

# Is the US Supreme Court a Driver of Social Change or Driven by it? A Literature Review

**Jamie Harris**

Researcher

November 26, 2019

© 2019 Sentience Institute

*Edited by Jacy Reese. Many thanks to Jamie Spurgeon and Kevin Schneider for reviewing and providing feedback.*

---

## Abstract

Whether the Supreme Court of the United States drives or is driven by social change is an important strategic question for social movements that seek to implement systemic change in the United States. However, a thorough summary of empirical research on this question is lacking. This report summarizes the results of the most important empirical contributions to this debate. The results of aggregating 121 research items based on the strength of evidence suggest that Supreme Court decision-making is influenced by public opinion and by the activities of interest groups. Supreme Court rulings that are favorable to social movements' goals can encourage positive changes in public attitudes, behavior, and policy, though these effects are sometimes negligible and the evidence is slightly weaker than that for the influence of public opinion on Supreme Court decisions. Additionally, Supreme Court rulings may encourage substantial backlash, so it may be counterproductive for social movements to actively pursue radical legal change if they are not prepared to respond to these threats.

---

# Table of Contents

Introduction	3
Methodology	4
Research questions	4
Search strategy	6
The scoring system	7
Overall estimates for the research questions	9
Results and discussion	9
Influences on Supreme Court decision-making (“I”)	9
Effects of Supreme Court decisions (“E”)	14
Policy and behavior	14
Public opinion	16
Backlash and polarization	19
Salience and indirect effects	21
The value of different research methods	23
Limitations	26
Conclusion	31
Potential Items for Further Study	32
Appendix: Comments on the strength of evidence for each research question	34
Bibliography	44

# Introduction

Political scientists, legal scholars, historians, and sociologists have sought to understand whether the Supreme Court of the United States is a driver or driven by social change. Although the question has been considered for centuries,<sup>1</sup> relevant empirical academic research has only begun more recently, arguably since Dahl (1957).<sup>2</sup> Work by Ammori (2006) at the Information Society Project provides a synthesis of this literature focused on free speech and argues that there is some association between Supreme Court decisions and public opinion, but there is both more recent data available since 2006 and a gap in weighing the evidence of effects in both directions.<sup>3</sup> This report addresses that gap, seeking to provide a summary that is understandable and actionable for advocates in social movements, especially the contemporary farmed animal movement.

Past work done by Sentience Institute has argued that the farmed animal movement needs to redistribute resources from “tactics that work by convincing individuals one-by-one to change their consumption” to “tactics that focus on changing institutions: governments, companies, nonprofits, and society as a whole.”<sup>4</sup> Influencing the decision-making of the courts, of which the Supreme Court is the highest and most influential in the US, is a promising institutional tactic.<sup>5</sup> Better understanding the effects of Supreme Court decisions and the influences upon those decisions will help to evaluate the extent to which the farmed animal movement should prioritize this tactic.

Sentience Institute’s historical research currently focuses on social movements that are most comparable to the farmed animal movement and on technology adoptions that present the most useful comparisons to animal-free food technology.<sup>6</sup> Although evidence from other, less comparable social movements and technologies usually provides weaker evidence for the foundational questions in effective animal advocacy, some issues of relevance to these questions have already been researched thoroughly across multiple historical contexts; summarizing this research can provide a greater breadth of evidence on specific questions than can be provided by a small number of case studies. The question of whether the Supreme Court drives or is

---

<sup>1</sup> For example, Elmer Ellis, *Mr. Dooley's America: A Life of Finley Peter Dunne* (Hamden CT: Archon Books, 1969), 160-2 notes that Mr. Dooley, a fictional bartender in the columns of journalist Finley Peter Dunne between 1893 and 1915, said that “no matter whether th’ constitution follows th’ flag or not, th’ Supreme Court follows th’ illection [election] returns.”

<sup>2</sup> Robert A. Dahl, “Decision-making in a democracy: The Supreme Court as a national policy-maker,” *The Journal of Public Law* 6 (1957), 279-95 is often cited as the beginnings of such research, as in William Mishler and Reginald S. Sheehan, “The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions,” *American Political Science Review* 87, no. 1 (March 1993), 87-8.

<sup>3</sup> Marvin Ammori, “Public Opinion and Freedom of Speech” (July 14, 2006), [https://law.yale.edu/sites/default/files/documents/pdf/Public\\_Affairs/ISP\\_PublicOpinion\\_fos.pdf](https://law.yale.edu/sites/default/files/documents/pdf/Public_Affairs/ISP_PublicOpinion_fos.pdf).

<sup>4</sup> Jacy Reese, “3 Big Changes We Need in the Farmed Animal Movement” (June 25, 2018), <https://www.sentienceinstitute.org/blog/three-big-changes>.

<sup>5</sup> See, for example, “Rights are important for sentient wellbeing” in “Our perspective,” Sentience Institute, accessed September 30, 2019, <https://www.sentienceinstitute.org/perspective> and Jacy Reese, “The relationship between legal and social change” (July 16, 2016), <https://animalcharityevaluators.org/blog/the-relationship-between-legal-and-social-change/>.

<sup>6</sup> For more detail on the process that SI uses, see Jamie Harris, “How is SI research different from existing social movement literature and relevant historical works?” (May 17, 2019), <https://www.sentienceinstitute.org/blog/how-is-SI-research-different>.

driven by social change is one such topic. This research provides evidence for the questions of whether animal advocates should focus on changing individuals or changing institutions and social norms, influencers or the general population, and incremental institutional reform or radical, single-step institutional reform.<sup>7</sup>

## Methodology

### Research questions

The findings of this literature review are organized by the questions listed below.<sup>8</sup> The wording and focus of the questions was informed by the content of the reviewed research and by the need for clarity for advocates who might use this report to drive social change. The phrasing of the questions here differs from the wording of the theories laid out and evaluated in the original research literature, to improve clarity and cohesion.<sup>9</sup>

---

<sup>7</sup> See “Summary of Evidence for Foundational Questions in Effective Animal Advocacy,” Sentience Institute, last edited June 21, 2018, <https://www.sentienceinstitute.org/foundational-questions-summaries>. This last question is related to the listed foundational questions of whether “welfare reforms lead to momentum or complacency for future progress” and whether animal advocates should “focus on ‘animal farming’ or ‘factory farming’ as the institution we oppose.”

<sup>8</sup> The research that I identified in my searches did not neatly match up to the research questions that were implied by my initial hypotheses, although much of it fitted within the broad question of whether the Supreme Court drives or is driven by social change and considered the relationship between Supreme Court decision-making and public opinion, salience, social movement organizations, legislation, or other factors related to the success and stability of social change. Hence, I reorganized and reworded my research questions but the broad topic did not substantially change.

Based on intuition and on findings from the US anti-abortion movement (Jamie Harris, “Social Movement Lessons From the US Anti-Abortion Movement” (November 26, 2019), <https://www.sentienceinstitute.org/anti-abortion>) and anti-death penalty movement (Jamie Harris, “Social Movement Lessons from the US Anti-Death Penalty Movement (forthcoming)), I formulated the following hypotheses:

1. The more favorable that the public is to a particular outcome, the more likely it is that the Supreme Court will come to a decision that is consistent with that outcome (moderate confidence).
2. The more favorable that the public is to a particular outcome, the more that a Supreme Court ruling that is consistent with that outcome will cause an increase in public support for that outcome (low confidence).
3. The less favorable that the public is to a particular outcome, the more that a Supreme Court ruling that is consistent with that outcome will cause a decrease in public support for that outcome (low confidence).
4. The less favorable that the public is to a particular outcome, the more that a Supreme Court ruling that is consistent with that outcome will encourage social movement or political mobilization to reverse the direction of change (high confidence).
5. The less salient that a particular issue is, the less of an effect that public opinion will have on Supreme Court decisions relating to that issue (moderate confidence).
6. The less polarized the political parties are on a particular issue, the less of an effect that public opinion will have on Supreme Court decisions relating to that issue through indirect mechanisms such as changes in the Supreme Court’s composition (moderate confidence).

<sup>9</sup> Some of the research items evaluated in this literature review provide hypotheses on multiple research questions simultaneously. For example, the “structural response” model suggests that (controversial) Supreme Court decisions will have no overall effect on public opinion but will polarize different groups. At other times, models of change are subdivided beyond what is useful or necessary for the purposes of this literature review. For example, Thomas R. Marshall, *Public Opinion and the Supreme Court* (London: Unwin Hyman, 1989), 14-30 lists twelve different models that might explain “linkages between public opinion and Supreme Court policy making.” However, these twelve separate models can be condensed down into “direct” and “indirect” models of public opinion’s influence on the Supreme Court, with little need for further subdivision.

Influences on Supreme Court decision-making (hereafter abbreviated to “I”):

1. Does public opinion directly positively influence the Supreme Court’s decisions? That is, do Supreme Court justices directly match their decisions to public opinion, whether consciously or unconsciously?
2. Does public opinion indirectly positively influence the Supreme Court’s decisions by electing presidents and Senators who appoint justices who then vote in line with public opinion?
3. Does interest group involvement, such as via *amicus curiae* briefs, influence the outcome of Supreme Court decisions in the direction that they intend it to?

Modifiers of the influences on Supreme Court decisions (“IM”):

1. Does higher pre-decision issue salience increase the effects of public opinion on the Supreme Court’s decisions? That is, does higher discussion and awareness of an issue among the public increase the likelihood or extent to which Supreme Court decisions match public opinion?

Effects of Supreme Court decisions (“E”):

1. Do Supreme Court decisions positively influence public opinion? That is, when the Supreme Court makes a decision, does this cause public opinion to move towards the opinion implied by that decision?
2. Do Supreme Court decisions polarize public opinion? That is, when the Supreme Court makes a decision, does this cause differences in opinion between groups to widen?
3. Do Supreme Court decisions cause a social movement or legislative backlash? That is, after the Supreme Court makes a decision, does this tend to encourage efforts to overturn that decision or wider activities that are contrary to the opinion implied by that decision?

Modifiers of the effects of Supreme Court decisions (“EM”):

1. Does pre-decision public opinion that is more closely aligned with a Supreme Court decision increase the positive effects or decrease the negative effects of that Supreme Court decision on public opinion?
2. Assuming that Supreme Court rulings at least sometimes cause a social movement or legislative backlash, does higher pre-decision public opinion decrease this backlash?
3. Does higher pre-decision issue salience decrease the effects of a Supreme Court decision on public opinion?
4. Does higher awareness of the decision itself increase its effects? That is, does it increase its effects on public opinion, increase any polarization effects, or increase backlash?
5. Do earlier landmark Supreme Court decisions on an issue have larger effects than subsequent Supreme Court decisions on the same issue?
6. Does unanimity or near unanimity among the justices’ votes in Supreme Court decisions maximize the positive effects of a Supreme Court decision or minimize its negative effects? That is, does unanimity increase positive influences on public opinion, decrease negative influences on public opinion, decrease polarization, or decrease backlash?
7. Does interest group involvement, such as via *amicus curiae* briefs, increase the likelihood, speed, or size of social movement or legislative backlash?

8. Does the framing of debate in the media, by legislators, and by relevant social movement actors modify the effects of a Supreme Court decision on public opinion?<sup>10</sup>

## Search strategy<sup>11</sup>

I inputted search terms into Google Scholar.<sup>12</sup> I read through the abstract (or equivalent) of all results on the first two pages of search results and decided whether to include the item or not in the “[Findings tables](#)” spreadsheet (54 of the 121 included items were identified this way). In the “Excluded items” tab of the same spreadsheet, I recorded 86 items that I decided not to include and my reasons for excluding them. I also looked through pages 3 to 10 of the Google Scholar results and selected research items that seemed especially useful for further review (26 of the 121 included items were identified this way). I looked up the citations of some of the most important research items, selecting items for review (30 of the 121 included items were identified this way). I sometimes reviewed items cited by other reviewed items that seemed especially useful (9 of the 121 included items were identified this way).

The search terms I used were:

- “Supreme Court” “public opinion” “literature review”

---

<sup>10</sup> This modifier was added during the write-up stage of this literature review, rather than early in the process. As a result, some relevant contributing information may have been missed from reviewed research items.

<sup>11</sup> Although I did not formally pre-register the methodology for this literature review, I wrote out my planned methodology before beginning my research. I made only minor deviations from my plan. I made the following deviations and no others, that I can recall:

- I had initially planned to systematically search through both Google and Google Scholar for each of the search terms listed with the addition of the term “literature review.” However, when conducting the systematic search for “Supreme Court” “public opinion” “literature review,” I found that the results were unhelpful; it seemed to be disproportionately undergraduate research and other non-peer reviewed research that used the term “literature review” explicitly. To save time and avoid focusing on lower quality research, I decided to conduct the other searches that incorporated the term “literature review” non-systematically and to focus on Google Scholar but not Google.
- Since the Google search was not very useful, I added to my inclusion criteria the consideration of whether items were published in a peer-reviewed academic journal.
- For the final search term, “Supreme Court” (polarization OR polarisation OR polarizing OR polarising OR polarize OR polarise), I had originally listed only ““Supreme Court” polarization,” but realized that this might exclude some relevant research.
- Though I did not initially write up my full list of inclusion criteria, I wrote these down early in the process, as I realized that I was using these criteria consistently but had not been explicit about them.
- I realized that my search terms were frequently returning research items that focused on “diffuse support” for the Supreme Court, which was of little relevance to the research questions of this literature review. Therefore, after including a small number of such items, I began to exclude items that focus on the levels of “diffuse support” for the Supreme Court as an institution; this relates to the second inclusion criterion, but I had not planned to exclude such items, because I was not aware of this topic as a focus of existing research.
- I made minor wording edits to the methodology for clarity, but did not otherwise change the substance of the process beyond the changes listed above.

<sup>12</sup> Given the novel methodology used in this report, the first person is used frequently to help clarify where the author of this report (Jamie Harris, researcher at Sentience Institute) has made judgment calls that some readers may disagree with.

For the first search term, I used the same methodology again with the standard Google search engine. For each of the other listed search terms, I first conducted a non-systematic search of Google Scholar, adding the phrase “literature review” to the search term (1 of the 121 included items was identified this way).

- “Supreme Court” “public opinion”
- “Supreme Court” (“social change” OR “social progress”)
- “Supreme Court” social movement mobilization
- “Supreme Court” backlash
- “Supreme Court” (activism OR activist OR protest)
- “Supreme Court” (polarization OR polarisation OR polarizing OR polarising OR polarize OR polarise)

I used the following criteria to decide which items to include:

- Is the item focused on the Supreme Court, rather than other forms of government?
- Does the item consider the relationship between Supreme Court decision-making and public opinion, salience, social movement organizations, legislation, or other factors related to the success and stability of social change?
- Does the item contain (or summarize) substantial empirical findings?
- Is the item unlikely to have been made predominantly redundant by subsequent research? Relevant factors affecting this criterion include the date of publication (for example, if it is published after around 1990) and any impressions that I have of the thoroughness of the literature on the subtopic that it covers.
- Are the findings applicable to the US context?
- Is the item published in a peer-reviewed academic journal?

I did not exclude all items that failed to meet some of the above criteria, if they seemed to perform especially well on others.

For non-systematic selections (items not identified from the first two pages of results for pre-planned search terms), I skipped over items that I believed had been clearly summarized by items that I had already reviewed, items that overlapped with, made similar arguments, or used similar data to other items that I had already reviewed, and items that seemed less obviously relevant from their title.

## The scoring system

I assigned each research item a score for each question that it provided evidence for. The possible scores range from -5 to +5, where +5 means that if this was the only piece of evidence available, I would be 100% confident that the answer is “yes” for the average highly salient, politically polarized issue.<sup>13</sup> By comparison,

---

<sup>13</sup> In my scoring, I also attempted to ignore, as far as possible, prior theoretical beliefs of heuristics. That is, I treated the default score for a research item as 0, even if, without having conducted this literature review I would estimate the probability that the answer to the question is “yes” as something other than 50%.

As far as possible, to avoid double counting evidence, I scored the research independently of other research findings. For example, if one research item used methods that I found persuasive but that were subsequently critiqued in a second item, I might give the first item a score of +4 and then the second item a score of -2, rather than giving the initial item a score of +2. Relatedly, if two research items contained duplicate information or reached similar conclusions by using similar methods and data, I only scored this information once. This means that some items may appear to the reader to

+1 means 60% likely, -1 means 40% likely, and -5 means 0% likely. For each research question, the scores from relevant research items were added together to create the final scores listed below.

Whether it is treated as a dependent or independent variable, much of the research in this literature review uses some measure of public opinion or behavior. For example, in 24 reviewed research items, a unidimensional measure of left-right ideological “public mood” is used. In other research, measures that are specific to the issue being analyzed are used. For example, 18 reviewed research items used measures of public support for same-sex marriage or other issues specific to gay rights. Included research that did not use a measure of public opinion or behavior was categorized by its topic area (gay rights, civil rights, etc.) or as “Other / all.” Reasonable people might place different weight on findings from research that focuses on these differing outcome measures and topic areas, so the results are listed separately in the “[Findings Tables](#)” spreadsheet.

Results are also listed separately by the research methods used. The “experimental” category includes research where students or online participants were randomly assigned to different intervention groups or to control conditions. The “observational” category includes research that made use of various statistical analyses of historical data from real-world contexts, such as results from public opinion polling before and after particular Supreme Court rulings. Studies that test for opinion change around Supreme Court rulings but also include experimenter manipulations are also included in the “observational” category. The “other” category covers all other research formats, including qualitative research. Some items in this category compile quantitative data, but differ from the research in the “observational” category in that statistical analyses are not usually undertaken.

To give a sense of whether the research tends to provide consistent evidence on particular questions, the number of relevant items is listed and can be compared with the overall score. For the summary of the main results, a total of the number of “substantial items” (research items that have a score of +0.75 or more or -0.75 or less for that research question) is also included.<sup>14</sup>

---

have counterintuitively high scores; this may be because I read that item before other similar items and therefore allocated it several points.

For example, I gave Thomas M. Keck, “Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights,” *Law and Society Review* 43, no. 1 (2009), 151-86 a score of 2.75 for E3, even though Keck actually argues against the importance of backlash from the gay rights Supreme Court cases discussed. In contrast, I only gave Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage* (Oxford: Oxford University Press, 2013) a score of 1.5 for E3, even though this book argues more persuasively that backlash was substantial, because I read this book after reading Keck’s article.

A reviewer of this report suggested that undergoing calibration training prior to conducting this review may have been helpful, such as using the application developed by Spencer Greenberg for the Open Philanthropy Project; see Luke Muehlhauser, “New web app for calibration training” (December 14, 2018), <https://www.openphilanthropy.org/blog/new-web-app-calibration-training>. The author has used this application previously, but did not train specifically for this literature review.

<sup>14</sup> Given that some of the counted research items have scores close to 0 because they only provide indirect evidence for that research question, the average score per “substantial” item is arguably a better measure of consistency than the total number of relevant items.



The inclusion of research that was identified through non-systematic methods introduces additional risk of selection bias. As an informal sensitivity analysis, I separately summarize the results for the systematic searches only, excluding any research that I identified non-systematically.

## Overall estimates for the research questions

Considering all the available evidence and my awareness of the limitations of the research, I present my overall estimates of the likelihood that the answer to each research question will be “yes” for the average highly salient, politically polarized issue and, as a concrete application to Sentience Institute’s main research focus, that the answer will be “yes” for the average farmed animal issue.<sup>15</sup> These estimates incorporate the considerations in the “[Limitations](#)” section and in the [appendix](#), as well as, to a smaller extent, evidence from Sentience Institute’s case studies on the US anti-abortion movement and the US anti-death penalty movement.<sup>16</sup> Unlike the scores for individual research items, these estimates incorporate a judgement of the intuitive likelihood of the answer being “yes.” These are estimates of the probability that the effect or modifier would be substantial enough that it would show up in well-designed statistical analyses if exogenous factors were sufficiently controlled for. That is, the estimates do not reflect the size of the effect, only the likelihood that there would be at least some detectable effect. Of course, these estimates involve subjective judgement calls and the use of precise numbers does not indicate confidence in the accuracy of the estimates.

## Results and discussion

Full tables of results of the scoring system and the overall estimates for the research questions can be found in the “[Findings tables](#)” spreadsheet.

## Influences on Supreme Court decision-making (“I”)

The public’s conservatism or liberalism is closely correlated with the conservatism or liberalism of the Supreme Court’s decision-making.<sup>17</sup> It seems likely that if public opinion on a specific issue substantially shifts in one direction, Supreme Court decision-making will eventually shift in the same direction, especially if the

---

<sup>15</sup> An example of a “farmed animal issue” would be support for a ban on factory farming. For example, would public support for a ban on factory farming directly positively influence the likelihood that the Supreme Court would re-interpret the Constitution to rule that factory farming was unconstitutional, or rule that new legislation banning factory farming was indeed constitutional (I1)? Would higher pre-decision awareness of factory farming and related social issues increase the effects of a Supreme Court decision on public opinion, increase any polarization effects, and increase backlash (EM3)? Other outcome measures in Jacy Reese, “Survey of US Attitudes Towards Animal Farming and Animal-Free Food October 2017” (November 20, 2017), <https://www.sentienceinstitute.org/animal-farming-attitudes-survey-2017> provide examples of other farmed animal issues of interest.

<sup>16</sup> Jamie Harris, “Social Movement Lessons From the US Anti-Abortion Movement” (November 26, 2019), <https://www.sentienceinstitute.org/anti-abortion> and Jamie Harris, “Social Movement Lessons From the US Anti-Death Penalty Movement” (forthcoming).

<sup>17</sup> See especially Lee Epstein and Andrew D. Martin, “Does Public Opinion Influence the Supreme Court? Possibly Yes (But We’re Not Sure Why),” *University of Pennsylvania Journal of Constitutional Law* 13 (2010), 263-81.

issue is highly salient.<sup>18</sup> However, the numerous possible causes of this relationship (I1, I2, E1, or exogenous social trends) and the limitations of the available evidence<sup>19</sup> mean that it remains possible (if unlikely) that changes in public opinion will have no effect on the decisions of the Supreme Court in cases of interest to social movements. This means that public-facing actions by social movements may not necessarily have much of an effect on Supreme Court decision-making, even if they successfully alter public opinion, but public opinion can still be used as an indicator of the tractability of specific litigation strategies. Several research items reviewed here highlight other factors that affect judicial decision-making;<sup>20</sup> even if these factors are beyond the influence of thoughtful actors, the findings from this research can be used to evaluate the tractability of different litigation campaigns.

Though it seems likely that public opinion has an effect on the Supreme Court's decision-making,<sup>21</sup> several included items also find evidence that the peculiarities of elite preferences have effects on the Court's decision-making.<sup>22</sup> Most research does not provide clear evidence on the relative importance of public opinion and elite opinion.<sup>23</sup>

---

<sup>18</sup> See the discussion in the sections for "I1," "I2," and "IM" in the [appendix](#).

<sup>19</sup> See the "[Limitations](#)" section and [appendix](#) below.

<sup>20</sup> For example, Melinda Gann Hall, "Electoral Politics and Strategic Voting in State Supreme Courts," *The Journal of Politics* 54, no. 2 (1992), 427-46 finds that "single-member districts, beginning at the end of a term, prior representational service, narrow vote margins and experience in seeking reelection encourage minority justices to be attentive to their constituencies by voting in accordance with constituent opinion."

See also footnotes 22 and 23 below.

<sup>21</sup> See the items with scores inputted for I1 and I2 in the "[Findings tables](#)" spreadsheet and relevant discussion in the [appendix](#).

<sup>22</sup> Lawrence Baum and Neal Devins, "Why the Supreme Court Cares about Elites, Not the American People," *Georgetown Law Journal* 98 (2009), 1515-81 note, for example, that "a survey of seventy Supreme Court law clerks... found that eighty-eight percent of clerks would be inclined to give 'closer attention' to amicus briefs filed by academics."

Klarman, *From the Closet to the Altar*, 170-1, seeking to explain why justices may sometimes diverge from public opinion, notes large disparities in public opinion on social issues between those with higher and lower levels of education.

<sup>23</sup> For example, Matthew E. K. Hall and Joseph Daniel Ura, "Judicial Majoritarianism," *The Journal of Politics* 77, no. 3 (2015), 818-32 find that, categorizing Congress and the President's support for legislation as either "high" or "low," the predicted probability of invalidation of the legislation by the Supreme Court within a year of its passage is around 0.018 and 0.035 respectively. This difference could mostly reflect either the indirect effects of public opinion, or the direct effects of elite preferences, since no tests are conducted to distinguish between these possibilities.

Similarly, Anna Harvey and Barry Friedman, "Pulling Punches: Congressional Constraints on the Supreme Court's Constitutional Rulings, 1987-2000," *Legislative Studies Quarterly* 31, no. 4 (2006), 533-62 find evidence that "the probability that the Rehnquist Court would strike a liberal congressional law rose between 47% and 288% as a result of the 1994 congressional elections, depending on the legislative model used." However, the extent to which this reflects the increased salience of public opinion, rather than the shifting balance of elite power and its direct influence on the Court, is unclear.

Micheal W. Giles, Bethany Blackstone, and Richard L. Vining Jr., "The Supreme Court in American democracy: Unraveling the linkages between public opinion and judicial decision making," *The Journal of Politics* 70, no. 2 (2008), 293-306 find that "the differences among the justices in their decisional propensities explain the overwhelming majority of the variation in liberalism. Model 1, which includes only dummy variables for the justices, explains approximately 85% of the variation in liberal voting." This suggests that the Supreme Court's decision-making responds to the public mood indirectly, when new appointments are made by the President and Senate, rather than by directly taking the public mood

There is evidence that active litigation and other direct involvement can affect the outcome of Supreme Court cases in the intended direction,<sup>24</sup> though perhaps by less than some advocates hope or expect. For example, one paper found evidence that each of the first few amicus curiae briefs filed in support of the petitioner in a Supreme Court case is associated with a 1.8% higher chance of success. Another paper found that petitioner win rates were only 0.69% higher when petitioners were supported by amicus briefs than when there were no supporting or opposing amicus briefs. Both papers found that amicus curiae briefs supporting the respondent were associated with larger changes in the probability of petitioner wins.<sup>25</sup> For comparison, a paper from 2004 estimated that the price of hiring a top attorney to prepare a single amicus curiae brief was around \$50,000.<sup>26</sup> Two papers also found evidence that the submission of amicus curiae briefs increases the likelihood that Congress reverses a Supreme Court ruling, or the speed with which it does so.<sup>27</sup> This suggests that advocates intending to maximize the chances of success of a particular legal ruling could inadvertently undermine the stability of that ruling by submitting amicus curiae briefs during the proceedings. However, given the limitations of this evidence,<sup>28</sup> the infrequency with which Congress overrides Supreme Court decisions,<sup>29</sup> and

---

into account. However, it shows more directly that their decision-making responds to the preferences of the President and the Senate.

<sup>24</sup> See the discussion in the section “I3” in the [appendix](#).

<sup>25</sup> Paul M. Collins Jr., “Friends of the Court: Examining the Influence of Amicus Curiae Participation in US Supreme Court Litigation,” *Law and Society Review* 38, no. 4 (2004), 807-32. Collins used logistic regression with several control variables to attempt to isolate the “marginal impact” of each independent variable on the probability of petitioner success. These results are used to predict probabilities of petitioner success with differing numbers of amicus briefs supporting the petitioner or the respondent. Collins does not note the 1.8% figure explicitly. Collins’ results suggest that, “holding all other variables at their mean or modal values,” the petitioner’s probability of success is 71.8% with no amicus briefs supporting the petitioner and no amicus briefs supporting the respondent. This increases to 73.6% chance of a petitioner win with 1 supporting amicus brief but no opposing amicus briefs (i.e. a difference of 1.8% from 0 briefs), 75.4% with 2 supporting amicus briefs (i.e. a further difference of 1.8 from 1 brief), and 77.1% with 3 supporting amicus briefs (i.e. a further difference of 1.7% from 2 briefs). Rounded to 1 decimal place, this suggests that each of the first three additional unopposed amicus briefs supporting the petitioner is associated with an average of a 1.8% higher chance of petitioner success. A similar calculation using Collins’ results suggests that each of the first few unopposed amicus briefs supporting the respondent decreased the chances of petitioner success by about 2.4%.

Joseph D. Kearney and Thomas W. Merrill, “The Influence of Amicus Curiae Briefs on the Supreme Court,” *University of Pennsylvania Law Review* 148, no. 3 (2000), 743-855. The authors “computed the benchmark rate by determining the mean p-win and p-loss rate for petitioners and respondents in cases in which no amicus briefs were filed.” The “Percentage Change in P-Win Rates for Amici Supporting Petitioner Relative to Benchmark Rates of Success” was then calculated for each decade and the results were averaged across all 5 decades studied. Using similar methodology, Kearney and Merrill found that amicus briefs supporting respondents were associated with a 7.34% lower probability of petitioner wins.

<sup>26</sup> Kelly J. Lynch, “Best Friends-supreme Court Law Clerks on Effective Amicus Curiae Briefs,” *Journal of Law and Politics* 20 (2004), 33.

<sup>27</sup> Joseph Ignani and James Meernik, “Explaining Congressional Attempts to Reverse Supreme Court Decisions,” *Political Research Quarterly* 47, no. 2 (June 1994), 353-71 and Virginia A. Hettinger and Christopher Zorn, “Explaining the Incidence and Timing of Congressional Responses to the US Supreme Court,” *Legislative Studies Quarterly* 30, no. 1 (2005), 5-28.

<sup>28</sup> See the discussion in the section “EM7” in the [appendix](#).

<sup>29</sup> Ignani and Meernik, “Explaining Congressional Attempts,” 353-71 found that “[i]n 26 percent of the cases public opinion was aroused; 92 percent of the time that public opinion was an issue, the Congress took some action, while in only 12 percent of the cases where public opinion was not a factor, did the legislature respond to a Court decision.” This works out as about 32% of all cases.

the potentially important effects of Supreme Court decisions if they are not reversed (see the section below), the submission of amicus curiae briefs may still be worth the associated risks and costs.

Table 1: Overall estimates for the influences on Supreme Court decision-making and their modifiers.

	Estimated likelihood for the average highly salient, politically polarized issue	Estimated likelihood for the average farmed animal issue
I1: Does public opinion directly positively influence the Supreme Court's decisions?	70%	65%
I2: Does public opinion indirectly positively influence the Supreme Court's decisions by electing presidents and Senators who appoint justices who then vote in line with public opinion?	70%	57.5%
I3: Does interest group involvement, such as via amicus curiae briefs, influence the outcome of Supreme Court decisions in the direction that they intend it to?	80%	80%
IM: Does higher pre-decision issue salience increase the effects of public opinion on the Supreme Court's decisions?	42.5%	42.5%

More recently, Richard L. Hasen, "End of the Dialogue: Political Polarization, the Supreme Court, and Congress," *Southern California Law Review* 86 (2012), 101-55 found that the rate of Congressional overriding of Supreme Court statutory decisions has fallen from an average of 12 overrulings of Supreme Court cases in each two-year Congressional term during the 1975-1990 period to an average of 2.8 in 2001-2012. By comparison, "Supreme Court cases, October term 2018-2019," Ballotpedia, accessed September 18, 2019, [https://ballotpedia.org/Supreme\\_Court\\_cases,\\_October\\_term\\_2018-2019](https://ballotpedia.org/Supreme_Court_cases,_October_term_2018-2019) notes that "[b]etween 2007 and 2018, SCOTUS released opinions in 850 cases," which works out as an average of 71 per year. "The Justices' Caseload," accessed September 18, 2019, <https://www.supremecourt.gov/about/justicecaseload.aspx> notes that "[p]lenary review, with oral arguments by attorneys, is currently granted in about 80 of those cases each Term," though this claim does not specify a date range and the webpage itself is not dated. The frequency with which backlash leads to a direct override of a decision seems to be a low proportion: comparing the figure of 71 opinions released per year in 2007 to 2018 to the average of 2.8 overrulings in 2001-2012 (and ignoring the slight difference in time periods covered) suggests that 4% of decisions are overruled.

Matthew R. Christiansen and William N. Eskridge Jr, "Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011," *Texas Law Review* 92 (2013), 1317-541 found that there was an "explosion" of overrides in the 1990s, but agree with Hasen (2012) that the rate declined subsequently. In the most salient cases, they suggest that Congress often uses overrides to "restore" its preferred understanding of the legislation, as with the 1991 Civil Rights Act. However, "the large majority" of overrides are bipartisan statutes to "update" rather than "restore" the law.

Categorizing Congress and the President's support for legislation as either "high" or "low," Hall and Ura, "Judicial Majoritarianism," 818-32 find that the predicted probability of invalidation of the legislation by the Supreme Court within a year of its passage is around 0.018 and 0.035 respectively. The probability declines steeply over time, reaching about 0.005 and 0.01 respectively 10 years after the legislation is passed.

Table 2: Summary of the results for the influences on Supreme Court decision-making and their modifiers.

	All results			Systematic results only		
	Score	Number of relevant items	Number of substantial items	Score	Number of relevant items	Number of substantial items
I1	5.25	26	9	7.25**	13	7
I2	15.75	32	9	13.75**	16	6
I3	5.5	14	5	1.5*	6	0
IM	-1.25	8	2	-2.5*	3	2

\*\* Indicates that the score for the systematic results is similar to the score for the overall results (neither score is equal to or more than double the score of the other), which include items identified through both systematic and non-systematic methods.

\* Indicates that the systematic results and overall results share the same sign (that is, are on the same side of zero) but that the score of one of these groups is at least double the score of the other.

Where there is no asterisk, the scores for the systematic results and overall results do not share the same sign.

“Substantial items” are research items that have a score of 0.75 or more or -0.75 or less.

The reviewed literature therefore finds evidence that advocates can influence the outcome of Supreme Court cases by directly participating in the cases, through involvement and advocacy in the elite institutions and cultures that influence the justices, and through tactics that modify public opinion. The size of each of these effects is not clear enough to enable a rigorous evaluation of the cost-effectiveness of these different methods for achieving favorable Supreme Court rulings. If I had to guess, I would expect that advocacy efforts most directly targeted at Supreme Court cases, such as direct litigation and the submission of amicus curiae briefs, would be the most cost-effective methods of influencing any individual Supreme Court case. However, involvement and advocacy targeted at the elite institutions that influence the Supreme Court or at the wider public could have indirect effects that make them more cost-effective tactics for the overall goals of a social movement. For the advocacy goal of legal recognition of nonhuman animal rights, a focus on state courts may be more tractable, though this literature review has not thoroughly compared advocacy at the state and federal levels.<sup>30</sup>

<sup>30</sup> In response to a draft of this report, Kevin Schneider, executive director of the Nonhuman Rights Project wrote (email correspondence with Jamie Harris, November 19, 2019) that there is “real value... in building the case from the ‘ground up’ by going through state courts, not to mention that US federal courts are not common law courts and are therefore far less able we think to make truly bold moves for nonhuman rights. Indeed, the more we focus on narrow, discrete cases in the state courts using habeas corpus in a very serious way, the more headway we seem to be making... [T]here is no clear path that we can see (in the absence of positive federal legislation) that the federal courts could create rights for nonhuman animals currently even if they wanted to. Our federal courts are courts of limited jurisdiction by design, whereas the state courts have deeper (if narrower) jurisdiction, in particular the common law (the law judges make). Federal courts are cabined in by legislative/constitutional intent in almost every instance... The other tricky thing is the certiorari process at the Supreme Court—for almost all cases they have discretion to hear or not hear a given case.”

A number of other factors could affect the tractability of state-level litigation in comparison to litigation aimed at the Supreme Court, such as the historical success rates of petitioners and the relative responsiveness to public opinion of different courts. As noted in the section on “Potential Items for Further Study,” an additional literature review focused on the lower courts could address questions such as these.

## Effects of Supreme Court decisions (“E”)

### Policy and behavior

The most obvious mechanisms through which the Supreme Court can effect change is by ruling that previously legal behaviors or pieces of legislation are illegal, or the reverse: ruling that previously illegal behaviors or pieces of legislation are legal. Alternatively, the Court may interpret existing legislation especially narrowly or broadly, which can have an effect similar to the creation of new policy.<sup>31</sup> Assuming that the behavioral and policy effects of such rulings are likely to be issue-specific and that evaluating them thoroughly would be too time-consuming, this literature review has not included an evaluation of the effectiveness of these mechanisms as one of its main research questions.<sup>32</sup> Nevertheless, some of the included research items, such as Gerald Rosenberg’s *The Hollow Hope* (2008), contribute to debates on these issues for particular social

---

<sup>31</sup> David Rudovsky, “Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights,” *University of Pennsylvania Law Review* 138 (1989), 23-81 argues that the 1883 Civil Rights Act was largely ignored until the 1961 *Monroe v. Pape* Supreme Court decision. Afterwards, the legislation was reinterpreted in a manner comparable to making entirely new policy. For example, Rudovsky summarizes that the Court “gave a broad reading to the concepts of state action and color of state law, ruled that property as well as liberty interests were protected by the Act, determined that exhaustion of state remedies was not required, and provided only limited immunities to individual defendants.”

Michael Selmi, “Interpreting the Americans with Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Did Not Care,” *George Washington Law Review* 76 (2007), 522-75 focuses on judicial decision-making in the wake of the 1990 Americans with Disabilities Act. This suggests that, without necessarily overturning legislation, the Supreme Court may interpret it narrowly, limiting its practical application, if the wording and intent of the legislation is insufficiently specific.

<sup>32</sup> Evaluating these effects may be better suited to a case study format. Sentience Institute’s social movement case studies include such evaluations. See Kelly Witwicki, “Social Movement Lessons From the British Antislavery Movement: Focused on Applications to the Movement Against Animal Farming” (December 1, 2017), <https://www.sentienceinstitute.org/british-antislavery>, Jamie Harris, “Social Movement Lessons From the US Anti-Abortion Movement” (November 26, 2019), <https://www.sentienceinstitute.org/anti-abortion>, and Jamie Harris, “Social Movement Lessons From the US Anti-Death Penalty Movement” (forthcoming).

movements.<sup>33</sup> It is also possible that decisions by state courts could be more impactful than decisions by the Supreme Court.<sup>34</sup>

Some of the included research items debate whether the Supreme Court should, or should not, be considered to be “activist,” a term which implies that the Supreme Court has gone beyond its proper role in interpreting the Constitution and has made policy decisions itself, perhaps at odds with the preferences of Congress and the public.<sup>35</sup> Some of these items show that the Court can become more or less activist — and therefore more or less capable of driving behavioral and policy change beyond what might have been implemented through other mechanisms — at different times.<sup>36</sup> Though there is evidence that the Court is becoming more

---

<sup>33</sup> Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (Chicago: University of Chicago Press, 2008).

Criticisms of Rosenberg include:

Roy B. Flemming, John Bohte, and B. Dan Wood, “One Voice among Many: The Supreme Court's Influence on Attentiveness to Issues in the United States, 1947-92,” *American Journal of Political Science* 41, no. 4 (1997), 1224-50.

David Schultz and Stephen E. Gottlieb, “Legal Functionalism and Social Change: A Reassessment of Rosenberg's The Hollow Hope: Can Courts Bring about Social Change” *The Journal of Law and Politics* 12, no. 63 (1998), 63-91.

Lani Guinier, “Beyond Legislatures: Social Movements, Social Change, and the Possibilities of Demosprudence-courting the People Demosprudence and the Law/Politics Divide,” *Boston University Law Review* 89 (2009), 539-61.

Scott L. Cummings, “Rethinking the foundational critiques of lawyers in social movements,” *Fordham Law Review* 85 (2016), 1987-2015.

Scott L. Cummings and Douglas NeJaime, “Lawyering for Marriage Equality,” *University of California, Los Angeles Law Review* 57 (2009), 1235-331.

<sup>34</sup> In response to a draft of this report, Kevin Schneider, executive director of the Nonhuman Rights Project wrote (email correspondence with Jamie Harris, November 19, 2019) that, “we [the NhRP] somewhat go against the NGO trend in our choice of state courts over federal/national advocacy. The tendency of activists to go for top-down (federal legislation being the main lever) has appeared to be counterproductive at times (perhaps because they get out ahead of public opinion), or the federal process waters down their efforts to make them even vaguely passable. Perhaps this is uniquely true about animal issues. The recent amendments to the federal Animal Welfare Act sound great in theory, until one realizes that almost no cruelty is covered unless it is in the context of interstate commerce (since federal law must in general be premised on that).” Schneider also noted that the Supreme Court “often looks at splits in opinions among federal appellate courts when deciding whether to grant review.”

<sup>35</sup> For example, Kermit Roosevelt III, *The Myth of Judicial Activism: Making Sense of Supreme Court Decisions* (New Haven: Yale University Press, 2006) argues that several decisions that have been referred to as “activist” decisions (and hence, it is implied, illegitimate), were actually reasonable and legitimate, including *Brown* and *Loving v. Virginia*.

<sup>36</sup> Thomas M. Keck, *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism* (Chicago: University of Chicago Press, 2004), analyzing the number and annual average of decisions striking down federal statutes on constitutional grounds, includes data showing that the “late Rehnquist Court” (1995-2003, the most recent Supreme Court analyzed) scored more highly (33 total, 3.67 average per year) than any other Court. The relationships appear entirely different when state and local statutes are examined, however.

William Lasser, “The Supreme Court in Periods of Critical Realignment,” *The Journal of Politics* 47, no. 4 (1985), 1174-87 argues that there have been periods of “critical realignment” in the 1850s, the 1890s, and the 1930s when “the Court was ‘captured’ by its conservative wing and struck down an important piece of moderate legislation. By making centrist

politically polarized,<sup>37</sup> one paper found no clear difference in overall levels of “activism” between liberal and conservative judges.<sup>38</sup> Overall, the literature is unclear what exact criteria the Court would have to meet to be an “activist” and whether it has met such criteria.

## Public opinion

The reviewed research provides evidence that Supreme Court decisions tend to positively influence public opinion.<sup>39</sup>

The effect of Supreme Court rulings on public opinion seems small enough that attitudinal change is not likely to often be the most important effect. For example, Michael Zilis (2015) found a significant change in the average approval of the Affordable Care Act of around 0.025 on a 6-point scale when comparing panel data from before and after the Supreme Court ruled that the Act was constitutional.<sup>40</sup> Although the effects seem to often be small and positive, this is not always the case. For example, polls conducted shortly before and after the *Lawrence v. Texas* (2003) ruling, which declared that laws prohibiting gay sex were unconstitutional, suggest that the percentage of Gallup poll respondents supporting legalization of gay sex fell by around 10%.<sup>41</sup>

Table 3: Overall estimates for the effects of Supreme Court decisions.

	Estimated likelihood for the average highly salient, politically polarized issue	Estimated likelihood for the average farmed animal issue
E1: Do Supreme Court decisions positively	62.5%	70%

positions untenable, the Court facilitated the takeover of the major parties by their extremist factions. In two of the three periods, in turn, the Court found itself at the center of intense controversy and criticism.”

<sup>37</sup> Corey Ditslear and Lawrence Baum, “Selection of Law Clerks and Polarization in the Us Supreme Court,” *The Journal of Politics* 63, no. 3 (2001), 869-85 argue that the Supreme Court is becoming increasingly polarized. One symbol of this is that, in 1993-1998, three justices, “Souter, Stevens, and Ginsburg all drew more than two-thirds of their clerks from Democratic appointees. Scalia and Rehnquist drew about 95% of their clerks from Republican appointees, and Thomas never went to a Democratically appointed judge for a clerk.”

Neal Devins and Lawrence Baum, “Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court,” *The Supreme Court Review* 2016, no. 1 (2016), 301-65 argue that “presidents have increasingly paid attention to ideology in Supreme Court appointments... Today, every Justice appointed by a Democratic president stands to the left of every Justice appointed by a Republican president, and this is not likely to change any time soon.”

<sup>38</sup> Frank H. Easterbrook, “Do Liberals and Conservatives Differ in Judicial Activism,” *University of Colorado Law Review* 73 (2002), 1401-16. Easterbrook counted the “activist” votes of nine different Supreme Court justices, divided by type of case, and found no clear evidence of difference between conservatives and liberals. Easterbrook found some evidence that “conservatives are more likely to reject statutory interpretations advanced by a Democratic president—though even here the difference is not great.”

<sup>39</sup> See the items with scores inputted for E1 in the “[Findings tables](#)” spreadsheet and the relevant discussion in the [appendix](#).

<sup>40</sup> Michael Zilis, “The Supreme Court on Trial” in his *The Limits of Legitimacy: Dissenting Opinions, Media Coverage, and Public Responses to Supreme Court Decisions* (Ann Arbor: University of Michigan Press, 2015), 143-70.

The change in beliefs about the law’s constitutionality were slightly higher, at 0.1 on a 6-point scale.

<sup>41</sup> Patrick J. Egan, Nathaniel Persily, and Kevin Wallsten, “Gay Rights,” in Nathaniel Persily, Jack Citrin, and Patrick J. Egan (eds.) *Public opinion and constitutional controversy* (Oxford: Oxford University Press, 2008), 234-66.



influence public opinion?		
E2: Do Supreme Court decisions polarize public opinion?	45%	45%
E3: Do Supreme Court decisions cause a social movement or legislative backlash?	55%	40%

Table 4: Summary of the results for the effects of Supreme Court decisions.

	All results			Systematic results only		
	Score	Number of relevant items	Number of substantial items	Score	Number of relevant items	Number of substantial items
E1	9.5	31	18	3.25*	11	6
E2	-1.25	17	11	0.5	5	4
E3	2.5	15	7	0.75*	4	2

\*\* Indicates that the score for the systematic results is similar to the score for the overall results (neither score is equal to or more than double the score of the other), which include items identified through both systematic and non-systematic methods.

\* Indicates that the systematic results and overall results share the same sign (that is, are on the same side of zero) but that the score of one of these groups is at least double the score of the other.

Where there is no asterisk, the scores for the systematic results and overall results do not share the same sign.

“Substantial items” are research items that have a score of 0.75 or more or -0.75 or less.

This literature review found evidence that higher pre-decision awareness of an issue is likely to decrease the effect of a Supreme Court decision on public opinion, that higher awareness of the decision is likely to increase the effects of a Supreme Court decision on public opinion, that unanimity or near unanimity among the justices’ votes in Supreme Court decisions is likely to maximize the positive effects of a Supreme Court decision on public opinion or minimize its negative effects, and that the framing in the media, by legislators, and by relevant social movement actors is likely to modify the effects of a Supreme Court decision on public opinion. It is possible, though less likely, that higher pre-decision public opinion may increase the positive effects or decrease the negative effects of a Supreme Court decision on public opinion and that earlier landmark Supreme Court decisions on an issue may have larger effects on public opinion than subsequent Supreme Court decisions on the same issue.<sup>42</sup>

Table 5: Overall estimates for the modifiers of the effects of Supreme Court decisions.

	Estimated likelihood for the average highly salient, politically polarized issue	Estimated likelihood for the average farmed animal issue
EM1: Does pre-decision public opinion that is more closely aligned with a Supreme Court decision increase the positive effects or decrease the negative effects of that Supreme Court	47.5%	47.5%

<sup>42</sup> See the results for EM1, EM3, EM4, EM5, EM6, and EM8 in the “[Findings tables](#)” spreadsheet and relevant discussion of the results in the [appendix](#).

decision on public opinion?		
EM2: Assuming that Supreme Court rulings at least sometimes cause a social movement or legislative backlash, does higher pre-decision public opinion decrease this backlash?	82.5%	82.5%
EM3: Does higher pre-decision issue salience decrease the effects of a Supreme Court decision on public opinion?	80%	80%
EM4: Does higher awareness of the decision itself increase its effects?	85%	85%
EM5: Do earlier landmark Supreme Court decisions on an issue have larger effects than subsequent Supreme Court decisions on the same issue?	30%	30%
EM6: Does unanimity or near unanimity among the justices' votes in Supreme Court decisions maximize the positive effects of a Supreme Court decision or minimize its negative effects?	80%	80%
EM7: Does interest group involvement, such as via amicus curiae briefs, increase the likelihood, speed, or size of social movement or legislative backlash?	45%	45%
EM8: Does the framing of debate in the media, by legislators, and by relevant social movement actors modify the effects of a Supreme Court decision on public opinion?	75%	75%

Table 6: Summary of the results for the modifiers of the effects of Supreme Court decisions.

	All results			Systematic results only		
	Score	Number of relevant items	Number of substantial items	Score	Number of relevant items	Number of substantial items
EM1	0	5	4	1.25*	2	2
EM2	5.5	4	2	0	0	0
EM3	2.75	6	2	0.5*	1	0
EM4	4.75	13	7	1*	2	1
EM5	1	5	4	-0.75	1	1
EM6	3.75	6	5	0	0	0
EM7	2	2	0	0	0	0
EM8	1.75	2	2	0	0	0

Is the US Supreme Court a Driver of Social Change or Driven by it? A Literature Review  
 Jamie Harris | Sentience Institute | November 27, 2019

\*\* Indicates that the score for the systematic results is similar to the score for the overall results (neither score is equal to or more than double the score of the other), which include items identified through both systematic and non-systematic methods.

\* Indicates that the systematic results and overall results share the same sign (that is, are on the same side of zero) but that the score of one of these groups is at least double the score of the other.

Where there is no asterisk, the scores for the systematic results and overall results do not share the same sign.

“Substantial items” are research items that have a score of 0.75 or more or -0.75 or less.

## Backlash and polarization

Qualitative evidence of backlash against Supreme Court rulings on same-sex marriage and the *Brown v. Board of Education* ruling on racial desegregation in education<sup>43</sup> is tempered slightly by criticisms that the backlash was created by circumstances rather than by litigation or Court rulings<sup>44</sup> and by research which shows that legislative reversals of Supreme Court decisions are infrequent, occurring in perhaps fewer than 5% of cases.<sup>45</sup> As well as the evidence included in this literature review, there is evidence of backlash against the *Roe v. Wade* ruling on abortion and the *Furman v. Georgia* and *Gregg v. Georgia* rulings on the death penalty.<sup>46</sup> Taken together, this research suggests that though social movement or legislative backlash may sometimes occur and may be substantial, this only infrequently results in direct reversals of Supreme Court rulings. The reviewed literature also provides evidence that unanimous Supreme Court rulings and higher pre-decision public opinion decrease the likelihood or size of backlash, but that the number of amicus briefs submitted during a case and higher public awareness of the decision itself have the opposite effect.<sup>47</sup>

---

<sup>43</sup> See, in the “Summary information” tab of the “[Findings tables](#)” spreadsheet:

Michael J. Klarman, “How *Brown* Changed Race Relations: The Backlash Thesis,” *The Journal of American History* 81, no. 1 (1994), 81-118,

Michael J. Klarman, “*Brown* and *Lawrence* (and *Goodridge*),” *Michigan Law Review* 104 (2005), 431-90,

Klarman, *From the Closet to the Altar*,

Keck, “Beyond Backlash,” 151-86,

Christopher B. Wlezien and Malcolm L. Goggin, “The Courts, Interest Groups, and Public Opinion about Abortion,” *Political Behavior* 15, no. 4 (1993), 381-405,

Michael F. Salamone, “Judicial Consensus and Public Opinion: Conditional Response to Supreme Court Majority Size,” *Political Research Quarterly* 67, no. 2 (2014), 320-334, and

Douglas NeJaime, “Winning Through Losing,” *Iowa Law Review* 96 (2010), 941-1012.

<sup>44</sup> See, in the “Summary information” tab of the “[Findings tables](#)” spreadsheet. Cummings and NeJaime, “Lawyering for Marriage Equality,” 1235-331 and Linda Greenhouse and Reva Siegel, *Before Roe v. Wade: Voices that Shaped the Abortion Debate before the Supreme Court’s Ruling* (New York: Kaplan Publishing, 2010).

<sup>45</sup> See footnote 29. Jeff King, *Judging Social Rights* (Cambridge, UK: Cambridge University Press, 2012) also argues that backlash is rare.

<sup>46</sup> Jamie Harris, “Social Movement Lessons From the US Anti-Abortion Movement” (November 26, 2019), <https://www.sentienceinstitute.org/anti-abortion> and Jamie Harris, “Social Movement Lessons From the US Anti-Death Penalty Movement” (forthcoming).

<sup>47</sup> See the items with scores inputted for EM2, EM4, EM6, and EM7 in the “[Findings tables](#)” spreadsheet and the discussion of them in the [appendix](#).

There is some historical evidence that just as a Supreme Court ruling that supports a social movement's goals may encourage mobilization by the movement's opponents, a Supreme Court ruling that challenges a movement's goals may galvanize the movement into action.<sup>48</sup> Similarly, one paper found evidence that interest groups affected by salient Supreme Court rulings increase their activity in response to them, whatever their position on the decision.<sup>49</sup> Social movements should seek to use major Supreme Court rulings to mobilize potential supporters, regardless of whether the direct effects of the ruling are helpful or harmful to their cause.<sup>50</sup>

The reviewed research has inconsistent results for the question of whether Supreme Court decisions polarize public opinion. Although several included research items found no evidence of polarization, it remains possible that at least some Supreme Court rulings will have this effect.<sup>51</sup> One paper suggests that earlier landmark Supreme Court decisions on an issue are more polarizing than subsequent Supreme Court decisions on the same issue, though the evidence for this claim is weak.<sup>52</sup>

---

<sup>48</sup> Klarman, *From the Closet to the Altar*, 37-9 describes how the *Bowers v. Hardwick* (1986) ruling, which was hostile to gay rights, increased the salience of gay rights in the newspapers and on television and “galvanized the gay rights movement.” Results included a tripling of individual donations to Lambda Legal and most likely in increased attendance at a national gay rights march in 1987.

See also Jamie Harris, “Social Movement Lessons From the US Anti-Death Penalty Movement” (forthcoming) on the US anti-death penalty movement's response to the *Gregg v. Georgia* (1976) ruling.

<sup>49</sup> Wlezien and Goggin, “The Courts, Interest Groups,” 381-405. For this study, “coders identified 943 abortion stories that appeared in the New York Times during the period between 1985 and 1989 (inclusive) and classified them according to content” to identify court activity and interest group activity.

<sup>50</sup> NeJaime, “Winning Through Losing,” 941-1012 summarizes that, “in configuring judicial defeat for internal movement purposes, sophisticated advocates may use litigation loss (1) to construct organizational identity and (2) to mobilize constituents. In translating loss into strategies aimed at decision makers outside the movement, advocates may use litigation loss (1) to appeal to other state actors, including elected officials and judges, through reworked litigation and nonlitigation tactics and (2) to appeal to the public by stressing the need to discipline a countermajoritarian judiciary.”

<sup>51</sup> See the items with scores inputted for E2 in the “[Findings tables](#)” spreadsheet and the discussion of I2 in the [appendix](#).

<sup>52</sup> Timothy R. Johnson and Andrew D. Martin, “The public's conditional response to Supreme Court decisions,” *American Political Science Review* 92, no. 2 (1998), 299-309 find that after the *Furman* decision, groups moved in different directions, with those with higher education becoming significantly more opposed to the death penalty and partisan attitudes becoming more polarized. After *Gregg v. Georgia*, they find no significant differences across the sample as a whole. The only significant change for a demographic subgroup was that those with higher education became significantly less opposed to the death penalty -- the opposite effect to that found for *Furman*. After the *McCleskey* decision, the overall change was not significant; the only group with a significant change was female, who became more opposed to the death penalty, despite not having been significantly different from average before. The finding that some groups moved significantly after the *Gregg* and *McCleskey* rulings provides some evidence against their hypothesis that after the first landmark ruling on an issue, subsequent rulings will have no effect on public opinion. Although groups do seem to move in different directions after *Furman*, with some of these changes being significant, there is no consistent pattern as to the directions in which groups moved.

Brickman, Danette, and David A. M. Peterson, “Public Opinion Reaction to Repeated Events: Citizen Response to Multiple Supreme Court Abortion Decisions,” *Political Behavior* 28, no. 1 (2006), 87-112 find that, in contrast to the “conditional response model” of Johnson and Martin (1998), different demographic groups likely did significantly change their views after the 1989 *Webster* decision. However, there is no evidence that groups more or less hostile to abortion rights before the decision moved in opposite directions after the decision. Using a different measure, they also

Accepting that there is at least some risk of polarization or backlash from favorable judicial rulings, then litigation efforts can be seen as a method of disrupting the status quo, rather than as a foolproof method to secure progress. Such disruption could create the circumstances that enables substantial progress, or it could enable opponents to enact preventative legislation. Given this uncertainty, it seems preferable that radical legal change is not sought unless the movement is strong enough to take advantage of any disruption and to respond to any legislative threats that arise.

Another reason to delay radical legal change is that more favorable pre-decision attitudes may maximize the positive effects of a Supreme Court decision on public opinion and reduce the risk of backlash,<sup>53</sup> so it could be preferable for a social movement to wait until the public is more supportive of its goals. On the other hand, if one believes that other advocacy efforts tend to increase issue salience without encouraging substantial favorable changes in public attitudes (or, indeed, that the public is becoming less supportive, rather than more supportive, of the movement's goals), then this is a weak reason to prefer radical legal change to occur as soon as possible, since evidence included in this literature review suggests that high prior knowledge of an issue decreases the effect on public opinion.<sup>54</sup>

## Salience and indirect effects

Court cases sometimes temporarily increase issue salience and sometimes attract longer-term increases in media attention to an issue.<sup>55</sup> In 1946-95, 914 of 6,114 Supreme Court cases (15%) were listed on the front

---

find evidence that groups responded differently after the 1976 *Danforth* decision. There is weak evidence that groups with greater pre-existing knowledge of the issue were less likely to change their views; they find that a group with mid-level political sophistication on abortion-specific political knowledge changed their views, but that the most and least sophisticated respondents did not.

<sup>53</sup> See the items with scores inputted for EM1 and EM2 in the "[Findings tables](#)" spreadsheet and the discussion of them in the [appendix](#).

<sup>54</sup> See the items with scores inputted for EM3 in the "[Findings tables](#)" spreadsheet and the discussion of EM3 in the [appendix](#).

To see this as an important factor, one would also need to be confident that Supreme Court decisions positively influence public opinion (E1).

<sup>55</sup> Flemming, Bohte, and Wood, "One Voice among Many," 1224-50 analyzed the media coverage of "school desegregation, freedom of speech/censorship, and church/state issues" in 8,179 articles from a variety of newspapers and magazines." Box-Tiao methods are used to understand the effects of Supreme Court decisions on the salience of those issues. Of three school desegregation decisions, the first, *Brown* (1954), "produced a lasting increase in media coverage of school desegregation issues of about 128%." The *Cooper* (1958) decision seems to have caused some increase for up to 12 months but the *Griffin* (1964) decision "produced only a one month shift in media coverage." The 1989 *Texas v. Johnson* decision seems to have caused a 118% "long-term shift in coverage of free speech/censorship issues." On "freedom of religion, and establishment questions," the first two significant cases analyzed (*McCullum*, 1948 and *Engel*, 1962) "were modeled as abrupt, permanent shifts," causing 93% and 139% shifts respectively, while the third, *Lynch* (1984) "was modeled as a temporary effect."

Joseph Daniel Ura, "The Supreme Court and Issue Attention: The Case of Homosexuality," *Political Communication* 26, no. 4 (2009), 430-46 analyzes "the media's responsiveness to the Supreme Court's gay rights cases from 1990 to 2005," using "monthly indicators of the level of attention paid to homosexuality by two stylistically divergent newspapers, The New York Times and USA Today." Ura finds "[s]ignificant increases in attention to homosexuality accompanied

page of *The New York Times*.<sup>56</sup> Indeed, though not reaching the Supreme Court, the work of the Nonhuman Rights Project has already been discussed in a story on the front page of *The New York Times Magazine* and was the subject of an HBO documentary.<sup>57</sup>

Several reviewed articles accept the arguments of legal scholars Gerald N. Rosenberg and Michael Klarman<sup>58</sup> that social movement litigation strategies may fail to achieve their intended goals (that is, supportive legal rulings which successfully encourage positive behavioral or attitudinal change) and may encourage backlash, but argue that litigation strategies can nevertheless have useful indirect effects. For example, sociologists David S. Meyer and Suzanne Staggenborg argue that Supreme Court decisions are unlikely to decisively resolve an issue but may “focus attention on issues and provide impetus for social movement mobilization.” They may also encourage a shift of movement and countermovement conflict to other avenues. For example, Court decisions could encourage a switch to legislation over litigation or vice versa.<sup>59</sup>

Sentience Institute’s case studies of genetically modified foods and nuclear power suggest that advocates can reduce the frequency and impact of criticisms of food technologies by avoiding raising the salience of potential harms of particular concern to the public, such as safety risks of the technologies.<sup>60</sup> Given that

---

Supreme Court decisions that expanded gay rights” but that cases that did not substantially expand gay rights “had no effect on media coverage.” The two newspapers were found to respond differently to different decisions.

In contrast, Rosenberg, *The Hollow Hope*, 111-7 and 229-34 argues that Supreme Court decisions on civil rights and womens’ rights had little effect on issue salience. However, much of the data presented by Rosenberg is open to interpretation, since formal statistical tests that control for multiple variables are not conducted; Rosenberg relies on intuitive visual interpretation of graphs of media coverage over time.

<sup>56</sup> Lee Epstein and Jeffrey A. Segal, “Measuring Issue Salience,” *American Journal of Political Science* 44, no. 1 (2000), 66-83.

<sup>57</sup> Charles Siebert, “Should a Chimp Be Able to Sue Its Owner?” (April 23, 2014), <https://www.nytimes.com/2014/04/27/magazine/the-rights-of-man-and-beast.html> and “Unlocking the cage,” Nonhuman Rights Project, accessed October 1, 2019, <https://www.nonhumanrights.org/unlocking-the-cage/>.

<sup>58</sup> These articles usually cite multiple works by Rosenberg and Klarman, but the most often-cited works are Rosenberg, *The Hollow Hope* and Klarman, “How *Brown* Changed Race Relations.”

<sup>59</sup> David S. Meyer and Suzanne Staggenborg, “Movements, Countermovements, and the Structure of Political Opportunity,” *American Journal of Sociology* 101, no. 6 (1996), 1628-60.

Similarly, in an article summarizing the differing contributions of legal scholarship and social movement scholarship to understandings of how law matters for social movements, Michael W. McCann, “How Does Law Matter for Social Movements?” in Bryant G. Garth and Austin Sarat (eds.) *How Does Law Matter?* (Evanston, Illinois: Northwestern University Press, 1998), 76-108 notes that the legal environment can affect “agenda formation” and the “opportunity structure” for social movements. Legal change can also defend the freedoms of advocates and compel issues to be placed on public and institutional agendas.

Guinier, “Beyond Legislatures,” 539-61 argues that it is possible for justices to shape and affect public discourse.

Douglas NeJaime, “Constitutional Change, Courts, and Social Movements,” *Michigan Law Review* 111 (2012), 877-902 summarizes previous literature and reviews Jack Balkin’s book, *Constitutional Redemption: Political Faith in an Unjust World*. NeJaime summarizes that Balkin “convincingly exposes the feedback loop between social movements and courts: courts respond to claims and visions crafted by movements, and court decisions in turn shape the claims and visions of those movements and alter the political terrain on which those movements operate.”

<sup>60</sup> “Framing remains paramount” in J. Mohorčich, “What can the adoption of GM foods teach us about the adoption of other food technologies?” (June 20, 2018), <https://www.sentienceinstitute.org/gm-foods#framing-remains-paramount> notes that, “an important shift in French discourse on GMOs in the late ’90s came about when “risk framing”

Court cases can raise the salience of particular issues, these findings suggest that, if the targets of litigation are chosen poorly, this could be damaging to a social movement's goals. For example, litigation over same-sex marriage, one of the least popular demands of the gay rights movement, has likely contributed to making that issue central to the gay rights debate, though the overall effect that this has had on the movement's success is unclear.<sup>61</sup> However, litigation that focuses attention on more widely accepted policy objectives could build support for further reform.<sup>62</sup>

## The value of different research methods

There were few questions where experimental research comprised a substantial proportion of included research (E1, E2, EM3, and EM6). Reviewed experimental research provided no evidence on the social

---

successfully challenged... 'innovation framing'. A further example comes in Calgene's and Zeneca's marketing of their GM tomatoes and tomato paste as high quality because they had been genetically engineered, not in spite of it: Zeneca, for example, 'spent an enormous amount of time cultivating British journalists and lining up partners in the food business. They'd already decided that this tomato paste would be packaged in special cans and labeled as the product of 'genetically altered tomatoes,' even though such labels weren't required.... They even turned genetic engineering into a marketing gimmick, advertising the launch of tomato paste as 'a world-first opportunity to taste the future.' The experiment succeeded: 'Through the summer of 1996 Zeneca's red cans of tomato paste, proudly labeled 'genetically altered,' outsold all competitors.'"

"Public narrative" in J. Mohorčich, "What can nuclear power teach us about the institutional adoption of clean meat?" (November 28, 2017), <https://www.sentienceinstitute.org/nuclear-power-clean-meat#public-narrative> summarizes that, "Kepplinger cites as an example water fluoridation experiments in which researchers found that 'acceptance [of fluoridation] dropped due solely to the subject being made a theme of popular interest. This was still the case even if the arguments in favour of fluoridation were presented in a suitable way.' Ralph Nader and engineer-turned-activist John Abbotts relate a story in which the US Atomic Energy Commission released 'Theoretical Possibilities and Consequences of Major Accidents in Large Nuclear Plants,' a 1957 report intended, at least in part, to show in detail how unlikely such accidents were. The effort backfired when activists and the public focused on projected casualty numbers included in the report (e.g. 3,400 deaths and upwards of 40,000 injuries in one scenario). Additionally, public debates tend not to focus on a specific chain of well-established technical claims (which is often necessary for arguing why a given technology is safe) but instead glide from concern to concern: 'As the opposition [to nuclear power] developed, its basis broadened out to reveal successive layers or facets of concern. This made it difficult to identify a set of cogent issues and provided scope for the debate to shift from one concern to another.' This type of shifting concern-cloud is difficult to dissipate with focused arguments, no matter how well-grounded."

<sup>61</sup> Klarman, *From the Closet to the Altar*, 176 describes how the gay rights legal advocacy group Lambda Legal included same-sex marriage on its priorities list, probably due to the litigation in Hawaii as part of the *Baehr v. Lewin* case. Klarman provides various qualitative evidence that legal cases increased the salience of same-sex marriage issues and may have "increased public support for compromise positions," as with the discussion of the 1986 *Bowers* ruling on pages 37-9. However, same-sex marriage was one of the most controversial gay rights issues in the 1990s; Klarman notes that, "in 1996, 84 percent of Americans supported equal rights for gays in employment, but only 33 percent favored gay marriage." The increased salience of gay marriage may therefore also have diverted advocates' attention from securing more tractable (albeit less valuable) victories. On page 213, Klarman notes that, "[i]n state after state, voters have rejected gay marriage when they probably would have approved civil unions if given the opportunity. In 2009, Mainers rejected gay marriage by 53 percent to 47 percent, while polls showed that they favored either gay marriage or civil unions over no legal recognition for same-sex couples by 73.8 percent to 23 percent. Also in 2009, the New York legislature voted down gay marriage while polls showed that New Yorkers supported civil unions by 65 percent to 27 percent."

<sup>62</sup> Evidence in the section on "Messaging" in Jamie Harris, "Social Movement Lessons from the US Anti-Death Penalty Movement (forthcoming) suggests that drawing attention to more acceptable policy issues further encourages support for reform.

influences on Supreme Court decision-making (I1, I2, and I3), the modifying effect of pre-decision issue salience on public opinion's effects on the Supreme Court's decisions (IM), or several of the modifiers of the effects of Supreme Court decisions (EM1, EM2, EM5, EM7, and EM8). This may partly reflect limitations of the search strategy used here.<sup>63</sup>

This may also reflect the inherent limitations of experimental research. Some researchers have argued that experimental results lack external validity.<sup>64</sup> Experimental studies usually measure results immediately after the participants receive an intervention and place the recipient in an artificially sheltered context, with no opportunity to hear the framing and opinions of their preferred media sources or personal connections. Experimental results therefore may not capture the sorts of effects suggested by Franklin and Kosaki (1989), who, seeking to explain their finding that the *Roe v. Wade* ruling polarized opinion on “discretionary” abortions, posited that, “when the Court rules, initial reactions may be entirely individualistic” but that “environmental inputs” from others in one’s social environment “may change or reinforce both the interpretation of the public decision and the individual’s reactions to it.”<sup>65</sup> Nevertheless, this literature review found that observational research mostly provided evidence against the hypothesis that Supreme Court decisions polarize public opinion (with a total score of -5.25 for E2), whereas experimental research provided stronger evidence for the hypothesis (with a total score of +2.25 for E2).<sup>66</sup> Additionally, one paper directly challenged the findings of Franklin and Kosaki for the *Roe v. Wade* case upon which they based their comments.<sup>67</sup>

---

<sup>63</sup> Few RCTs came up in my systematic searches and I did not look up all RCTs that were summarized at the start of reviewed research items — it is possible that I have looked at a lower proportion of the existing relevant experimental research than the relevant observational research.

<sup>64</sup> For example, Dino P. Christenson and David M. Glick, “Issue-specific Opinion Change: The Supreme Court and Health Care Reform,” *Public Opinion Quarterly* 79, no. 4 (2015), 883 note that “[p]erhaps the most important threat to experiments’ external validity is that people rarely learn about actual Supreme Court cases, and what they do hear about cases is accompanied by a variety of partisan and political messages. Almost no one merely hears that the Supreme Court decided a case in a certain way (Unger 2008; Egan and Citrin 2011), as it is often portrayed in experiments. Experiments can estimate the effect of knowing that the Court ruled a certain way on an issue, but are limited in their ability to capture the realities that people often do not receive or understand the Court’s position (Unger 2008) or are influenced by the media’s and other elites’ framing of decisions (Clawson and Waltenburg 2003).”

<sup>65</sup> Charles H. Franklin and Liane C. Kosaki, “Republican Schoolmaster: The US Supreme Court, Public Opinion, and Abortion,” *American Political Science Review* 83, no. 3 (1989), 763.

<sup>66</sup> These scores sometimes reflect a disagreement with the original authors about how their findings should be interpreted. For example, Timothy R. Johnson and Andrew D. Martin, “The Public’s Conditional Response to Supreme Court Decisions,” *American Political Science Review* 92, no. 2 (1998), 299-309 claim that the cases they evaluate provide evidence of polarization. There do indeed appear to be differences in how groups respond to a ruling, but these differences are not obviously related to their attitudes prior to the decision. For example, after the *Furman* decision, the authors find that groups moved in different directions, with those with higher education becoming significantly more opposed to the death penalty and partisan attitudes becoming more polarized. After *Gregg v. Georgia*, they find no significant differences across the sample as a whole. The only significant change for a demographic subgroup was that those with higher education became significantly less opposed to the death penalty — the opposite effect to that found for *Furman*. After the *McCleskey* decision, the overall change was not significant; the only group with a significant change was female, who became more opposed to the death penalty, despite not having been significantly different from average before.

<sup>67</sup> John Hanley, Michael Salamone, and Matthew Wright, “Reviving the Schoolmaster: Reevaluating Public Opinion in the Wake of *Roe v. Wade*,” *Political Research Quarterly* 65, no. 2 (2011), 408-21.



Some questions of interest to this literature review cannot easily be evaluated in observational research. For example, several experiments evaluated the effect of varying whether a policy was recommended by the Supreme Court or by other institutions on agreement with and acceptance of that policy.<sup>68</sup> For other issues, experimental research has helped to understand the causal relationships underlying observable trends. For example, two research items used experimental research to understand the effects of variations in framing.<sup>69</sup> Of course, experimental research can more easily control for confounding factors than observational research can. This has meant, for example, that experimental research has been able to find evidence that unanimous voting among the justices for a ruling has significant effects on public perceptions of that ruling,<sup>70</sup> even though this would be difficult to rigorously evaluate with non-experimental designs.<sup>71</sup>

Assuming that the lower number of reviewed items of experimental research than observational research has not entirely been caused by the limitations of the search strategy used in this review or inherent downsides of experimental research on the topic, experimental methods seem to be undervalued by the scholars researching the issues of interest to this literature review.<sup>72</sup>

---

<sup>68</sup> Six included experimental research items evaluated this:

Brandon L. Bartels and Diana C. Mutz, “Explaining Processes of Institutional Opinion Leadership,” *The Journal of Politics* 71, no. 1 (2009), 249-61,

Valerie J. Hoekstra, “The Supreme Court and Opinion Change: An Experimental Study of the Court’s Ability to Change Opinion,” *American Politics Quarterly* 23, no. 1 (1995), 109-29,

Jeffery J. Mondak, “Policy Legitimacy and the Supreme Court: The Sources and Contexts of Legitimation,” *Political Research Quarterly* 47, no. 3 (1994), 675-92,

Stephen P. Nicholson and Thomas G. Hansford, “Partisans in Robes: Party Cues and Public Acceptance of Supreme Court Decisions,” *American Journal of Political Science* 58, no. 3 (2014), 620-36,

Benjamin G. Bishin, Thomas J. Hayes, Matthew B. Incantalupo, and Charles Anthony Smith, “Opinion Backlash and Public Attitudes: Are Political Advances in Gay Rights Counterproductive?” *American Journal of Political Science* 60, no. 3 (2016), 625-48, and

David Fontana and Donald Braman, “Judicial Backlash or Just Backlash-Evidence from a National Experiment,” *Columbia Law Review* 112 (2012), 731-99.

<sup>69</sup> Zilis, *The Limits of Legitimacy* and Katerina Linos and Kimberly Twist, “The Supreme Court, the Media, and Public Opinion: Comparing Experimental and Observational Methods,” *The Journal of Legal Studies* 45, no. 2 (2016), 223-54.

<sup>70</sup> James R. Zink, James F. Spriggs, and John T. Scott, “Courting the Public: The Influence of Decision Attributes on Individuals’ Views of Court Opinions,” *The Journal of Politics* 71, no. 3 (2009), 909-25 and Salamone, “Judicial Consensus and Public Opinion,” 320-334.

<sup>71</sup> For example, Marshall, *Public Opinion*, 147-54, tried to evaluate this and found no evidence of an effect. However, given that only 18 cases were analyzed, only two of which were unanimous, and given that average poll shifts were only compared across binary categories, rather than analyzed in multiple regression that controlled for the other 10 identified factors, this does not constitute strong evidence of no effect.

<sup>72</sup> For example, only 2 experimental research items were identified and included from my systematic searches. This may reflect a tendency of scholars to cite such research less frequently. The smaller overall number of included experimental research items compared to observational research (11 and 58 respectively) could also a lower incidence of such research being carried out.

Although effective animal advocacy researchers have conducted various surveys,<sup>73</sup> I am not aware of much use of observational research to better understand the impact of important events and changes on animal farming attitudes or animal product consumption.<sup>74</sup> The importance of observational research to understanding whether the Supreme Court drives or is driven by social change (comprising 58 of the total 121 research items included in this literature review) suggests that this research type may have been undervalued in the effective animal advocacy community so far. For example, the effects of major legislative changes, legal changes, public-facing campaigns, and mass protests on attitudes and behavior could all be estimated through surveys with waves shortly before and after.<sup>75</sup>

## Limitations

Some limitations are common to much of the research reviewed here:<sup>76</sup>

- For the public mood, researchers frequently use Stimson's (1991) index, which uses survey data to place the mood of the public on a single liberal-conservative dimension.<sup>77</sup> Not all social issues are politically polarized<sup>78</sup> and the overall public mood seems unlikely to be closely correlated with public views on specific issues.<sup>79</sup> Thus, correlations between the Stimson (1991) index and Supreme Court

---

<sup>73</sup> See, for example, Jacy Reese, "Survey of US Attitudes Towards Animal Farming and Animal-Free Food October 2017" (November 20, 2017), <https://www.sentienceinstitute.org/animal-farming-attitudes-survey-2017> and Jo Anderson and Linda Tyler, "Attitudes Toward Farmed Animals in the BRIC Countries," (September 2018), <https://faunalytics.org/attitudes-towards-farmed-animals-bric-countries/>.

<sup>74</sup> Jayson Lusk, "The Effect of Proposition 2 on the Demand for Eggs in California," *The Journal of Agricultural and Food Industrial Organization* 8, no. 1 (January 2010) provides one example of where relevant research has already been conducted.

<sup>75</sup> In these cases, large RCTs between states or local communities might be preferable, but I do not expect that the effective animal advocacy movement will have the resources and political control necessary to run such large-scale RCTs for decades, if ever.

<sup>76</sup> To avoid repetition, the limitations listed in this section are not repeated each time in the "Notable Limitations" column of the tab "Search results" in the spreadsheet "[Findings tables](#)" or in the [appendix](#).

<sup>77</sup> James A. Stimson, *Public Opinion in America: Moods, Cycles, and Swings* (New York: Routledge, 1999 [1991]).

<sup>78</sup> As one example of a social issue where there is little political polarization, see "Public opinion about genetically modified foods and trust in scientists connected with these foods," Pew Research Center (December 1, 2016), <https://www.pewresearch.org/science/2016/12/01/public-opinion-about-genetically-modified-foods-and-trust-in-scientists-connected-with-these-foods/>.

However, research suggests that Democrats tend to prioritize animal welfare and rights more than Republicans do. Robert W. Prickett, "Consumer preferences for farm animal welfare: Results from a telephone survey of US households" (PhD dissertation, 2008), [https://shareok.org/bitstream/handle/11244/8715/Prickett\\_okstate\\_0664M\\_10025.pdf](https://shareok.org/bitstream/handle/11244/8715/Prickett_okstate_0664M_10025.pdf) found that 39% Republicans reported considering the "well-being of farm animals" when making decisions "about purchasing meat," compared to 61% of Democrats. 64% of Republicans agreed that "[t]he government should take an active role in promoting farm animal welfare," compared to 84% of Democrats.

Rebecca Riffkin, "In U.S., More Say Animals Should Have Same Rights as People" (May 18, 2015), <https://news.gallup.com/poll/183275/say-animals-rights-people.aspx> notes that 39% of Democratic survey respondents believed that animals "deserve the same rights as people," compared to 23% of Republicans.

<sup>79</sup> For example, Epstein and Martin, "Does Public Opinion Influence," 269 provides a graph of changes in Stimson's annual measure of the public mood, 1953-2008. Visual inspection suggests no strong correlation between this measure and attitudes on abortion (see the tab "Gallup overall support" in the spreadsheet "[Public opinion data](#)," relating to Jamie Harris, Social Movement Lessons From the US Anti-Abortion Movement (November 26, 2019)

decisions may not correspond to correlations between public opinion on specific issues and Supreme Court decisions. However, research items that have used slight variations in methodology have found results that confirm an indirect influence of the public mood on Supreme Court decision-making, if not also a direct influence.<sup>80</sup>

- Other variables commonly used in the reviewed research could be limited. For example, to track the ideologies of individual justices at the time of their nominations, researchers frequently use the measure initially developed by Segal and Cover (1989).<sup>81</sup> Researchers often use information on the Supreme Court database<sup>82</sup> to categorize decisions as liberal or conservative and frequently use Martin and Quinn's (2002) measure of the ideology of the median justice to represent the Court's ideology.<sup>83</sup> Epstein and Segal's (2000) measure of case salience is widely used; a case is categorized as salient if coverage of the decision appears on the front page of *The New York Times*. If this does not happen, it is considered to not be salient.<sup>84</sup> Of course, *The New York Times* does not appeal equally to all demographics and does not represent all geographic regions of the US equally well.<sup>85</sup>
- Some of the observational analyses, though noting correlations between the ideological direction of the public mood and the ideological direction of Supreme Court decisions, do not distinguish between whether the Court's rulings or the public mood caused the other to change (or whether a

---

<https://www.sentienceinstitute.org/anti-abortion>) or the death penalty (see "Death Penalty," Gallup, accessed June 28, 2019, <https://news.gallup.com/poll/1606/death-penalty.aspx>).

Both of these issues are high in salience and highly politically polarized; for lower salience, less polarized issues, I suspect that the correlation would be even weaker.

<sup>80</sup> See, for example:

William Mishler and Reginald S. Sheehan, "Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-analytic Perspective," *The Journal of Politics* 58, no. 1 (1996), 169-200,

Kevin T. McGuire and James A. Stimson, "The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences," *The Journal of Politics* 66, no. 4 (2004), 1018-35,

Jonathan P. Kastellec, Jeffrey R. Lax, and Justin H. Phillips, "Public Opinion and Senate Confirmation of Supreme Court Nominees," *The Journal of Politics* 72, no. 3 (2010), 767-84,

and Giles, Blackstone, and Vining, "The Supreme Court," 293-306.

Matthew E. Wetstein, C. L. Ostberg, Donald R. Songer, and Susan W. Johnson, "Ideological Consistency and Attitudinal Conflict: A Comparative Analysis of the US and Canadian Supreme Courts," *Comparative Political Studies* 42, no. 6 (2009), 763-92 also finds evidence that a simple conservative-liberal spectrum represents the decision-making of the US Supreme Court well.

<sup>81</sup> Jeffrey A. Segal and Albert D. Cover, "Ideological values and the votes of US Supreme Court justices," *American Political Science Review* 83, no. 2 (1989), 557-65.

<sup>82</sup> "The Supreme Court Database," Washington University, accessed September 10, 2019, <http://supremecourtdatabase.org/>.

<sup>83</sup> Andrew D. Martin and Kevin M. Quinn, "Dynamic ideal point estimation via Markov chain Monte Carlo for the US Supreme Court, 1953-1999," *Political Analysis* 10, no. 2 (2002), 134-53.

<sup>84</sup> Epstein and Segal, "Measuring Issue Salience," 66-83.

<sup>85</sup> As examples of empirical findings suggesting the coverage of a national newspaper might be a misleading measure of salience, see Valerie J. Hoekstra, "The Supreme Court and Local Public Opinion," *American Political Science Review* 94, no. 1 (2000), 89-100 and Valerie J. Hoekstra and Jeffrey A. Segal, "The Shepherding of Local Public Opinion: The Supreme Court and Lamb's Chapel," *The Journal of Politics* 58, no. 4 (1996), 1079-1102.

lurking variable caused changes in both variables). Of those focusing on the effects of the public mood on the Court's rulings, some do not distinguish between direct and indirect effects.<sup>86</sup>

- Only a small proportion of the research that uses the public mood as an outcome measure controls for social forces that may influence both public opinion and the Supreme Court's decisions.<sup>87</sup>
- Many observational analyses focus only on cases that were heard as oral arguments by the Supreme Court. This excludes cases resolved by *per curiam* opinions, which do not involve oral argument.<sup>88</sup>
- The reviewed experimental studies suffer the limitations common to experimental research that is used to understand social change, such as placing respondents in an artificially sheltered context and measuring changes after only short time delays.<sup>89</sup>
- Much of the research that focuses on specific issues rather than on overall indicators of the public mood or other aggregate measures across topic areas (62 of 121 included research items) is focused on abortion rights (11 included research items), the death penalty (5), gay rights (19), or African American civil rights (7). Of these, only the anti-death penalty movement and anti-abortion movement seem to be ally-based movements, which is an important feature affecting their comparability with other ally-based movements such as the farmed animal movement.<sup>90</sup> It could be misleading for the farmed animal movement, or any other movement, to place much weight on the findings from other, less comparable movements.

---

<sup>86</sup> These criticisms were raised especially by Epstein and Martin, "Does Public Opinion Influence," 263-81.

<sup>87</sup> This problem is highlighted by Giles, Blackstone, and Vining, "The Supreme Court," 293-306, Epstein and Martin, "Does Public Opinion Influence," 263-81, and Christopher J. Casillas, Peter K. Enns, and Patrick C. Wohlfarth, "How Public Opinion Constrains the US Supreme Court," *American Journal of Political Science* 55, no. 1 (2011), 74-88.

However, the latter paper still found that public opinion influenced the Supreme Court's decisions after controlling for social forces.

<sup>88</sup> For example, Mishler and Sheehan, "The Supreme Court," 90 note that, for their main analysis, "[i]n developing an index of the liberalism of Court decisions, we considered only the approximately four thousand cases that were decided by full opinion and oral argument. Per curiam cases and cases decided by memorandum were excluded because of concerns that many such cases are highly routine. Such cases are unlikely either to influence, or to be influenced by, public opinion," although they also "constructed a second index using all of the Court's decisions, including those decided per curiam or with memorandum opinions" and found similar results.

As another example, Collins, "Friends of the Court," 816 notes that, in their analysis, "[t]he data on litigation success come from Spaeth's (1999) United States Supreme Court Judicial Database, 1953-1997 Terms. I consider all orally argued cases formally decided on the merits from this dataset, excluding those cases decided by a tie vote and falling under the Court's original jurisdiction, during the Warren and Burger courts (1953-1985)." Unlike Mishler and Sheehan (1993), Collins does not appear to have conducted a robustness check that included *per curiam* or memorandum opinions.

For an explanation of oral argument and *per curiam* cases, see "Opinions," Supreme Court of the United States, accessed November 5, 2019, <https://www.supremecourt.gov/opinions/opinions.aspx>.

<sup>89</sup> See the paragraph above beginning "This may also reflect..." and the section on "[meta] Social movements vs. EAA randomized controlled trials (RCTs) vs. intuition/speculation/anecdotes vs. external findings" in "Summary of Evidence for Foundational Questions in Effective Animal Advocacy," Sentience Institute, last edited June 21, 2018, [https://www.sentienceinstitute.org/foundational-questions-summaries#\[meta\]-social-movements-vs.-eaa-randomized-controlled-trials-\(rcts\)-vs.-intuition/speculation/anecdotes-vs.-external-findings](https://www.sentienceinstitute.org/foundational-questions-summaries#[meta]-social-movements-vs.-eaa-randomized-controlled-trials-(rcts)-vs.-intuition/speculation/anecdotes-vs.-external-findings)

<sup>90</sup> See the section on "Features of the anti-abortion movement" in Jamie Harris, "Social Movement Lessons From the US Anti-Abortion Movement" (November 26, 2019), <https://www.sentienceinstitute.org/anti-abortion#features-of-the-anti-abortion-movement> and the equivalent section in Jamie Harris, "Social Movement Lessons from the US Anti-Death Penalty Movement (forthcoming).

- Most of the research in this literature review uses historical data, usually from between 1950 and 2000. It is possible that the dynamics of Supreme Court decision-making could change, or have already changed. For example, the correlation between the ideological “public mood” and the ideological direction of Supreme Court decisions weakened after 1980.<sup>91</sup>
- Publication bias could prevent relevant research findings from being available for review.<sup>92</sup> Given that for some of the key research questions, studies that confirm the findings of prior research and studies that challenge them have both been published, publication bias may not be a substantial problem in this research area.

As well as reflecting the weaknesses of the included research, this literature review is limited in several other ways:

- The processes of scoring the reviewed research and generating the overall estimates both involved subjective judgements. Reasonable people, reading the same evidence, could come to different conclusions.
- In order to cover a large amount of literature and summarize its most important findings, this review includes only a small proportion of the useful information from each included research item.
- This literature review is focused on the US Supreme Court. The findings may not transfer very well to high courts in other countries.<sup>93</sup>
- Likewise, the findings here may not transfer well to lower courts in the US. For example, some research has found evidence that appointed justices in state courts of appeals are not highly responsive to the public mood,<sup>94</sup> which contrasts with most research on the federal Supreme Court.<sup>95</sup> This is an important consideration, given that very few cases ever reach the federal Supreme Court;

---

<sup>91</sup> See Mishler and Sheehan, “The Supreme Court,” 87-101 and Epstein and Martin, “Does Public Opinion Influence,” 268-9.

<sup>92</sup> For an explanation of publication bias, see “Publication Bias” in Julian P. T. Higgins and Sally Green (eds.) *Cochrane Handbook for Systematic Reviews of Interventions*, last edited March 2011, [https://handbook-5-1.cochrane.org/chapter\\_10/10\\_2\\_1\\_0\\_introduction\\_text.htm](https://handbook-5-1.cochrane.org/chapter_10/10_2_1_0_introduction_text.htm).

<sup>93</sup> Wetstein, Ostberg, Songer, and Johnson, “Ideological Consistency and Attitudinal Conflict,” 763-92 discuss this concern. They find that “unlike the U.S. justices of the Rehnquist court, Canadian justices exhibit a much higher degree of ideological complexity” and that a unidimensional left-right measure of ideology is inadequate.

<sup>94</sup> Paul Brace and Brent D. Boyea, “State Public Opinion, the Death Penalty, and the Practice of Electing Judges,” *American Journal of Political Science* 52, no. 2 (2008), 360-72 tested for direct and indirect effects of public opinion on death penalty outcomes in state Supreme Courts, focusing on capital punishment. They used results from the annual General Social Survey at the state level. They found that public opinion has no direct effect on the likelihood that the Courts reverse a capital punishment ruling, unless the justices are directly elected. If the justices are elected, the level of public support for the death penalty specifically has nearly twice as much of an effect as the justices’ own political ideology.

Bryan Calvin, Paul M. Collins Jr., and Matthew Eshbaugh-Soha, “On the Relationship Between Public Opinion and Decision Making in the US Courts of Appeals,” *Political Research Quarterly* 64, no. 4 (2011), 736-48 examined “a random sample of thirty cases per year from each of the courts of appeals.” The dependent variable is “the percentage of liberal decisions rendered by each circuit per year.” They found that two of three indicators of indirect influence of the public mood were significant in both models (OLS and fixed effects regression); the median justice’s ideology and Congress’ ideology, but not the President’s ideology. Neither of the direct measures of the public mood had significant effects in either model and neither did the federal Supreme Court’s ideological preferences.

<sup>95</sup> See the items with scores inputted for I1 and I2 in the “Findings tables” spreadsheet and the discussion of them in the appendix.

the Court Statistics Project estimates that state courts had 84.2 million “incoming cases” in 2016,<sup>96</sup> whereas Lee Epstein and Jeffrey A. Segal counted 6,114 Supreme Court rulings in 1946-95.<sup>97</sup> This review did not thoroughly consider the influence of lower court rulings on Supreme Court decision-making.

- Some effects of Supreme Court rulings and modifiers of effects have been considered by one or two reviewed research items but have not been included as scored research questions here. Issues that could arguably have been scored include the effects of Supreme Court rulings on policy, behavior, and issue salience.
- This review has focused on the issues that were most thoroughly evaluated in the included research literature and does not comprehensively evaluate all relevant influences on Supreme Court decision-making, modifiers of these influences, effects of Supreme Court decisions, or modifiers of these effects. For example, it is possible that the identified moderators of the effects of Supreme Court rulings on public opinion do not explain much of the variance in the size of the effects. Thomas Marshall lists several other factors that previous research had suggested might modify the effects of Supreme Court decisions on public opinion, including whether the decision was a full, written opinion or not (rather than a memorandum opinion, cert denial, or summary affirmation or denial), was liberal or not, activist or not, related to privacy and gender or not, related to civil rights and race or not, related to criminal rights or not, related to the death penalty or not, and was widely publicized or not.<sup>98</sup> No included research item attempted to analyze the relative importance of all of these factors in its statistical models.<sup>99</sup>
- At least two authors have claimed that experimental research has more consistently found evidence that Supreme Court decisions positively influence public opinion than observational research has.<sup>100</sup>

---

<sup>96</sup> “National Overview,” Court Statistics Project, accessed October 2, 2019, <http://www.courtstatistics.org/NCSC-Analysis/National-Overview.aspx>.

<sup>97</sup> Epstein and Segal, “Measuring Issue Salience,” 66-83.

<sup>98</sup> Marshall, *Public Opinion*, 147-54. Of these, Marshall found that whether the decision was liberal or not and whether it was activist or not had a significant effect on the average poll shift, as did the time lag from the decision until the post-decision poll, but no other factors had significant effects. However, given that only 18 cases were analyzed and average poll shifts were only compared across binary categories, rather than analyzed in multiple regression that controlled for the other 10 identified factors, insignificant differences do not constitute strong evidence of no effect.

<sup>99</sup> Marshall, *Public Opinion*, chapter 6 notes the average effect on public opinion of 18 Supreme Court rulings, dividing results into dichotomous categories. However, formal multiple regression is only conducted for three variables: the time lag between the ruling and the survey, the coding of the ruling as liberal or conservative, and the coding of the ruling as activist or not.

The lack of such research is unsurprising, as it would be fraught with methodological difficulties, such as comparing across different social issues, with varying levels of closeness of fit between the issues ruled upon by the Court and the issues asked about directly in the polls. Some factors would be difficult to create a clear instrument for, such as the media framing.

<sup>100</sup> For example, Valerie J. Hoekstra, *Public Reaction to Supreme Court Decisions* (Cambridge, UK: Cambridge University Press, 2003), 9 states that experimental research has “found that Court decisions can positively influence public opinion.” In support of this, Hoekstra cites one of their own studies, included elsewhere in this review, and 4 studies by Jeffery J. Mondak, one of which is included in this review.

Similarly, Christenson and Glick, “Issue-specific Opinion Change,” 881-905 summarizes that “[m]any, but not all, experimental studies in which participants are exposed to information about a (sometimes fictional) Court decision have yielded evidence that the Court can lead to public opinion change on some controversial policy issues (e.g., Mondak

However, this literature review has found the opposite to be the case, with observational research contributing a score of 7.75 from 21 relevant research items to E1 and experimental research contributing a score of 1.5 from 9 relevant research items. Though I expect that this literature review is more comprehensive than the reviews of previous research that informed the claims by these authors,<sup>101</sup> this discrepancy could reflect flaws in this literature review's methodology.

## Conclusion

There seems to be strong evidence of a close connection between public opinion and Supreme Court decision-making. The former likely influences the latter, both directly and indirectly, though the size of each of these effects is unclear and could vary across social issues. In turn, Supreme Court rulings seem likely to encourage public opinion to move towards support for the positions implied by those rulings, though sometimes the opposite may be true, the effects may be small, and the evidence is slightly weaker than that for the influence of public opinion on Supreme Court decisions.

Supreme Court rulings may bring beneficial changes to policy and behavior, though the effects may be limited if the rulings are not well-enforced. Court rulings may polarize opinion and spark mobilization of both the proponents and opponents of change. This suggests that litigation for radical legal change can disrupt the status quo, but social movements should be prepared to respond to any unintended negative consequences. If movements are not yet prepared to deal with legislative backlash, then it may be preferable to delay active efforts to pursue radical legal change. Advocacy that successfully increases public support for particular policy changes could reduce backlash against relevant favorable Supreme Court rulings in terms of public opinion change, counter-mobilization, or hostile legislation.

Research reviewed here suggests that direct involvement in Supreme Court cases, involvement and advocacy in the elite institutions and cultures that influence the justices, and advocacy focused on shifting public opinion can all affect the likelihood of favorable rulings. Some included research also suggests that advocates can use strategic litigation to influence the framing of discussion about outcomes of interest to social movements. This could be used either to shift the Overton window, or to focus attention on a movement's most tractable incremental policy objectives.

---

1994; Bartels and Mutz 2009; Clawson, Kegler, and Waltenburg 2001). Observational studies have generally found less evidence of the Court changing hearts and minds (Marshall 1989; Rosenberg 1991), though Campbell and Persily (2013) capture slight movement at the macro level by comparing cross-sectional polls on health care reform."

<sup>101</sup> Hoekstra, *Public Reaction*, 16-21 includes a table summarizing the results "of relevant research on the Court on public opinion," but this table excludes many of the research items reviewed here. While this literature review has not covered all of the research cited by Hoekstra (most of their cited research focuses on the Supreme Court's legitimacy), I believe that this review, with 121 included research items, is more comprehensive than Hoekstra's review, which only includes 36 items in the table.

In support of the claim that "[o]bservational studies have generally found less evidence of the Court changing hearts and minds," Christenson and Glick, "Issue-specific Opinion Change," 881-905 cite only two research items. In addition to the two cited research items, this literature review has found 20 research items that have been categorized as observational and provide evidence on the question of whether or not Supreme Court decisions positively influence public opinion.

## Potential Items for Further Study

- This literature review has not very comprehensively or systematically reviewed research on whether lower courts in the US (such as state courts of appeals) drive or are driven by social change; this could be addressed through an additional literature review. This additional literature review could also assess the extent to which lower court rulings seem to influence Supreme Court rulings.
- In addition to the literature focusing on the influences on Supreme Court rulings and the effects of Supreme Court rulings, there is a related but partly separate literature focusing on the effectiveness and limitations of using litigation to encourage social change.<sup>102</sup> This literature review has, at times, considered such research, but has not done so very comprehensively or systematically. An additional literature review could more comprehensively aggregate and summarize that research.<sup>103</sup>
- In focusing on public opinion, this literature review has not very thoroughly evaluated the extent to which Supreme Court rulings successfully encourage behavioral change and policy enforcement, though this is the focus of some included research items.<sup>104</sup>
- Likewise, this literature review has not reviewed research on whether courts outside the US drive or are driven by social change.
- In focusing on public opinion and interest groups, this literature review has covered only a small section of the research on the factors that influence judicial decisions.<sup>105</sup> A brief summary of the factors that this research has found to be influential could help social movements to assess the tractability of litigation strategies and to better predict and prepare for forthcoming legal change.
- There is related research on the interaction between the Supreme Court, Congress, and the President (that is, on the separation of powers) beyond the research on the frequency and causes of overrides of each other's decisions that is included in this literature review. Further review of that research may offer some insight into the questions evaluated here.
- In much of the research reviewed here, the implied alternative to social change through Supreme Court rulings is social change through Congress. Many of the questions evaluated here — the extent to which radical change reflects public opinion, causes changes in public opinion, or encourages

---

<sup>102</sup> Catherine Albiston, “The dark side of litigation as a social movement strategy,” *Iowa Law Review Bulletin* 96 (2010), 61 refers to this literature as “voluminous.”

<sup>103</sup> Potentially useful starting points include:

Yoav Dotan and Menachem Hofnung, “Interest Groups in the Israeli High Court of Justice: Measuring Success in Litigation and in Out-of-Court Settlements,” *Law and Policy* 23, no. 1 (2001), 1-6

Lee Epstein, “Interest Group Litigation During the Rehnquist Court Era,” *The Journal of Law and Politics* 9 (1992), 639-717, and

Susan P. Sturm, “Legacy and Future of Corrections Litigation,” *University of Pennsylvania Law Review* 142 (1993), 639-738, including the information provided in the footnotes on pages 639-48.

<sup>104</sup> See footnote 33.

<sup>105</sup> As examples of this broader literature, see Lee Epstein and Thomas G. Walker, *Constitutional law for a changing America: institutional powers and constraints* (Thousand Oaks, CA: CQ Press, 2019; first published 1992) and Lawrence Baum, *The Puzzle of Judicial Behavior* (Ann Arbor: University of Michigan Press, 1997).



backlash — could be evaluated for congressional legislative change, too.<sup>106</sup> Although relevant social scientific studies may be harder to identify and aggregate,<sup>107</sup> a comparable literature review focused on legislation could be useful. At the state level, it seems likely that there will be important differences between legislation driven by ballot initiatives and legislation that is developed by elected representatives. A comparable literature review focused on policy driven by presidents or state governors may also be possible.<sup>108</sup>

- If public opinion is understood to be an important factor affecting how social change occurs, then a review of quantitative research on the factors that affect public opinion on social issues could be achievable and useful.<sup>109</sup> Additionally, a focused examination of several short case studies with reference to this question could complement the contributions of Sentience Institute’s existing case studies.
- A review that tries to more clearly evaluate the relative merits of the overarching theories of judicial behavior that underpin much of the research included in this review could be useful.<sup>110</sup> However, this would be hard to do well and could be a poor use of time compared to other possible research projects.

---

<sup>106</sup> For example, Klarman, *From the Closet to the Altar*, 26-9 notes that a 1977 ordinance in Dade County, Florida, to ban discrimination on sexual orientation in housing and employment encouraged direct action protests and hostile legislation. On page 46 Klarman describes state reversals of local gay rights measures in Colorado and Cincinnati in the 1990s. Much of the rest of the book focuses on the legislative backlash to Court decisions, such as noting on page xi that after the 2004 *Goodridge* decision in Massachusetts, “more than twenty-five states passed constitutional amendments banning gay marriage, and the issue figured prominently in the 2004 elections, possibly even altering the outcome of that year’s presidential contest.”

Cummings, “Rethinking the Foundational Critiques,” 1987-2015 summarizes research which has found evidence that legislation enacted by Congress is similarly difficult to enforce to policy made by the Supreme Court.

<sup>107</sup> I expect that relevant research will be more dispersed across a wide variety of case studies, and less clearly labelled in the titles of research items as being of relevance to the evaluation of the efficacy of congressional legislation. For example, a large proportion of the entire research field of social movement impact theory evaluates these questions to some extent. There is no convenient equivalent search term to “Supreme Court.” However, replacing “Supreme Court” with “Legislation” or “Congress” and otherwise using the same search terms as this literature review appears to generate some relevant results. Even an incomplete aggregation of some of the relevant social science research could be helpful.

Articles that could be useful starting points include Robert Y. Shapiro, “Public opinion and American democracy,” *Public Opinion Quarterly* 75, no. 5 (2011): 982-1017 and Paul Burstein, “The Impact of Public Opinion on Public Policy: A Review and an Agenda,” *Political Research Quarterly* 56, no. 1 (March 2003), 29-40.

<sup>108</sup> For example, Marshall, *Public Opinion*, 147, cites Robert Weissber, *Public Opinion and Popular Government* (Englewood Cliffs, N.J.: Prentice-Hall, 1976), 234-7 as having found that televised presidential news appearances affect public opinion on issues by an average of nearly 17%.

<sup>109</sup> Benjamin Page, Robert Shapiro, and Glenn Dempsey, “What Moves Public Opinion?” *American Political Science Review* 81 (March 1987), 23-44 would be a good starting point for such a review.

<sup>110</sup> Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge, UK: Cambridge University Press, 2002) would be a good starting point for such a review.

## Appendix: Comments on the strength of evidence for each research question

To avoid repetition, common limitations that affect multiple research questions are listed in the “[Limitations](#)” section, rather than here. The bullet points below summarize important features (particularly the overall strength of the evidence) of the reviewed research, previous Sentience Institute research, and my own intuitions that have affected the overall estimates. Unreferenced content can be identified through the “Summary information” tab of the “[Findings tables](#)” spreadsheet, or by sorting the “Search results” tab by the relevant column and looking at the research items that were scored for that research question.

I1: Does public opinion directly positively influence the Supreme Court’s decisions?

- The systematic results fairly consistently (6 out of 7 substantial items and a total score of 7.25) found evidence that public opinion directly positively influences the Supreme Court’s decisions. Adding in the non-systematic findings reduced this consistency and the overall score (from 7.25 down to 5.25).
- The most important evidence came from analyses that used the public mood as one of the main measures of public opinion or behavior; without these analyses, the score would only be 0.25, since the other analyses had conflicting results. Likewise, 6 out of 7 substantial items were observational and without observational research, the score would only be 0.25. This reliance on a narrow range of research types and measures of public opinion should reduce our confidence in these results.
- Of the analyses that provided evidence for both I1 and I2, 2 analyses had a higher score for I1, 9 had a higher score for I2, and 8 had the same score for both.<sup>111</sup>
- Although many research items found no evidence or only very weak evidence for I1, no reviewed research found evidence that public opinion directly, negatively influenced the Supreme Court’s decisions.
- My impression is that farmed animal issues are less salient than the social issues that the included research focused on, such as abortion and gay rights. Given this, the estimate for the average farmed animal issue relative to the estimate for the average highly salient, politically polarized issue was also affected by the possibility that higher pre-decision issue salience increases the effects of public opinion on the Supreme Court’s decisions (see IM below).

I2: Does public opinion indirectly positively influence the Supreme Court’s decisions by electing presidents and Senators who appoint justices who then vote in line with public opinion?

- The systematic results consistently (6 out of 6 substantial items and a total score of 13.75) found evidence that public opinion indirectly positively influences the Supreme Court’s decisions. Adding in the non-systematic findings reduced this consistency (7 out of 9 substantial items), though the total score increased slightly to 15.75.

---

<sup>111</sup> Some of these results may have been scored lower on either I1 or I2 if the methods and results seemed to substantially repeat the methods and results used elsewhere. Therefore a comparison of the results for I1 and I2 provides an imperfect representation of whether individual research items found stronger evidence for one or the other.

- The most important evidence came from analyses that used the public mood as one of the main measures of public opinion or behavior; without these analyses, the score would be 3. Similarly, without observational research items, the score would be 2.25.
- The reviewed research provides no evidence that public opinion ever indirectly negatively influences Supreme Court decision-making.
- There is very little research that provides strong evidence that the convergence of public opinion and the Court's views encouraged by new appointments reflects the indirect effects of public opinion, rather than simply reflecting the effects of lurking variables such as wider social trends.<sup>112</sup> This issue does not show up clearly in the scores for I2, because the research items that raise this concern still find evidence that either public opinion or exogenous social forces influence Supreme Court decision-making, so I have given them positive scores for I2. If the question was: "Does public opinion indirectly positively influence the Supreme Court's decisions, or do the social forces that encourage changes in public opinion also encourage changes in the Supreme Court's decisions?" then I would be much more confident (92.5%) that the answer would be "yes" for the average highly salient, politically polarized issue and for the average farmed animal issue (85%).
- It is not clear that the mechanisms that lead the Court to respond to overall shifts in the public mood will also lead the Court to respond to shifts in public opinion on specific issues, especially issues that are not highly salient and politically polarized. For example, it currently seems unlikely that a candidate's views on farmed animal issues would function as a "litmus test" for whether the president nominated them and the Senate approved them, as has been the case in the past for views on abortion.<sup>113</sup> However, it seems likely that public opinion will exert an indirect effect on Supreme Court decision-making on any issue (or at least that the social forces that encourage public opinion to change on an issue will also encourage the Supreme Court's decision-making to change) if measured over sufficiently long timeframes.
- The estimate for the average farmed animal issue relative to the estimate for the average highly salient, politically polarized issue was also affected by the possibility that higher pre-decision issue salience increases the effects of public opinion on the Supreme Court's decisions (see IM below).

---

<sup>112</sup> Giles, Blackstone, and Vining, "The Supreme Court," 293-306 find that the justices seem to be more affected by the public mood in non-salient than salient cases. They interpret this as evidence that the justices do not respond strategically to public opinion and that the correlation with public opinion is more likely explained by the influence of exogenous social forces.

However, Casillas, Enns, and Wohlfarth, "How Public Opinion Constrains," 74-88 controlled for the percent of the federal budget spent on the military, a measure of policy liberalism, the Gini Index (a measure of inequality), and the homicide rate in their analysis. Though they also found that public mood has a significant effect on the non-salient cases only, they describe a theory that suggests that judges may deviate from public opinion more strongly on salient cases, because these cases "commonly involve issues where justices face the strongest competing desire to follow legal considerations or their personal ideology." For non-salient cases, they may be less willing to risk "compromising the Court's institutional legitimacy."

I see no reason why salient cases should be more influenced by exogenous social forces than non-salient cases, so I find the explanation offered by Casillas, Enns, and Wohlfarth (2011) for the higher responsiveness on non-salient cases more convincing.

<sup>113</sup> See, for example, Ed Kilgore, "Gillibrand Offers Explicit Abortion Rights Litmus Test for Judicial Nominees" (May 7, 2019), <http://nymag.com/intelligencer/2019/05/gillibrand-offers-abortion-rights-litmus-test-for-judges.html>.

I3: Does interest group involvement, such as via amicus curiae briefs, influence the outcome of Supreme Court decisions in the direction that they intend it to?

- None of the systematic results were substantial items, though 5 of the 6 systematic results provided evidence that interest groups modify the outcome of Supreme Court decisions in the direction that they intend to, resulting in a score of 1.5.
- The non-systematic results included 5 substantial items, 4 of which provided further evidence that interest groups modify the outcome of Supreme Court decisions in the direction that they intend to, resulting in an overall score of 5.5.
- The results include observational and “other” research. Only 2 of 14 analyses were focused on specific social issues; most were general analyses of the frequency and effectiveness of interest groups’ engagement with the Supreme Court.
- Two research items found evidence of trends that suggest that interest group involvement could backfire by increasing the receptivity of policy to public opinion<sup>114</sup> or by increasing the speed at which a Supreme Court decision is overridden.<sup>115</sup> However, these two research items did not distinguish between interest groups siding with the petitioner or the respondent. The only other research item with a negative score simply failed to find evidence of interest group effectiveness.<sup>116</sup> However, other analyses found that interest groups could modify the outcome of Supreme Court decisions in the direction that they intend to in a variety of ways.

IM: Does higher pre-decision issue salience increase the effects of public opinion on the Supreme Court’s decisions?

- Two of three systematic results were observational research items using the public mood as their measure of public opinion which found substantial evidence that pre-decision issue salience actually decreases the direct effects of the public mood on the Supreme Court’s decisions.<sup>117</sup>
- Adding in non-systematic results reduced the strength of the overall finding (from a score of -2.5 to -1.25), via several non-substantial observational and “other” research items. There is no included relevant research using measures of public opinion on specific issues.
- Four research items found evidence that that higher pre-decision issue salience is likely to increase the effects of public opinion on the Supreme Court’s decisions, although 2 of these 4 were focused on policy makers generally, rather than the Supreme Court specifically. Of the two research items specific to the Supreme Court, the findings from one of these only applied to indirect effects of public opinion on the Supreme Court’s decision-making.<sup>118</sup> Overall, then, it seems possible that higher pre-decision issue salience amplifies the indirect effects of public opinion on the Supreme Court’s decision-making but decreases the direct effects of public opinion on the Supreme Court’s

---

<sup>114</sup> Burstein, “The Impact of Public Opinion,” 29-40.

<sup>115</sup> Hettinger and Zorn, “Explaining the Incidence,” 5-28.

<sup>116</sup> Marshall, *Public Opinion*, chapter 4.

<sup>117</sup> Casillas, Enns, and Wohlfarth, “How Public Opinion Constrains,” 74-88 and Giles, Blackstone, and Vining, “The Supreme Court,” 293-306.

<sup>118</sup> Michael A. Bailey and Forrest Maltzman, *The Constrained Court: Law, Politics, and the Decisions Justices Make* (Princeton: Princeton University Press, 2011).

decision-making. Both propositions seem intuitively and theoretically plausible,<sup>119</sup> though there is not strong evidence for either.

- No included research items argued explicitly that higher pre-decision issue salience neither amplifies nor decreases the effects of public opinion on the Supreme Court's decisions. Though the overall direction of the effect is unclear, it could still be substantial.

E1: Do Supreme Court decisions positively influence public opinion?

- There is evidence from the systematic results that Supreme Court decisions positively influence public opinion, but the evidence becomes much stronger when the non-systematic results are included as well, rising from a score of 3.25 up to 9.5.
- Compared to the results for I1 and I2, the results for E1 come from a broader range of topic areas, relying less on unidimensional left-right measures of the public mood. However, 13 out of 19 substantial items are still observational studies and without the included research items using observational methods, the score would only be 1.75.
- There is some evidence that Supreme Court decisions have negatively influenced public opinion.<sup>120</sup> However, most of the research that I have assigned negative scores to simply failed to find evidence of any effects of Supreme Court decisions on public opinion.

---

<sup>119</sup> On the former proposition, see the bullet point beginning "It is not clear that the mechanisms that lead..." above. On the latter proposition, see footnote 112.

<sup>120</sup> James W. Stoutenborough, Donald P. Haider-Markel, and Mahalley D. Allen, "Reassessing the Impact of Supreme Court Decisions on Public Opinion: Gay Civil Rights Cases," *Political Research Quarterly* 59, no. 3 (2006), 419-33 found that two out of four examined gay rights cases had negative effects on public support for same-sex marriage. The effects of these two rulings on public opinion were substantial; -12% and -8% support.

Egan, Persily, and Wallsten, "Gay Rights," 234-66 note that, in contrast to the arguments of Stoutenborough, Haider-Markel, and Allen (2006), the Gallup poll questions about opinion on legalizing gay sex around the *Bowers v. Hardwick* (1986) decision varied and that the results do not provide evidence of a public opinion backlash. The question in the poll shortly before the decision was preceded by other gay rights questions, whereas this was not the case in the polls shortly after the decision. Gallup polls where this question was preceded by other gay rights questions found that support was higher by nearly 10%. However, they agree that there is clear evidence that *Lawrence v. Texas* (2003) did disrupt the upward trend in opinion.

Wlezien and Goggin, "The Courts, Interest Groups," 381-405 found in various analyses that New York Times reports of Supreme Court activity and the activity of anti-abortion groups (which were also encouraged by Court decisions like *Webster* in 1989) encouraged support for the status quo. This provides weak evidence of both a direct and indirect public opinion backlash.

Though potentially caused by confounding factors such as changing crime rates, there is also reason to believe that the *Furman v. Georgia* decision (which declared capital punishment, as it was practised in the US at the time, to be unconstitutional) may have encouraged a reversal of the downwards trend in support (see Jamie Harris, "Social Movement Lessons From the US Anti-Death Penalty Movement" (forthcoming)).

Indeed, *Furman* is one of the 9 Supreme Court rulings that seemed to have a negative effect on public opinion (as opposed to 3 with no effect and 6 with positive effects) in Marshall, *Public Opinion*, 146-7. Marshall analyzed 18 instances of polls that asked identical questions both before and after Supreme Court rulings. Marshall found that the average shift in support for the position implied by the Court's decision before and after the ruling was only 0.06%, though the shift varied from +20% to -10%, with 8 decisions appearing to have an effect of greater than 5%.

- Given the findings for EM3, my estimate for the average farmed animal issue is higher than my estimate for the average highly salient, politically polarized issue. Additionally, Thomas Marshall found evidence that liberal decisions increase support for the Court's preference more than conservative decisions.<sup>121</sup> There is currently more support for policies to improve farmed animal welfare among liberals than among conservatives,<sup>122</sup> so this also increased my estimate for E1 for the average farmed animal issue.

#### E2: Do Supreme Court decisions polarize public opinion?

- The systematic results are inconsistent, with a total score of 0.5 from 4 relevant substantial items. Adding the non-systematic results more than triples the total number of relevant items (from 5 to 17) but the score is still quite close to zero (-1.25).
- The total scores of the observational and experimental results weigh in opposite directions (-5.25 and 2.25 respectively); I am inclined to place more weight on the former.

#### E3: Do Supreme Court decisions cause a social movement or legislative backlash?

- As well as the evidence included in this literature review, there is some evidence of backlash against the *Roe v. Wade* ruling on abortion and strong evidence of backlash against the *Furman v. Georgia* ruling on the death penalty.<sup>123</sup>
- Qualitative evidence of backlash against Supreme Court rulings on same-sex marriage and against the *Brown v. Board of Education* ruling is tempered slightly by criticisms of the evidence that backlash did occur in these cases and by research categorized as "Other / all" in terms of its topic area that shows how infrequent legislative reversals of Supreme Court decisions are.
- Compared to the non-systematic results, the "Other / all" research is overrepresented in the systematic results, hence the overall score of only 0.75.
- Taken together, this research can be understood as suggesting that though social movement or legislative backlash may occur and may be substantial, this only infrequently results in direct reversals of Supreme Court rulings.
- Evidence of backlash against abortion liberalization and against abolition of the death penalty is not strong evidence that the farmed animal movement will experience similar backlash; abortion liberalization and the abolition of the death penalty are undesirable under some widely held moral systems,<sup>124</sup> whereas better protection of farmed animals is unlikely to be unacceptable for comparable moral reasons. Additionally, Thomas Marshall found evidence that liberal decisions are less likely to be overturned by Congress than conservative decisions (96% of liberal decisions prevailed compared

---

<sup>121</sup> Marshall, *Public Opinion*, 153.

<sup>122</sup> See footnote 78.

<sup>123</sup> Jamie Harris, "Social Movement Lessons From the US Anti-Abortion Movement" (November 26, 2019), <https://www.sentienceinstitute.org/anti-abortion> and Jamie Harris, "Social Movement Lessons From the US Anti-Death Penalty Movement" (forthcoming).

<sup>124</sup> See "Features of the anti-abortion movement" in Jamie Harris, "Social Movement Lessons From the US Anti-Abortion Movement" (November 26, 2019), <https://www.sentienceinstitute.org/anti-abortion#features-of-the-anti-abortion-movement> and "Features of the anti-death penalty movement" in Jamie Harris, "Social Movement Lessons From the US Anti-Death Penalty Movement" (forthcoming).

to 65% of conservative decisions).<sup>125</sup> These two considerations reduce my estimate that a Supreme Court decision on the average farmed animal issue would cause a social movement or legislative backlash.

EM1: Does pre-decision public opinion that is more closely aligned with a Supreme Court decision increase the positive effects or decrease the negative effects of that Supreme Court decision on public opinion?

- The research items that have been scored for EM1 are those that analyze the effects of multiple rulings on the same social issue at different time points (here focused on same-sex marriage),<sup>126</sup> or those that analyze the effects of a single ruling on multiple different issues for which there were differing levels of support (reviewed research that met this criteria was focused on the *Roe v. Wade* ruling on abortion).<sup>127</sup> The findings are disputed and unclear for both of these issues, with the result that the overall score is 0, though the score for the systematic results only is 1.25.
- More broadly, where research suggests that Supreme Court decisions have positively influenced public opinion, sometimes there was only minority pre-decision support for the position implied by the Court's ruling. This occurred with the Supreme Court ruling that accepted the provisions of the Affordable Care Act of 2010,<sup>128</sup> the *Varnum v. Brien* (2009) Iowa Supreme Court ruling that established same-sex marriage,<sup>129</sup> the *Obergefell v. Hodges* (2015) ruling establishing same-sex marriage at the national level (at least, when measured in Nebraska),<sup>130</sup> and in experimental results.<sup>131</sup> Issues that lacked majority support and saw no evidence of change may include "discretionary" abortions around the time of *Roe v. Wade* (1973)<sup>132</sup> and same-sex marriage around the time of *Bowers v. Hardwick* (1986), though the situation is not clear in either case.<sup>133</sup> In comparison, there was majority support for same-sex marriage at the national level before *Obergefell v. Hodges*; the ruling seems to have had

<sup>125</sup> Marshall, *Public Opinion*, 176-9.

<sup>126</sup> Andrew R. Flores and Scott Barclay, "Backlash, Consensus, Legitimacy, or Polarization: The Effect of Same-sex Marriage Policy on Mass Attitudes," *Political Research Quarterly* 69, no. 1 (2016), 43-56, Egan, Persily, and Wallsten, "Gay Rights," 234-66, and Stoutenborough, Haider-Markel, and Allen, "Reassessing the Impact," 419-33.

<sup>127</sup> Franklin and Kosaki, "Republican Schoolmaster," 751-71 and Hanley, Salamone, and Wright, "Reviving the Schoolmaster," 408-21.

<sup>128</sup> Christenson and Glick, "Issue-specific Opinion Change," 881-905 and Katerina Linos and Kimberly Twist, "The Supreme Court, the Media, and Public Opinion: Comparing Experimental and Observational Methods," *The Journal of Legal Studies* 45, no. 2 (2016), 223-54.

In slight contrast, Zilis, *The Limits of Legitimacy*, 153-4 notes that, "[b]efore the Supreme Court's health care ruling, respondents were divided in their views about the ACA. Roughly 45 percent of respondents indicated they disapproved of it (with nearly two-thirds expressing 'strong' disapproval, and 55 percent indicated they approved (with only one-third expressing 'strong' approval). When asked about their views regarding the law's constitutionality, respondents were more unsympathetic: about 63 percent judged the law to be unconstitutional." Zilis notes, however, that the sample had a "Democratic bias," which may help to explain the slightly higher support found in his sample.

<sup>129</sup> Rebecca J. Kreitzer, Allison J. Hamilton, and Caroline J. Tolbert, "Does Policy Adoption Change Opinions on Minority Rights? The Effects of Legalizing Same-sex Marriage," *Political Research Quarterly* 67, no. 4 (2014), 795-808.

<sup>130</sup> Emily Kazyak and Mathew Stange, "Backlash or a Positive Response? Public Opinion of LGB Issues after *Obergefell v. Hodges*" (2018), <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1526&context=sociologyfacpub>.

<sup>131</sup> Bartels and Mutz, "Explaining Processes," 249-61.

<sup>132</sup> Franklin and Kosaki, "Republican Schoolmaster," 751-71 and Hanley, Salamone, and Wright, "Reviving the Schoolmaster," 408-21.

<sup>133</sup> Stoutenborough, Haider-Markel, and Allen, "Reassessing the Impact," 419-33 and Egan, Persily, and Wallsten, "Gay Rights," 234-66.

little direct effect on personal attitudes, but increased perceived social norms supporting gay marriage.<sup>134</sup> Of the four Supreme Court decisions with low national salience that Hoekstra examined, the two issues that had the strongest evidence of public opinion change towards the Court's preference also had higher levels of baseline support, though the studies have very small sample sizes.

<sup>135</sup> Majority public support for same-sex marriage seems to have been damaged by the (favorable) *Lawrence v. Texas* (2003) ruling.<sup>136</sup> Abortion "in cases of threat to the mother's health, rape, and probable birth defects" had majority support, which was further positively reinforced by *Roe v. Wade*.<sup>137</sup> Overall, in 4 cases, minority support was enhanced by a Supreme Court ruling and in 2 cases (4 if Hoekstra's examples are counted), minority support was not much affected. In 1 case (2 cases if Hoekstra's example is counted), majority support was consolidated by a Supreme Court ruling, but in another case (two cases if Hoekstra's example is counted) there was little change and in another case, majority support was damaged by a Supreme Court ruling. Of course, many other factors could have influenced the direction of these public opinion changes and the differences between the cases evaluated in the included research, but this simplistic analysis provides weak evidence against the hypothesis that higher pre-decision public opinion increases the positive effects and decreases the negative effects of a Supreme Court decision on public opinion. Several analyses did not provide sufficient information to evaluate whether there was majority or minority pre-decision support for the position taken by the Court.<sup>138</sup>

- The findings for E2 should provide indirect evidence for EM1 and EM2, but since the results were inconclusive for E2, this has little effect on the estimates.

EM2: Assuming that Supreme Court rulings at least sometimes cause a social movement or legislative backlash, does higher pre-decision public opinion decrease this backlash?

---

<sup>134</sup> Margaret E. Tankard and Elizabeth Levy Paluck, "The Effect of a Supreme Court Decision Regarding Gay Marriage on Social Norms and Personal Attitudes," *Psychological Science* 28, no. 9 (2017), 1334-44.

<sup>135</sup> Hoekstra, *Public Reaction*. Only one of these changes actually seems to have had a significant effect on public opinion. The sample sizes in the 4 panel studies are very small, with 93, 88, 24, and 59 participants. The two studies with the smallest numbers of participants did not show significant differences in support for the Court's ruling; insufficient statistical power may have prevented substantial change from being detected. A variety of other analyses are carried out, almost all of which fail to find statistically significant differences when this is tested for. Given the small sample sizes, I place little weight on these non-findings.

<sup>136</sup> Stoutenborough, Haider-Markel, and Allen, "Reassessing the Impact," 419-33 and Egan, Persily, and Wallsten, "Gay Rights," 234-66.

<sup>137</sup> Franklin and Kosaki, "Republican Schoolmaster," 751-71 and Hanley, Salamone, and Wright, "Reviving the Schoolmaster," 408-21.

<sup>138</sup> These were:

Hoekstra, "The Supreme Court and Opinion Change," 109-29,

Nicholson and Hansford, "Partisans in Robes," 620-36,

Bishin, Hayes, Incantalupo, and Smith, "Opinion Backlash," 625-48,

Fontana and Braman, "Judicial Backlash," 731-99, and

Flores and Barclay, "Backlash, Consensus," 43-56.



- The items that were scored for EM2 are those that evaluated the frequency, size, or speed of social movement or legislative backlash against multiple Supreme Court decisions with varying characteristics. All included research that has been scored for EM2 was identified non-systematically.
- All relevant research items had positive scores and there seem to be no plausible mechanisms for higher pre-decision public opinion to increase backlash.<sup>139</sup>
- Of the 4 relevant research items, all 4 were observational and 3 were categorized as “Other / all” in terms of topic area.
- Reviewed research suggests that Supreme Court decisions encouraged social movement or legislative backlash against same-sex marriage in the 1990s and early 2000s (which had only minority support at this time<sup>140</sup>) and against desegregation in the 1950s and 1960s (which had unclear levels of overall support but had the support of only a small minority in the South, where much of the backlash occurred<sup>141</sup>). Sentience Institute’s case studies have found evidence of backlash against the *Roe v. Wade* ruling which made elective abortion legal in the first trimester, despite only minority support for this proposition, and strong evidence of backlash against the *Furman v. Georgia* ruling on the death penalty, when abolition of the death penalty narrowly still had only minority support.<sup>142</sup> There is also some evidence of increased anti-death penalty movement mobilization in response to the *Gregg v. Georgia* ruling which accepted the death penalty as constitutional, despite majority support for the death penalty. However, the strength of this backlash seems to have been much less substantial than the earlier backlash against the *Furman* ruling.<sup>143</sup> Therefore, with the possible exception of *Brown v. Board of Education*, all of the Supreme Court decisions which the research in this review and in the case studies suggests caused substantial backlash have ruled against the preferences of the majority of the population.

EM3: Does higher pre-decision issue salience decrease the effects of a Supreme Court decision on public opinion?

- Only one research item, with a score of 0.5, was identified systematically.
- Apart from one research item with insubstantial, indirect evidence to the contrary, all relevant research provided evidence that higher pre-decision awareness of an issue decreases the effects of a Supreme Court decision.

<sup>139</sup> Higher pre-decision public support might be weakly correlated with pre-decision awareness or intensity of opinion, which might plausibly increase backlash.

<sup>140</sup> Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage* (Oxford: Oxford University Press, 2013), 169 argues this point. See also “Homosexuals should have the right to marry (agree/disagree),” National Opinion Research Center, accessed September 25, 2019, <https://gssdataexplorer.norc.umd.edu/trends/Gender%20&%20Marriage?measure=marhomo>.

<sup>141</sup> Mildred A. Schwarz, “Trends in White Attitudes toward Negroes” (1967), [http://www.norc.umd.edu/PDFs/publications/NORCRpt\\_119.pdf](http://www.norc.umd.edu/PDFs/publications/NORCRpt_119.pdf), 25-6. Rosenberg, *The Hollow Hope*, 127 points to low support for desegregation in the South after the ruling (24% approval in July 1954) and again in June 1961, but also does not have information about approval shortly before the ruling. On page 128, Rosenberg notes that “[q]uestions were not asked regularly and the pre-1954 data are sketchy.”

<sup>142</sup> Jamie Harris, “Social Movement Lessons From the US Anti-Abortion Movement” (November 26, 2019), <https://www.sentienceinstitute.org/anti-abortion> and Jamie Harris, “Social Movement Lessons From the US Anti-Death Penalty Movement” (forthcoming).

<sup>143</sup> Jamie Harris, “Social Movement Lessons From the US Anti-Death Penalty Movement” (forthcoming).

- The directly relevant supporting evidence all comes from observational research on three different Supreme Court cases. Two experiments provide additional indirect evidence, one of which supports the hypothesis that higher pre-decision awareness of an issue decrease the effects of a Supreme Court decision on public opinion, the other of which does not.

EM4: Does higher awareness of the decision itself increase its effects?

- There is evidence from the systematic results that higher awareness of the decision itself increases the effects of a Supreme Court decision, but the evidence becomes much stronger when the non-systematic results are included as well (rising from a score of 1 up to 4.75).
- The overall results fairly consistently (5 out of 7 substantial items and 4 out of 6 other items) found evidence in support of the hypothesis that higher awareness of the decision itself increase the effects of a Supreme Court decision. One of the two contrary substantial items is a methodological paper; it does not present contrary evidence.<sup>144</sup> The other found no significant evidence that publicity of Court cases had an effect on the average public opinion shift.<sup>145</sup>
- The included research covers a range of topics and measures of public opinion. Most of the research (10 of 13 items) is observational; without the included research using observational methods, the score would be 1.5.
- There is no evidence that higher awareness of the decision itself decreases the effects of a Supreme Court decision and there seem to be no plausible mechanisms for this being the case.
- Six research items provided evidence specifically on whether higher awareness of a decision increases its effect on public opinion (with a combined score of 3.25) and four items provided evidence specifically on whether higher awareness of a decision increases the likelihood or size of the social movement or legislative backlash against it (with a combined score of 2.75). No included research provided evidence specifically on whether or not higher salience decisions are more polarizing.

EM5: Do earlier landmark Supreme Court decisions on an issue have larger effects than subsequent Supreme Court decisions on the same issue?

- There is only one relevant research item that was identified systematically; this evidence weighs in the opposite direction (with a score of -0.75) to the overall score of 1.
- The evidence is not consistent, with 2 of 4 substantial items and the only other relevant research item providing evidence that landmark Supreme Court decisions on an issue do not have larger effects than subsequent Supreme Court decisions on the same issue.
- The research focuses on a mixture of topic areas and measures of public opinion, though all 4 substantial items are observational research.
- There is no evidence that earlier landmark Supreme Court decisions have smaller effects than subsequent Supreme Court decisions on the same issue.

EM6: Does unanimity or near unanimity among the justices' votes in Supreme Court decisions maximize the positive effects of a Supreme Court decision or minimize its negative effects?

- No relevant research was identified through systematic methods.

---

<sup>144</sup> Taylor Grant and Matthew J. Lebo, "Error Correction Methods with Political Time Series," *Political Analysis* 24, no. 1 (2016), 3-30.

<sup>145</sup> Marshall, *Public Opinion*.

- The overall results fairly consistently (4 out of 5 substantial items and the only other relevant research item) found evidence that unanimity or near unanimity among the justices' votes in Supreme Court decisions maximizes the positive effects of a Supreme Court decision or minimizes its negative effects.
- However, one item found evidence that unanimous decisions actually increased the chances of legislative efforts being made to reverse a Supreme Court decision.<sup>146</sup> This finding is counterintuitive and could be the result of a confounding factor that is not controlled for in the analysis. For example, unanimity in Supreme Court decisions could be correlated with the salience of the cases and the underlying issues.<sup>147</sup>
- The included research uses a mixture of observational, experimental, and other methods. Half of the relevant research items focus on specific topics and the other half focus on generalized Supreme Court data.

EM7: Does interest group involvement, such as via amicus curiae briefs, increase the likelihood, speed, or size of social movement or legislative backlash?

- No relevant research was identified through systematic methods.
- Both relevant items were observational research, categorized as "Other / all" in terms of topic area, and had a score of 0.5.
- Both relevant items provide some evidence that higher numbers of amicus curiae briefs increase the chances or speed of Congressional overrides of Supreme Court decisions. However, these items do not distinguish between amicus briefs that support the petitioner and those that support the respondent. These findings could be the result of a lurking variable that is not controlled for in the analysis, such as case salience.<sup>148</sup>

EM8: Does the framing of debate in the media, by legislators, and by relevant social movement actors modify the effects of a Supreme Court decision on public opinion?

- No relevant research was identified through systematic methods.
- Both relevant items used a mixture of research methods, were categorized as "Specific other," and had positive scores.
- It seems intuitively plausible that media framing could have no modifying effect; these two analyses do not constitute strong evidence against the null hypothesis.

---

<sup>146</sup> Ignani and Meernik, "Explaining Congressional Attempts," 353-71.

<sup>147</sup> This might happen if, for example, the Supreme Court sought to present a united front on a potentially controversial issue. Baum and Devins, "Why the Supreme Court Cares," 1525-6 suggest that this happened in the *United States v. Nixon* (1974) ruling on the Watergate scandal and the *Brown v. Board of Education* (1954) ruling on desegregation.

<sup>148</sup> Intuitively, the more prominent and socially important a case is, the more likely that interest groups will seek to influence its outcome through amicus briefs and the more likely Congress is to seek to reverse the outcome, if it disapproves.

## Bibliography

- Ammori, Marvin, "Public Opinion and Freedom of Speech" (July 14, 2006), [https://law.yale.edu/system/files/documents/pdf/Public\\_Affairs/ISP\\_PublicOpinion\\_fos.pdf](https://law.yale.edu/system/files/documents/pdf/Public_Affairs/ISP_PublicOpinion_fos.pdf).
- Badger, Tony, "Brown and Backlash," in *Massive Resistance: Southern Opposition to the Second Reconstruction* (Oxford: Oxford University Press, 2005), 39-55.
- Bailey, Michael A., and Forrest Maltzman, *The Constrained Court: Law, Politics, and the Decisions Justices Make* (Princeton: Princeton University Press, 2011).
- Baltes, Lexi, "The Least Dangerous Branch: The Dark Horse in American Democracy," *Res Publica - Journal of Undergraduate Research* 19, no. 1 (2015), <https://pdfs.semanticscholar.org/7c76/7a4296549f89560369308260aee6fee5e524.pdf>.
- Barnum, David G., "The Supreme Court and public opinion: Judicial decision making in the post-New Deal period," *The Journal of Politics* 47, no. 2 (1985), 652-66.
- Bartels, Brandon L., and Diana C. Mutz, "Explaining Processes of Institutional Opinion Leadership," *The Journal of Politics* 71, no. 1 (2009), 249-61.
- Baum, Lawrence, and Neal Devins, "Why the Supreme Court Cares about Elites, Not the American People," *Georgetown Law Journal* 98 (2009), 1515-81.
- Baum, Lawrence, *The Puzzle of Judicial Behavior* (Ann Arbor: University of Michigan Press, 1997).
- Bishin, Benjamin G., Thomas J. Hayes, Matthew B. Incantalupo, and Charles Anthony Smith, "Opinion Backlash and Public Attitudes: Are Political Advances in Gay Rights Counterproductive?" *American Journal of Political Science* 60, no. 3 (2016), 625-48.
- Brace, Paul, and Brent D. Boyea, "State Public Opinion, the Death Penalty, and the Practice of Electing Judges," *American Journal of Political Science* 52, no. 2 (2008), 360-72.
- Brickman, Danette, and David A. M. Peterson, "Public Opinion Reaction to Repeated Events: Citizen Response to Multiple Supreme Court Abortion Decisions," *Political Behavior* 28, no. 1 (2006), 87-112.
- Burstein, Paul, "Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity," *American Journal of Sociology* 96, no. 5 (1991), 1201-225.
- Burstein, Paul, "The Impact of Public Opinion on Public Policy: A Review and an Agenda," *Political Research Quarterly* 56, no. 1 (March 2003), 29-40.

Burstein, Paul, and April Linton, “The Impact of Political Parties, Interest Groups, and Social Movement Organizations on Public Policy: Some Recent Evidence and Theoretical Concerns,” *Social Forces* 81, no. 2 (December 2002), 380-408.

Caldeira, Gregory A., “Public opinion and the US Supreme Court: FDR’s Court-packing Plan,” *American Political Science Review* 81, no. 4 (1987), 1139-53.

Calvin, Bryan, Paul M. Collins Jr., and Matthew Eshbaugh-Soha, “On the Relationship Between Public Opinion and Decision Making in the US Courts of Appeals,” *Political Research Quarterly* 64, no. 4 (2011), 736-48.

Casillas, Christopher J., Peter K. Enns, and Patrick C. Wohlfarth, “How Public Opinion Constrains the US Supreme Court,” *American Journal of Political Science* 55, no. 1 (2011), 74-88.

Choundhry, Sujit, and Claire E. Hunter, “Measuring Judicial Activism on the Supreme Court of Canada: A Comment on *Newfoundland (Treasury Board) V. NAPE*,” *McGill Law Journal* 48 (2003), 525-62.

Christenson, Dino P., and David M. Glick, “Issue-specific Opinion Change: The Supreme Court and Health Care Reform,” *Public Opinion Quarterly* 79, no. 4 (2015), 881-905.

Christiansen, Matthew R., and William N. Eskridge Jr., “Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011,” *Texas Law Review* 92 (2013), 1317-541.

Clark, Tom S., “The Separation of Powers, Court Curbing, and Judicial Legitimacy,” *American Journal of Political Science* 53, no. 4 (2009), 971-89.

Collins Jr., Paul M., “Friends of the Court: Examining the Influence of Amicus Curiae Participation in US Supreme Court Litigation,” *Law and Society Review* 38, no. 4 (2004), 807-32.

Cummings, Scott L., “Rethinking the Foundational Critiques of Lawyers in Social Movements,” *Fordham Law Review* 85 (2016), 1987-2015.

Cummings, Scott L., and Douglas NeJaime, “Lawyering for Marriage Equality,” *University of California, Los Angeles Law Review* 57 (2009), 1235-331.

Devins, Neal, and Lawrence Baum, “Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court,” *The Supreme Court Review* 2016, no. 1 (2016), 301-65.

Ditslear, Corey, and Lawrence Baum, “Selection of Law Clerks and Polarization in the US Supreme Court,” *The Journal of Politics* 63, no. 3 (2001), 869-85.

Dotan, Yoav, and Menachem Hofnung, “Interest Groups in the Israeli High Court of Justice: Measuring Success in Litigation and in Out-of-Court Settlements,” *Law and Policy* 23, no. 1 (2001), 1-27.

Easterbrook, Frank H., “Do Liberals and Conservatives Differ in Judicial Activism,” *University of Colorado Law Review* 73 (2002), 1401-16.

Egan, Patrick J., Nathaniel Persily, and Kevin Wallsten, “Gay Rights,” in Nathaniel Persily, Jack Citrin, and Patrick J. Egan (eds.) *Public opinion and constitutional controversy* (Oxford: Oxford University Press, 2008), 234-66.

Emmert, Craig F., “An Integrated Case-related Model of Judicial Decision Making: Explaining State Supreme Court Decisions in Judicial Review Cases,” *The Journal of Politics* 54, no. 2 (1992), 543-52.

Enns, Peter K., Nathan J. Kelly, Takaaki Masaki, and Patrick C. Wohlfarth, “Don’t Jettison the General Error Correction Model Just Yet: A Practical Guide to Avoiding Spurious Regression with the GECM,” *Research and Politics* 3, no. 2 (2016).

Epstein, Lee, “Interest Group Litigation During the Rehnquist Court Era,” *The Journal of Law and Politics* 9 (1992), 639-717.

Epstein, Lee, and Andrew D. Martin, “Does Public Opinion Influence the Supreme Court? Possibly Yes (But We’re Not Sure Why),” *University of Pennsylvania Journal of Constitutional Law* 13 (2010), 263-81.

Epstein, Lee, and Jack Knight, “Reconsidering Judicial Preferences,” *Annual Review of Political Science* 16 (2013), 11-31.

Epstein, Lee, and Jeffrey A. Segal, “Measuring Issue Salience,” *American Journal of Political Science* 44, no. 1 (2000), 66-83,

Epstein, Lee, and Joseph F. Kobylka, *The Supreme Court and Legal Change: Abortion and the Death Penalty* (Chapel Hill: University of North Carolina Press, 1992).

Eskridge Jr., William N., “Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States,” *Boston University Law Review* 93 (2013), 275-323.

Flemming, Roy B., and B. Dan Wood. “The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods,” *American Journal of Political Science* (1997), 468-98.

Flemming, Roy B., John Bohte, and B. Dan Wood, “One Voice among Many: The Supreme Court’s Influence on Attentiveness to Issues in the United States, 1947-92,” *American Journal of Political Science* 41, no. 4 (1997), 1224-50.

Flores, Andrew R., and Scott Barclay, “Backlash, Consensus, Legitimacy, or Polarization: The Effect of Same-sex Marriage Policy on Mass Attitudes,” *Political Research Quarterly* 69, no. 1 (2016), 43-56.

Fontana, David, and Donald Braman, “Judicial Backlash or Just Backlash-Evidence from a National Experiment,” *Columbia Law Review* 112 (2012), 731-99.

Franklin, Charles H., and Liane C. Kosaki, “Republican Schoolmaster: The US Supreme Court, Public Opinion, and Abortion,” *American Political Science Review* 83, no. 3 (1989), 751-71.

Friedman, Barry, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (Farrar: Straus and Giroux, 2009).

Giles, Micheal W., Bethany Blackstone, and Richard L. Vining Jr., “The Supreme Court in American Democracy: Unraveling the Linkages Between Public Opinion and Judicial Decision Making,” *The Journal of Politics* 70, no. 2 (2008), 293-306.

Glennon, Colin Ross, “The Determinants of Supreme Court Decision-making: An Ideal Point Analysis” (2011),  
[https://trace.tennessee.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2255&context=utk\\_graddiss](https://trace.tennessee.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2255&context=utk_graddiss).

Grant, Taylor, and Matthew J. Lebo, “Error Correction Methods with Political Time Series,” *Political Analysis* 24, no. 1 (2016), 3-30.

Greenhouse, Linda, and Reva Siegel, *Before Roe v. Wade: Voices that Shaped the Abortion Debate before the Supreme Court's Ruling* (New York: Kaplan Publishing, 2010).

Guinier, Lani, “Beyond Legislatures: Social Movements, Social Change, and the Possibilities of Demosprudence-courting the People Demosprudence and the Law/Politics Divide,” *Boston University Law Review* 89 (2009), 539-61.

Hall, Matthew E. K., “The Semiconstrained Court: Public Opinion, the Separation of Powers, and the US Supreme Court’s Fear of Nonimplementation,” *American Journal of Political Science* 58, no. 2 (2014), 352-66.

Hall, Matthew E. K., and Joseph Daniel Ura, “Judicial Majoritarianism,” *The Journal of Politics* 77, no. 3 (2015), 818-32.

Hall, Melinda Gann, “Electoral Politics and Strategic Voting in State Supreme Courts,” *The Journal of Politics* 54, no. 2 (1992), 427-46.

Hammond, Thomas H., Chris W. Bonneau, and Reginald S. Sheehan, *Strategic Behavior and Policy Choice on the US Supreme Court* (Stanford University Press, 2005).

Hanley, John, Michael Salamone, and Matthew Wright, “Reviving the Schoolmaster: Reevaluating Public Opinion in the Wake of *Roe v. Wade*,” *Political Research Quarterly* 65, no. 2 (2011), 408-21.

Harvey, Anna, and Barry Friedman, "Pulling Punches: Congressional Constraints on the Supreme Court's Constitutional Rulings, 1987–2000," *Legislative Studies Quarterly* 31, no. 4 (2006), 533-62.

Hasen, Richard L., "End of the Dialogue: Political Polarization, the Supreme Court, and Congress," *Southern California Law Review* 86 (2012), 101-55.

Hausegger, Lori, and Troy Riddell, "The Changing Nature of Public Support for the Supreme Court of Canada," *Canadian Journal of Political Science* 37, no. 1 (March 2004), 23-50.

Hettinger, Virginia A., and Christopher Zorn, "Explaining the Incidence and Timing of Congressional Responses to the US Supreme Court," *Legislative Studies Quarterly* 30, no. 1 (2005), 5-28.

Hoekstra, Valerie J., "The Supreme Court and Local Public Opinion," *American Political Science Review* 94, no. 1 (2000), 89-100.

Hoekstra, Valerie J., "The Supreme Court and Opinion Change: An Experimental Study of the Court's Ability to Change Opinion," *American Politics Quarterly* 23, no. 1 (1995), 109-29.

Hoekstra, Valerie J., and Jeffrey A. Segal, "The Shepherding of Local Public Opinion: The Supreme Court and Lamb's Chapel," *The Journal of Politics* 58, no. 4 (1996), 1079-1102.

Hoekstra, Valerie J., *Public Reaction to Supreme Court Decisions* (Cambridge, UK: Cambridge University Press, 2003).

Ignani, Joseph, and James Meernik, "Explaining Congressional Attempts to Reverse Supreme Court Decisions," *Political Research Quarterly* 47, no. 2 (June 1994), 353-71.

Johnson, Timothy R., and Andrew D. Martin, "The Public's Conditional Response to Supreme Court Decisions," *American Political Science Review* 92, no. 2 (1998), 299-309.

Kastellec, Jonathan P., Jeffrey R. Lax, and Justin H. Phillips, "Public Opinion and Senate Confirmation of Supreme Court Nominees," *The Journal of Politics* 72, no. 3 (2010), 767-84.

Kastellec, Jonathan P., Jeffrey R. Lax, Michael Malecki, and Justin H. Phillips, "Polarizing the Electoral Connection: Partisan Representation in Supreme Court Confirmation Politics," *The Journal of Politics* 77, no. 3 (2015), 787-04.

Kazyak, Emily, and Mathew Stange, "Backlash or a Positive Response? Public Opinion of LGB Issues after *Obergefell v. Hodges*" (2018),  
<https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1526&context=sociologyfacpub>.

Kearney, Joseph D., and Thomas W. Merrill, "The Influence of Amicus Curiae Briefs on the Supreme Court," *University of Pennsylvania Law Review* 148, no. 3 (2000), 743-855.



Keck, Thomas M., “Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights,” *Law and Society Review* 43, no. 1 (2009), 151-86.

Keck, Thomas M., *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism* (Chicago: University of Chicago Press, 2004).

King, Jeff, *Judging Social Rights* (Cambridge, UK: Cambridge University Press, 2012).

Klarman, Michael J., “Brown and Lawrence (and Goodridge),” *Michigan Law Review* 104 (2005), 431-90.

Klarman, Michael J., *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage* (Oxford: Oxford University Press, 2013).

Klarman, Michael J., “How Brown Changed Race Relations: The Backlash Thesis,” *The Journal of American History* 81, no. 1 (1994), 81-118.

Kreitzer, Rebecca J., Allison J. Hamilton, and Caroline J. Tolbert, “Does Policy Adoption Change Opinions on Minority Rights? The Effects of Legalizing Same-sex Marriage,” *Political Research Quarterly* 67, no. 4 (2014), 795-808.

Langer, Laura, and Paul Brace, “The Preemptive Power of State Supreme Courts: Adoption of Abortion and Death Penalty Legislation,” *Policy Studies Journal* 33, no. 3 (2005), 317-40.

Lasser, William, “The Supreme Court in Periods of Critical Realignment,” *The Journal of Politics* 47, no. 4 (1985), 1174-87.

Lindquist, Stefanie A., and Frank B. Cross, *Measuring Judicial Activism* (New York: Oxford University Press, 2009).

Link, Michael W., “Tracking Public Mood in the Supreme Court: Cross-Time Analyses of Criminal Procedure and Civil Rights Cases,” *Political Research Quarterly* 48, no. 1 (1995), 61-78.

Linos, Katerina, and Kimberly Twist, “The Supreme Court, the Media, and Public Opinion: Comparing Experimental and Observational Methods,” *The Journal of Legal Studies* 45, no. 2 (2016), 223-54.

Lynch, Kelly J., “Best Friends-supreme Court Law Clerks on Effective Amicus Curiae Briefs,” *The Journal of Law and Politics* 20 (2004), 33.

Marshall, Thomas R., *Public Opinion and the Supreme Court* (London: Unwin Hyman, 1989).

McCann, Michael W., “How Does Law Matter for Social Movements?” in Bryant G. Garth and Austin Sarat (eds.) *How Does Law Matter?* (Evanston, Illinois: Northwestern University Press, 1998), 76-108.

McGuire, Kevin T., and James A. Stimson, "The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences," *The Journal of Politics* 66, no. 4 (2004), 1018-35.

Meernik, James, and Joseph Ignagni, "Judicial Review and Coordinate Construction of the Constitution," *American Journal of Political Science* (1997), 447-67.

Meyer, David S., and Suzanne Staggenborg, "Movements, Countermovements, and the Structure of Political Opportunity," *American Journal of Sociology* 101, no. 6 (1996), 1628-60.

Mishler, William, and Reginald S. Sheehan, "Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-analytic Perspective," *The Journal of Politics* 58, no. 1 (1996), 169-200.

Mishler, William, and Reginald S. Sheehan, "The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions," *American Political Science Review* 87, no. 1 (March 1993), 87-101.

Mitchell, Terence R., and William G. Scott, "Leadership Failures, the Distrusting Public, and Prospects of the Administrative State," *Public Administration Review* 47, no. 6 (November-December 1987), 445-52.

Mondak, Jeffery J., "Policy Legitimacy and the Supreme Court: The Sources and Contexts of Legitimation," *Political Research Quarterly* 47, no. 3 (1994), 675-92.

Monroe, Alan D., "Public Opinion and Public Policy, 1980-1993," *Public Opinion Quarterly* 62, no. 1 (1998).

NeJaime, Douglas, "Constitutional Change, Courts, and Social Movements," *Michigan Law Review* 111 (2012), 877-902.

NeJaime, Douglas, "Winning Through Losing," *Iowa Law Review* 96 (2010), 941-1012.

Nicholson, Stephen P., and Thomas G. Hansford, "Partisans in Robes: Party Cues and Public Acceptance of Supreme Court Decisions," *American Journal of Political Science* 58, no. 3 (2014), 620-36.

Norpoth, Helmut, Jeffrey A. Segal, William Mishler, and Reginald S. Sheehan, "Popular Influence on Supreme Court Decisions," *American Political Science Review* 88, no. 3 (1994), 711-24.

O'Connor, Karen, and Lee Epstein, "Amicus Curiae Participation in US Supreme Court Litigation: An Appraisal of Hakman's Folklore," *Law and Society Review* 16 (1981), 311-20.

Owens, Ryan J., and Patrick C. Wohlfarth, "Public Mood, Previous Electoral Experience, and Responsiveness among Federal Circuit Court Judges," *American Politics Research* 45, no. 6 (2017), 1003-31.

Pinello, Daniel R., "Linking Party to Judicial Ideology in American Courts: A Meta-analysis," *The Justice System Journal* (1999), 219-54.

Rohde, David W., and Kenneth A. Shepsle, "Advising and Consenting in the 60-vote Senate: Strategic Appointments to the Supreme Court," *The Journal of Politics* 69, no. 3 (2007), 664-77.

Romero, Francine Sanders, "The Supreme Court and the Protection of Minority Rights: An Empirical Examination of Racial Discrimination Cases," *Law and Society Review* 34, no. 2 (2000), 291-313.

Roosevelt III, Kermit, *The Myth of Judicial Activism: Making Sense of Supreme Court Decisions* (New Haven: Yale University Press, 2006).

Rosenberg, Gerald N., "Romancing the Court," *Boston University Law Review* 89 (2009), 563-79.

Rosenberg, Gerald N., *The Hollow Hope: Can Courts Bring about Social Change?* (Chicago: University of Chicago Press, 2008).

Rudovsky, David, "Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights," *University of Pennsylvania Law Review* 138 (1989), 23-81.

Ryan J. Owens, "The Separation of Powers and Supreme Court Agenda Setting," *American Journal of Political Science* 54, no. 2 (2010), 412-27.

Salamone, Michael F., "Judicial Consensus and Public Opinion: Conditional Response to Supreme Court Majority Size," *Political Research Quarterly* 67, no. 2 (2014), 320-334.

Schultz, David, and Stephen E. Gottlieb, "Legal Functionalism and Social Change: A Reassessment of Rosenberg's *The Hollow Hope: Can Courts Bring about Social Change?*" *The Journal of Law and Politics* 12, no. 63 (1998), 63-91.

Segal, Jeffrey A., and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge, UK: Cambridge University Press, 2002).

Segal, Jeffrey A., Richard J. Timpone, and Robert M. Howard, "Buyer Beware? Presidential Success Through Supreme Court Appointments," *Political Research Quarterly* 53, no. 3 (2000): 557-573.

Selmi, Michael, "Interpreting the Americans with Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Did Not Care," *George Washington Law Review* 76 (2007), 522-75.

Smith, Miriam, "Social Movements and Judicial Empowerment: Courts, Public Policy, and Lesbian and Gay Organizing in Canada," *Politics and Society* 33, no. 2 (2005), 327-53.

Stimson, James A., Michael B. MacKuen, and Robert S. Erikson, "Dynamic Representation," *American Political Science Review* 89, no. 3 (1995), 543-65.

Stoutenborough, James W., Donald P. Haider-Markel, and Mahalley D. Allen, "Reassessing the Impact of Supreme Court Decisions on Public Opinion: Gay Civil Rights Cases," *Political Research Quarterly* 59, no. 3 (2006), 419-33.

Tankard, Margaret E., and Elizabeth Levy Paluck, "The Effect of a Supreme Court Decision Regarding Gay Marriage on Social Norms and Personal Attitudes," *Psychological Science* 28, no. 9 (2017), 1334-44.

Tyler, Tom R., and Gregory Mitchell, "Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights," *Duke Law Journal* 43, no.4 (1993), 703-815.

Ura, Joseph Daniel, "Backlash and Legitimation: Macro Political Responses to Supreme Court Decisions," *American Journal of Political Science* 58, no. 1 (2014), 110-26.

Ura, Joseph Daniel, "The Supreme Court and Issue Attention: The Case of Homosexuality," *Political Communication* 26, no. 4 (2009), 430-46.

Wefing, John B., "The New Jersey Supreme Court 1948-1998: Fifty Years of Independence and Activism," *Rutgers Law Journal* 29 (1997), 701.

Wetstein, Matthew E., C. L. Ostberg, Donald R. Songer, and Susan W. Johnson, "Ideological Consistency and Attitudinal Conflict: A Comparative Analysis of the US and Canadian Supreme Courts," *Comparative Political Studies* 42, no. 6 (2009), 763-92.

Wise, Andrew, "The Role of Public Opinion: Judicial Decision Making on Gay Rights Cases" (2019), [https://scholar.colorado.edu/cgi/viewcontent.cgi?article=3206&context=honr\\_theses](https://scholar.colorado.edu/cgi/viewcontent.cgi?article=3206&context=honr_theses).

Wlezien, Christopher B., and Malcolm L. Goggin, "The Courts, Interest Groups, and Public Opinion about Abortion," *Political Behavior* 15, no. 4 (1993), 381-405.

Zilis, Michael, *The Limits of Legitimacy: Dissenting Opinions, Media Coverage, and Public Responses to Supreme Court Decisions* (Ann Arbor: University of Michigan Press, 2015).

Zink, James R., James F. Spriggs, and John T. Scott, "Courting the Public: The Influence of Decision Attributes on Individuals' Views of Court Opinions," *The Journal of Politics* 71, no. 3 (2009), 909-25.