussion should merely serve to sharpen the debate over the desirability of the Court's current substantive due process doctrine.

i. Substantive Due Process

The Court has devised a tiered analysis for substantive due process cases. For cases involving non-fundamental privacy rights, the statute must be rationally related to a legitimate state purpose.²³⁵ Laws regulating access to abortions must not impose an "undue burden" on women seeking them.²³⁶ And laws implicating fundamental rights must be narrowly tailored to achieve a compelling state purpose.²³⁷

An expansion of individual rights seems most likely to arise in the context of

231. See Sadurski, *supra* note 1, at 354.

232. See Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

233. See generally BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998).

234. See Sadurski, *supra* note 1, at 346.

235. See Lawrence v. Texas, 539 U.S. 558, 578 (2003) (finding no legitimate government interest in prohibition of consensual, private adult homosexual sodomy).

236. See Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 874 (1992) ("Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.").

237. See Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (finding no fundamental right), *overruled by* Lawrence v. Texas, 539 U.S. 558, 566-67 (2003) (holding that the *Bowers* Court misstated the nature of the right at issue).

the Court's substantive due process jurisprudence. Justice Souter's *Casey* framework for the consideration of public opinion in determining whether to overturn watershed constitutional cases analogously advises against creating rights until they are settled in the public's mind.²³⁸ But because the Court cannot create new rights without invalidating at least one law that presumably has some public support, the creation of constitutional rights in the politically charged areas of substantive due process and equal protection is unlikely to occur without public controversy under any circumstances.

Part of the answer to this potentially doctrine-paralyzing problem lies in the Court's influence over public opinion. Public opinion may shift in favor of the Court's holding after the fact due to its reasoning and the respect accorded the judiciary as an institution. The Court is most likely to be persuasive if the extension of a right is consistent with current doctrine. In fact, the most controversial substantive due process cases may be those where the new right was seen as a *non sequitur*.

An examination of public opinion surrounding *Lawrence v. Texas*, which held that the right to privacy precluded the state from criminalizing private same-sex sodomy between consenting adults, is enlightening.²³⁹ Justice Kennedy, writing for the majority, cast *Lawrence* as the natural extension of substantive due process doctrine by reframing the question considered in *Bowers*. In *Bowers*, the Court held the Federal Constitution does not confer a fundamental right upon homosexuals to engage in sodomy.²⁴⁰ In *Lawrence*, Justice Kennedy reframed "the liberty at stake" without discussing *Bowers*' homosexual-heterosexual dichotomy until concluding that "[t]he liberty protected by the Constitution allows homosexual persons the right to make this choice."²⁴¹

The *Lawrence* Court engaged in analysis bearing striking similarities to its Eighth Amendment "evolving standards of decency" jurisprudence. Justice Kennedy began his analysis with an examination of the historical record, concluding that "the historical grounds relied on in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate."²⁴² History, Justice Kennedy concluded, was inconclusive, and the opinion next looked to the laws and traditions in the last half century as the most relevant evidence of the liberty interest at stake.²⁴³

The opinion went on to recognize an "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private

238. See *Casey*, 505 U.S. at 963 (Scalia, J., dissenting).

239. See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

240. See *Lawrence*, 539 U.S. at 566 (quoting *Bowers v. Hardwick*, 478 U.S. at 190).

241. See *id.* at 567.

242. See *id.* at 571.

243. See *id.* at 571-72.

lives in matters pertaining to sex.”²⁴⁴ Justice Kennedy found this “emerging awareness” in the traditional repositories of the Eighth Amendment’s “evolving standards of decency”—the legislative trends and enforcement history of the states.²⁴⁵

After noting that *Bowers* had been weakened by the Court’s subsequent holdings in *Casey* and *Romer v. Evans*,²⁴⁶ the Court noted scholarly criticism of *Bowers* and rejection of its reasoning by five state supreme courts in creating state constitutional law.²⁴⁷ The Court noted a legislative trend to decriminalize sodomy.²⁴⁸ It then went on to justify its conclusion that *Bowers* should be overruled by citing several sources similar to those cited in *Atkins*’s footnote 21.

As it had in *Atkins*, the *Lawrence* Court noted international opinion supporting its conclusion.²⁴⁹ It observed that “[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries,”²⁵⁰ and by the European Court of Human Rights.²⁵¹

The *Lawrence* Court also paralleled its *Atkins* analysis by observing the view of a knowledgeable professional association.²⁵² Earlier in its opinion, the Court had noted the American Law Institute’s decision not to incorporate “criminal penalties for consensual sexual relations conducted in private.”²⁵³ In the end, the Court’s determination that substantive due process prohibited Texas from criminalizing homosexual sodomy bore remarkable resemblance to its determination that “evolving standards of decency” prohibited Virginia from executing mentally challenged persons convicted of otherwise-capital offenses.

The Court did not, however, cite the views of religious groups or public opinion polls as it had cited in *Atkins*.²⁵⁴ The fact that the groups were not cited is not surprising, as most religious groups opposed the Court’s holding.²⁵⁵ In fact, by holding that moral approbation of a group is not a legitimate state purpose for criminalizing private behavior that defines the group,²⁵⁶ the Court impliedly stated that the religious beliefs of a large number of Americans are not a valid form of public opinion in this context. This reversal of field by

244. See *Lawrence v. Texas*, 539 U.S. 558, 572 (2003).

245. See *Lawrence*, 539 U.S. at 572-73.

246. See *Romer v. Evans*, 517 U.S. 620 (1996).

247. See *Lawrence*, 539 U.S. at 576.

248. See *Lawrence*, 539 U.S. at 573.

249. See *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

250. See *Lawrence v. Texas*, 539 U.S. 558, 577 (2003).

251. See *Lawrence*, 539 U.S. at 576.

252. See *Atkins*, 536 U.S. at 316 n.21.

253. See *Lawrence*, 529 U.S. at 572 (quoting ALI, MODEL PENAL CODE § 213.2, Comment 2, p. 372 (1980)).

254. See *Atkins v. Virginia*, 536 U.S. 304, 316 n.21.

255. See *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (acknowledging but holding irrelevant the religious beliefs of those who opposed private adult same-sex consensual sodomy).

256. See *Lawrence*, 539 U.S. at 571, 577.

many of the same Justices who cited the views of religious groups in *Atkins* was not explained.

As in *Roper*, the Court's decision not to cite to public opinion polls may have several explanations. First, it could signal a retreat from the stance that public opinion polls are relevant in constitutional decision-making, or at least confined to Eighth Amendment jurisprudence. Another explanation is that the majority had learned its lesson from Chief Justice Rehnquist's dissent in *Atkins*, and was unwilling to expose itself to legitimate criticism by taking judicial notice of polls that had not been subjected to rigorous scrutiny below.

The *Lawrence* Court was able to avoid a decision about whether to consider public opinion polls by selectively citing portions of *Casey*. The Court correctly noted that *Bowers* had not engendered the same type of "reliance" as had *Roe*,²⁵⁷ but did not meaningfully discuss *Casey*'s other constraints on *stare decisis*. Justice Souter's suggestion in *Casey* that the Court should not overrule its watershed constitutional cases "under fire" suggests, however, that an issue should be all but resolved against the Court in the public mind before the Court should reverse its prior ruling. The *Lawrence* Court also avoided squarely deciding whether public opinion polls were relevant to its inquiry by focusing on elite rather than mass opinion, citing such luminaries as Charles Fried and Richard Posner.²⁵⁸ But the analytic similarities between *Lawrence* and *Atkins* suggest that public opinion has relevance to substantive due process.

The Eighth Amendment's inquiry into the "evolving standards of decency" indicates a quest for horizontal consistency, which is basic conformity to the principles of other current law.²⁵⁹ This explains the Eighth Amendment's preoccupation with the current status of state law, and may explain why legislative trends are relevant.

Substantive due process, however, has traditionally been a doctrine dependant on history for its substance. Fundamental rights—those triggering heightened scrutiny under substantive due process, are defined as "those liberties that are deeply rooted in this Nation's history and tradition."²⁶⁰ As such, vertical consistency—coherence with precedent²⁶¹—would seem more important than horizontal consistency. Legislative "trends" would therefore seem to have little to no relevance, as they indicate *current* attitudes and likely *future* legislative action. But the *Lawrence* Court's emphasis of developments since its *Bowers* decision suggest that substantive due process doctrine may begin to look to expressions of current public opinion. Indeed, the *Lawrence* Court specifically rejected historical tradition as the end of the inquiry into

257. See *Lawrence*, 539 U.S. at 577.

258. See *Lawrence*, 539 U.S. at 576.

259. See Eskridge, *supra* note 211, at 1013.

260. *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977).

261. See Eskridge, *supra* note 203, at 1013.

whether a protected liberty interest exists,²⁶² emphasizing “laws and traditions in the past half century.”²⁶³

The shift from vertical to horizontal consistency in the Court’s substantive due process analysis is consistent with the lexicon that it has created to define its analysis, especially at its lower tiers. Like the terms “cruel and unusual,” the terms “rational,” “legitimate,” and “undue” are difficult to define independently from public opinion.²⁶⁴

ii. *Equal Protection*

The Court’s equal protection doctrine may implicate the same basic premise as substantive due process in underlying the use of public opinion to invalidate the judgment of a local majority.²⁶⁵ But there does not appear to be a suitable doctrinal niche for the consideration of public opinion. Equal protection analysis involves several steps. First, the court must determine whether the classification in question is “suspect.” If it is, then the Court applies heightened scrutiny to the law, determining whether the importance of the state interest and the nexus between the state interest and the law is sufficient to justify use of the suspect classification.²⁶⁶

Doctrinally, the national judgment that differences between groups do not justify different treatment in most cases is reflected in the determination that a group deserves “protected class” status. Laws implicating suspect classifications such as race, gender, or illegitimacy are subject to more exacting scrutiny largely because of a national consensus that, most of the time, distinctions drawn along those lines simply do not matter. Therefore, invalidation of laws under the equal protection doctrine often reflects a lack of synchronization between local and national consensus about perceived differences.

Equal protection doctrine looks to history to determine whether the group in question has traditionally been discriminated against.²⁶⁷ But, absent a

262. See *Lawrence v. Texas*, 539 U.S. 558, 571 (“[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)) (internal quotation marks omitted).

263. See *Lawrence*, 539 U.S. at 571-72.

264. For example, “undue” means “excessive or unwarranted,” according to BLACK’S LAW DICTIONARY 1653 (8th ed. 2004). The text of the Eighth Amendment prohibits excessive bail and fines. The Court has held that it also prohibits some forms of excessive punishment. Compare *Roper v. Simmons*, 125 S. Ct. 1183, 1194-95 (2005) (noting that “[t]here are a number of crimes that beyond question are severe in absolute terms, yet the death penalty may not be imposed for their commission” and noting “the underlying principle that the death penalty is reserved for a narrow category of crimes and offenders”), with *Harmelin v. Michigan*, 501 U.S. 957, 962-65 (1991) (rejecting “proportionality requirement for life prison sentences).

265. See Sadurski, *supra* note 1, at 346.

266. See *Grutter v. Bollinger*, 539 U.S. at 326.

267. See *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (identifying a “suspect class” entitled to the protections of strict judicial scrutiny as one “saddled with such disabilities, or subjected to such a history

realization that the classification is not relevant, laws based on that classification cannot be said to be discriminatory. Furthermore, to have any legitimacy, the Court's judgment that a "distinction" formerly thought of as being relevant is now irrelevant must enjoy support from a significant portion of the national population.

Unlike in the substantive due process area, where the Court has been relatively active in finding new rights, the protected groups of the equal protection doctrine have remained fairly static. Because equal protection doctrine has not undergone changes akin to those wrought upon substantive due process doctrine, this article does not take a position regarding the potential for incorporating public opinion polls into the doctrine.

3. *Can Public Opinion Be Measured Accurately (Enough) For Integration?*

To complete this thought experiment, we must examine whether public opinion can be measured accurately enough to be relied upon in formulating law. It is hard to say what is "accurate enough." Polls are never methodologically perfect, but they may be probative nonetheless.

It is generally not the courts' task "to translate public opinion into policies and laws."²⁶⁸ While this is certainly the legislature's job in a democracy, it may be a permissible judicial function in several circumstances: First, in policy-making situations not implicating constitutional rights, where the court's choice merely disappoints those hoping for another outcome in much the same way as a legislature's policy choice would; and second, when the Court "represents a broader majority in overruling a local majority,"²⁶⁹ as in its substantive due process jurisprudence. In such situations, the "national legislative process might may be unable to vindicate the national moral consensus."²⁷⁰

Of course, a judge cannot rely on non-existent public opinion, or on public opinion that has no credible supporting evidence, regardless of how firmly a judge believes public opinion supports her position. In fact, polling may represent the only accurate way to measure public opinion directly.²⁷¹ Polls are far superior to many of the alternative ways public opinion may be "measured": the judge's impression of what public sentiment may be, the judge's own

of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process").

268. See Sadurski, *supra* note 1, at 344.

269. See Sadurski, *supra* note 1, at 346.

270. See Sadurski, *supra* note 1, at 347.

271. See Robert C. Sorensen & Theodore C. Sorensen, *The Admissibility and Use of Opinion Research Evidence*, 28 N.Y.U. L. REV. 1213 (1953) (comparing polls favorably to a laundry list of other alternatives for divining public opinion when necessary).

opinion as a proxy, or the judge's own unscientific poll.²⁷²

Each judge would have to determine for herself what evidence will suffice to inform her about the public's opinion. Although this standard may vary from judge to judge, some minimal standard should be established. This article does not attempt to articulate such a standard, but Professor Eskridge's balancing approach seems both appropriate and applicable to polls. Public opinion's influence would be at its zenith when preferences are strong and other interpretive tools are relatively indeterminate.²⁷³ Many traditional informal constraints on judges would operate to prevent abuses of public opinion as support for judicial decisions. The appellate process itself would serve as a check, and in Courts of Appeals and the Supreme Court, the other judges and Justices would deter low standards of proof for public opinion. Assertions based on evidence viewed by fellow judges as insufficient will result in difficulty in inducing those judges to join the opinion relying in part on that public opinion.

Judges might legitimately prefer that majoritarian impulses be channeled to the political branches. However, in the context of individual rights, majority preferences for "new" rights might be thwarted by the cumbersome amendment process—a much more serious obstacle to the expression of majority will than mere legislative inertia. The ultimate question of how much more than a majority of the public is necessary is answered differently in various adjudicatory contexts. Professor Eskridge correctly realized that this will be a case-specific inquiry, the outcome of which depends on the strength of the public value at issue and the strength of countervailing considerations, such as the clarity of statutory language or legislative history.²⁷⁴

Moreover, the use of public opinion polls would help dispel the criticism that judges citing public opinion are merely substituting their own opinion for that of the public. This accusation is not altogether underserved, and the practice seems intertwined with the fallacy of "inferring empirical propositions from logical ones."²⁷⁵ This fallacy assumes "that what people should (logically) believe is what they must believe. . . and that what they must believe is what they do believe."²⁷⁶

Justice Marshall appears to have made this logical misstep in his opinion in *Furman v. Georgia*.²⁷⁷ Justice Marshall "eschewed an empirical enquiry into public opinion,"²⁷⁸ dismissing opinion polls as minimally important in

272. See Sorenson & Sorenson, *supra* note 271, at 1219-1220.

273. See Eskridge, *supra* note 211, at 1018-19.

274. See Eskridge, *supra* note 211, at 1066.

275. See Sadurski, *supra* note 1, at 379.

276. See Sadurski, *supra* note 1, at 379 (quoting Prothro & Grigg, *Fundamental Principles of Democracy: Bases of Agreement and Disagreement*, 22 J. POL. 276, 281 (1960)) (internal quotation marks omitted).

277. 408 U.S. 238, 332-33 (1972).

278. See Sadurski, *supra* note 1 at 362.

determining the “evolving standards of decency.”²⁷⁹ Instead, Justice Marshall asserted that “whether or not a punishment is cruel and unusual depends, not on whether its mere mention ‘shocks the conscience and sense of justice of the people,’ but on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable.”²⁸⁰ Professor Sadurski validly criticizes “Justice Marshall’s appeal to popular sentiment. . . as a disguise for his own substantive morality.”²⁸¹ Justice Brennan also contended, without citing empirical evidence, that the death penalty had “been almost totally rejected by contemporary society.”²⁸² In light of the post-*Furman* explosion of state death penalty litigation that led to *Gregg v. Georgia*,²⁸³ it is apparent that public opinion did not support Justices Marshall’s and Brennan’s position.

Without evidence, perhaps the only way to avoid public criticism might be for the judge to cite public opinion contrary to her own political leanings, rule against those political leanings, and acknowledge the conflict between the public’s preferences and her own. Public opinion is rarely if ever determinative by itself, however. Thus, judges who explicitly acknowledge that they disagree with the public sentiments as expressed in poll results might be subject to the criticism that they have abdicated their judicial responsibility to judge independently.²⁸⁴ In any case, judicial use of public opinion without empirical evidence calls into question the legitimacy of the decision. One solution is for judges to cite to methodologically sound polls in instances where public opinion is relevant, which may deflect some of this criticism.

Although strategic use of methodologically unsound polls may still allow judges to assert their own political opinions under the guise of public opinion, those polls are subject to objective criticism, and other polls may contradict their results. Indeed, one of the strengths of using polls is that they may delineate cases where public opinion is *not* determinative.

Finally, like any other judicial tool, if the evidence of public opinion is unreliable or inconclusive, judges would not be required to rely upon it.²⁸⁵ When properly invoked, opinion polls can gauge public sentiment with sufficient accuracy to be useful, as well as identifying issues on which public opinion is truly indeterminate. Integration of public opinion into many aspects of judicial decision-making is not as impractical or doctrinally disruptive as it seems at first glance – if only because it seems utterly impossible.

279. See *Furman*, 408 U.S. at 361.

280. See *Furman*, 408 U.S. at 361.

281. See Sadurski, *supra* note 1 at 363.

282. See *Furman*, 408 U.S. at 300.

283. 428 U.S. 153 (1976).

284. See Rehnquist, *supra* note 9 at 752.

285. See Sorensen & Sorenson, *supra* note 271, at 1219.

V. CONCLUSION

As this Article's inquiry into the possibility of the integration of public opinion into various judicial decision-making structures demonstrates, the structure of various judicial doctrines is formulated in a way that reflects public opinion, at least indirectly, *without* explicit incorporation or as some sort of extra-doctrinal influence. Not only do current decisional tools produce popular—or at least acceptable—outcomes, they may be a more satisfying explanation for the correlation of public opinion and judicial outcomes. This is true even in cases not directly controlled by precedent. Even when precedent does not *dictate* a result, the decisional tools in any given case often make one result significantly more tenable than others. Moreover, to the extent that certain decisional tools are changing, such as the shift in emphasis from vertical to horizontal consistency in the Court's substantive due process analysis, it often places increasing emphasis on those analyses that reflect public opinion.

If, as Professor Chemerinsky posits, the twin pillars of judicial legitimacy are regularity of process and acceptability of outcomes,²⁸⁶ that the former has evolved in such a way as to produce the latter on a regular basis should not be surprising. When both process and result are necessary for an institution's legitimacy, the institution has a strong disincentive to design processes that will produce outcomes that undermine what legitimacy that the regularity of process afforded it.

Moreover, recent case law demonstrates an institutional resistance to changes in doctrine that increase the likelihood of countermajoritarian results. For example, the court recently resisted a pull toward the complete primacy of text in statutory interpretation advocated by Justice Scalia. In *City of Rancho Palos Verdes v. Abrams*,²⁸⁷ the court unanimously concluded that the federal Telecommunications Act could not be enforced through a lawsuit under 42 U.S.C. § 1983. Justice Scalia, writing for a plurality, based his opinion squarely on the TCA's text, and disavowed any use of legislative history in determining § 1983's—or any other statute's—meaning.²⁸⁸ But a four-Justice concurrence stressed that “context, not just literal text, will often lead a court to Congress' intent in respect to a particular statute.”²⁸⁹ Justice Stevens concurred in the result only, and emphasized that the Court “must fill the gap in the statute's text by examining all relevant evidence that sheds light on the intent of the enacting Congress,” including legislative history.²⁹⁰

While both of the concurring opinions agree that Congress' intent governs

286. See Chemerinsky, *supra* note 2, at 947.

287. 125 S. Ct. 1453 (2005).

288. See *City of Rancho Palos Verdes*, 125 S. Ct. at 1459. (focusing on “textual indication” of Congressional intent).

289. See *City of Rancho Palos Verdes*, 125 S. Ct. at 1462.

290. See *City of Rancho Palos Verdes*, 125 S. Ct. at 1463.

the meaning of the statute, restricting the judicial inquiry into that intent narrows the court's ability to achieve the "horizontal consistency" described by Professor Eskeridge that marks congruence with current public opinion. Examination of context and legislative history may allow the Court to find "gaps" in the statute, where none exist on the text's face by using context to determine the intended scope of various statutory provisions. While the subsequent "gap-filling" must be grounded in the intent of the enacting Congress, Professor Eskeridge's thesis suggests it may also be informed by current sensibilities.

The Court has also resisted shaping doctrine in ways that are likely to produce unpopular results in other contexts. As described above, *Raich* represented a step back from the increased potential under *Lopez* for the invalidation of federal legislation under the Commerce Clause. Justice Scalia's concurrence in *Raich* indicates that the relative comprehensiveness of federal regulation may allow Congress to regulate certain activities under the Commerce Clause (and Necessary and Proper Clause) that it otherwise could not regulate.²⁹¹ While there is no necessary correlation between a statute's comprehensiveness and its popularity, comprehensive legislation such as the CSA often enjoy popular support. If this is true, then *Raich* is virtually iron-clad protection for the margins of some of the federal government's most popular regulatory regimes.

The production of acceptable results is perhaps at its most difficult when "morality issues," such as the death penalty and privacy rights, are at stake. In such cases, any outcome will be unacceptable to a large segment of the population. But here too, the Eighth and Fourteenth Amendment doctrines have evolved to produce acceptable outcomes. The Court no longer speaks in terms of "fundamental" rights in its substantive due process cases. For those who base their opposition to the Court's rulings on issues such as abortion and sodomy on religious principles and believe that "fundamental" rights are inherently a matter of divine definition, the Court's abandonment of the "fundamental" label takes some of the personal affront out of its adverse decisions. Moreover, by lowering the rhetorical stakes, the Court may have made the future announcement of substantive due process rights easier; the Court may be more willing to find "rights" than "fundamental rights." In addition, the evolving focus on recent, rather than historical, legislation and national views in the Court's Fourteenth Amendment jurisprudence can only increase the likelihood that outcomes will be acceptable to a current majority of the nation.

In sum, the best explanation for the correlation between public sentiment and judicial outcomes appears to be the design of judicial decision-making frameworks themselves. Because the correlation between public opinion and

291. See *Gonzalez v. Raich*, 125 S. Ct. 2195, 2218 (2005).

2006] *MAJORITY COURT & REFLECTION OF PUBLIC OPINION IN DOCTRINE* 423

judicial outcomes appears to be produced by judicial decisional tools themselves rather than an influence outside the ordinary judicial decision-making process, the correlation should not be viewed as evidence of a threat to judicial independence. And because the court appears to have an institutional resistance to doctrinal shifts that would increase the likelihood of unpopular outcomes, we can expect this correlation to continue in the future.