DOES PUBLIC OPINION INFLUENCE THE
SUPREME COURT? POSSIBLY YES
(BUT WE'RE NOT SURE WHY)

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INTRODUCTION

Using qualitative data and historical methods, Barry Friedman asserts with confidence that "we the people" influence the decisions of the U.S. Supreme Court.[1] Using quantitative data and statistical methods, political scientists are not so sure. Despite their best efforts to validate basic claims about the effect of public opinion on the Court, the evidence remains mixed at best.[2]

We enter this dialogue but in a voice distinct from existing political science work. Rather than explore the relationship between the public and the Court on a term-by-term basis, we analyze it at the level of the case. This allows us to exploit more nuanced public opinion data, as well as to attend to the many other case-level factors that may influence the Court's decisions.

Based on our analysis, we are prepared to say that Professor Friedman is on to something. When the "mood of the public" is liberal (conservative), the Court is significantly more likely to issue liberal (conservative) decisions. But why is anyone's guess. Professor

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[1] The full title of Professor Friedman's book tells the story. BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 14 (2009) (stating that the decisions of the Supreme Court on contentious issues align with popular approval and public understanding of the Constitution).

[2] *See infra* Part II.

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Friedman posits that the Justices will bend to the will of the people because the Court requires public support to remain an efficacious branch of government. Our analysis could be read to support this view, but it is equally consistent with another mechanism: that "the people" include the Justices. On this account, the Justices do not respond to public opinion directly, but rather respond to the same events or forces that affect the opinion of other members of the public.[3] Or, as Cardozo once stated, "[t]he great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by."[4]

Our study proceeds as follows. In Part II, we briefly review the extant literature, emphasizing the similar methodology it invokes but the varying conclusions it reaches. Parts III and IV describe our methods and findings. We end, in Part V, with the implications of our statistical work for Professor Friedman's claims, as well as for future research assessing the Court's response to public opinion.

II. THE EXISTING LITERATURE

Professor Friedman's book is only the last in a long and distinguished line of research evaluating the link between the public and the courts. Much, perhaps most, of the work in the social sciences has explored the flipside of Professor Friedman's interest: the extent to which Court decisions affect (or "move") public opinion.[5] But

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3   The debate between these two accounts has a long history in the political science literature. *Compare* Beverly B. Cook, *Public Opinion and Federal Judicial Policy*, 21 AM. J. POL. SCI. 567, 574 (1977) (showing that federal judges were more lenient with Vietnam War draft offenders as public opinion toward the war grew increasingly negative), *with* Herbert M. Kritzer, *Federal Judges and Their Political Environments: The Influence of Public Opinion*, 23 AM. J. POL. SCI. 194, 195–98 (1979) (showing that changes in severity of sentencing did not move in the same way as changes in public opinion, possibly reflecting "the judges' own doubts about the war" rather than a direct response to public opinion). *See generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 424–25 (2002) (explaining that while it is unsurprising that Supreme Court decisions generally correspond with public opinion, it is difficult to determine whether public opinion directly influences the Court).

4   BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 168 (1921).

5   The classic work is Charles H. Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751, 768 (1989) (finding that the Court's decisions have an impact on the public, but that the impact manifests itself as both increased support and increased opposition for the position taken by the Court's majority). For recent research, see, e.g., Brandon L. Bartels & Diana C. Mutz, *Explaining Processes of Institutional Opinion Leadership*, 71 J. POL. 249, 259 (2009), reporting experimental evidence that an endorsement from the Court affected respondents' opinions about particular public policy issues; Mark D. Ramirez, *Procedural Perceptions and Support for the U.S. Supreme Court*, 29 POL. PSYCHOL. 675, 676 (2008), arguing that positive me-

there is no shortage of quantitative (and multivariate) work address-ing directly the question of whether the public *influences* the Court. Rather than waste space with lengthy descriptions of each paper, we summarize the key results in Table 1. We limit our list to studies of the U.S. Supreme Court, the focus of Professor Friedman's book.[6]

TABLE 1

SUMMARY OF NOTABLE MULTIVARIATE STUDIES ON THE EFFECT OF PUBLIC OPINION ON THE DECISIONS OF THE SUPREME COURT OR INDIVIDUAL JUSTICES

Author (Year)	Description of Methods and Key Findings
Clark (2009)[7]	Examines the number of federal laws struck down by the Court each term; finds that as public support for the Supreme Court declines, the Court strikes down fewer laws.

dia coverage increases support for the Court; James W. Stoutenborough, and Donald P. Haider-Markel & Mahalley D. Allen, *Reassessing the Impact of Supreme Court Decisions on Public Opinion: Gay Civil Rights Cases*, 59 POL. RES. Q. 419, 430 (2006), asserting that the Court is able to legitimate controversial policies. *See also* Valerie J. Hoekstra, *The Supreme Court and Local Public Opinion*, 94 AM. POL. SCI. REV. 89, 91, 97 (2000) (relaying the ability of particular Court decisions to affect overall evaluations of the Court in the geographic areas that gave rise to the case).

6   Studies of other federal judges include Cook, *supra* note 3, at 574; Kritzer, *supra* note 3, at 195–98. There are also studies of state court judges. These are more uniform in their re-sults, tending to confirm the obvious: that (elected) state court judges must consider their constituents' preferences to keep their jobs. *See, e.g.,* Steven P. Croley, *The Majori-tarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 696–97, 788 (1995) (criticizing elective judiciaries because they respond to majoritarian political pres-sures); James H. Kuklinski & John E. Stanga, *Political Participation and Government Respon-siveness: The Behavior of California Superior Courts*, 73 AM. POL. SCI. REV. 1090, 1093 (1979) (explaining findings that California superior courts less in line with public opinion showed adjustments in their decisions); Alexander Tabarrok & Eric Helland, *Court Poli-tics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 187 (1999) (indicating that elected judges rule according to popular views because they wish to be re-elected). Fi-nally, a growing number of scholars are exploring the relationship between public senti-ment and judicial decisions in courts outside the United States. Along these lines, we commend JEFFREY K. STATON, JUDICIAL POWER AND STRATEGIC COMMUNICATION IN MEXICO 3–4 (2010). Staton documents the Mexican Supreme Court's "coordinated and aggressive" public relations campaign to create public support. He also shows that courts throughout the world publicize their decisions, issue press releases, and maintain websites describing their procedures and publishing their cases and biographies of their members.

7   Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971, 985 (2009).

Giles et al. (2008)[8]	Explores the percentage of liberal votes cast by each Justice each term; finds that public opinion exerts only a small effect and that it operates on "as few as 20%" of the Justices serving between 1956 and 1999.
McGuire & Stimson (2004)[9]	Analyzes the percentage of liberal decisions each term in cases in which the Court reverses the court below; shows that the public's mood affects the percentage even after controlling for ideology.
Flemming & Wood (1997)[10]	Analyzes the percentage of liberal votes cast by each Justice each term; shows that the Court's composition accounts for most of the variation, but that the public's mood also exerts a small (though significant and quick) effect on most Justices in the majority of legal areas under analysis.
Mishler & Sheehan (1996)[11]	Considers the percentage of liberal votes cast by each Justice each term; finds that some moderate Justices respond to the public mood and concludes that it "shapes the subjective norms of individual justices thereby potentially influencing their decisions."[12]
Stimson et al. (1995)[13]	Analyzes the ideological direction of decisions each term; unearths some responsiveness to the mood of the public, but the effect nearly disappears when controlling for the Court's composition.
Link (1995)[14]	Examines the percentage of liberal decisions each

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8   Micheal W. Giles, Bethany Blackstone & Richard L. Vining, Jr., *The Supreme Court in American Democracy: Unraveling the Linkages Between Public Opinion and Judicial Decision Making,* 70 J. POL. 293, 296, 303 (2008).

9   Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences,* 66 J. POL. 1018, 1033 (2004).

10   Roy B. Flemming & B. Dan Wood, *The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods,* 41 AM. J. POL. SCI. 468, 474, 482 (1997).

11   William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective,* 58 J. POL. 169, 180 (1996).

12   *Id.* at 174.

13   James A. Stimson, Michael B. MacKuen & Robert S. Erikson, *Dynamic Representation,* 89 AM. POL. SCI. REV. 543, 552, 556 (1995).

	term in criminal procedure and race cases; finds that the public's mood, to greater and lesser extents (and with some lags), has a direct effect on Court decisions.
Norpoth & Segal (1994)[15]	Reexamines Mishler & Sheehan's 1993 study; finds that any change in the direction of the Court's decisions was due to an "indirect model" of public influence in which "popularly elected presidents, through new appointments, affect the ideological composition of the Court."[16]
Mishler & Sheehan (1993)[17]	Explores the percentage of liberal decisions each term; finds that (lagged) public mood influences Court's decisions both indirectly (through composition changes) and directly; claims that the Justices "are broadly aware of fundamental trends in the ideological tenor of public opinion, and . . . at least some justices, consciously or not, may adjust their decisions at the margins to accommodate such fundamental trends."[18]

Two features of the studies in Table 1 stand out: their common methodology and their mixed findings. Both deserve some elaboration.

A. *Common Methods*

As even a cursory glance at Table 1 reveals, the studies tend to follow the same methodological approach to answer the question of whether public opinion influences the Court. They begin by calculating the percentage of liberal decisions (or votes) that the Court (an individual Justice) reaches each term—or, in the jargon of social science, by aggregating decisions (votes) on a term-by-term basis. Figure 1 provides an example.

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14 Michael W. Link, *Tracking Public Mood in the Supreme Court: Cross-Time Analyses of Criminal Procedure and Civil Rights Cases*, 48 POL. RES. Q. 61, 67, 75 (1995).

15 Helmut Norpoth & Jeffrey A. Segal, Comment, *Popular Influence on Supreme Court Decisions*, 88 AM. POL. SCI. REV. 711, 711 (1994).

16 *Id.*

17 William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 90, 96 (1993).

18 *Id.* at 89.

FIGURE 1. PERCENTAGE OF LIBERAL DECISIONS, 1953–2008 TERMS

Term
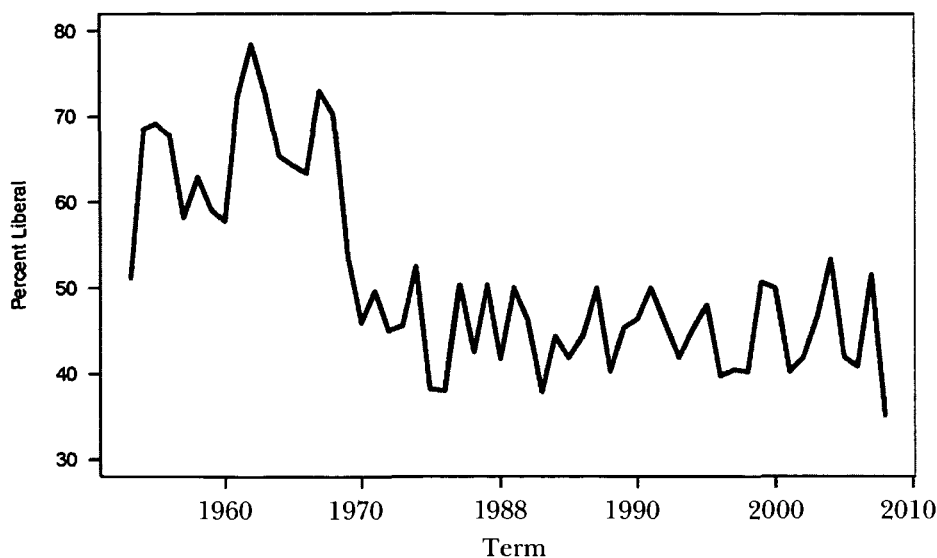
Because almost all the authors use the U.S. Supreme Court Database to categorize decisions as liberal or conservative (as do we in Figure 1), their definitions of ideology do not vary much. Where differences emerge are in the types of cases they include in their study. For example, some studies analyze only a few areas of the law;[19] one focuses on reversals;[20] and another separates the cases into "salient" and "non-salient" categories.[21] Figure 1 is a generic depiction of the percentage, using all cases decided between the 1953–2008 terms.[22] (As an aside, readers should take care in interpreting Figure 1 or any other display based on "percent liberalism" because the types of cases the Justices agree to hear and decide in a given term will affect the percentage.)

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19   *See, e.g.,* Link, *supra* note 14, at 67 (examining only criminal procedure and civil rights cases). Others analyze separately particular areas of the law or control for areas in the analysis. *See, e.g.,* Flemming & Wood, *supra* note 10, at 485–92 (evaluating whether specific issue areas impacted judicial responsiveness to public opinion); McGuire & Stimson, *supra* note 9, at 1025 (reflecting case outcome types for distinct issue areas).

20   McGuire & Stimson, *supra* note 9, at 1019.

21   Giles, Blackstone & Vining, *supra* note 8, at 296.

22   The percentage was calculated using the U.S. Supreme Court Database, THE SUPREME COURT DATABASE, http://supremecourtdatabase.org (last visited Oct. 7, 2010) (cases organized by citation), and orally argued cases (decisionType = 1 or 6 or 7) in which the direction of the decision is liberal or conservative (i.e., we omit the 60 cases coded as "unspecifiable").

The percentage of liberal decisions (votes) per term is the dependent variable in the studies (i.e., what the authors are trying to explain). The key independent variable is, of course, public opinion. In other words, the authors are interested in determining whether a more liberal public leads the Court (or the individual Justices) to produce more liberal decisions (votes) each term, all else being equal. To measure public opinion, the studies typically rely on Stimson's indicator of "public mood."[23] Computed by analyzing survey responses to a range of questions with a sophisticated dynamic factor analysis model, the indicator is a single number summarizing the mood of the public along a liberal-conservative dimension. Although Stimson calculates his measure on a quarterly basis, the articles in Table 1 use an annual indicator of mood because their dependent variable (percentage liberalism) is also aggregated (though usually to the term rather than the year). Figure 2 displays this annual version.

FIGURE 2. STIMSON'S ANNUAL MEASURE OF THE "PUBLIC MOOD," 1953-2008

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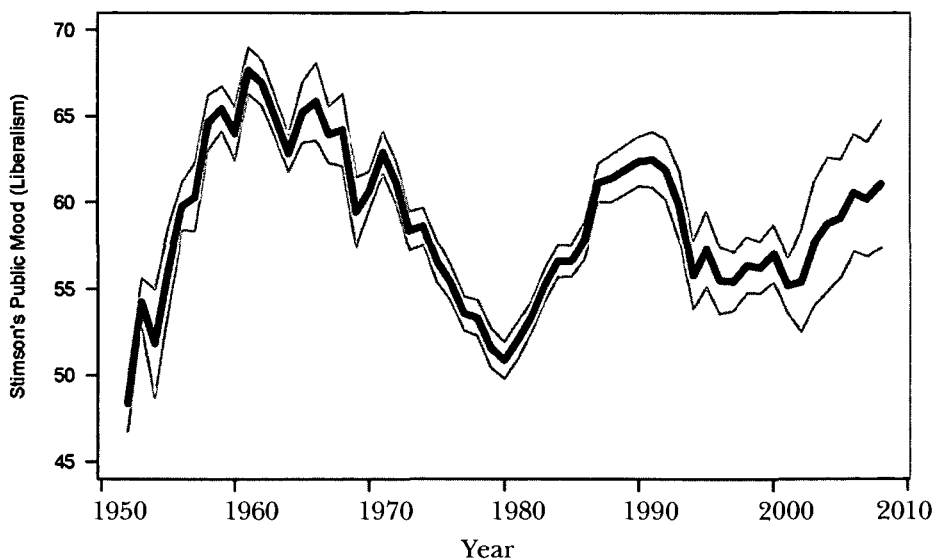
23   JAMES A. STIMSON, PUBLIC OPINION IN AMERICA: MOODS, CYCLES, AND SWINGS (2d ed. 1999). Updated at James A. Stimson, *Time Series*, UNIV. OF N.C. AT CHAPEL HILL, http://www.unc.edu/~jstimson/time.html.

B. *Mixed Findings*

The final step in most of the studies in Table 1 is to analyze whether the annual public mood measure explains term-by-term variation in the Court's (Justices') liberal decisions (votes), while controlling for other factors that also might affect the percentage of liberal decisions (votes) each term. These other factors almost always include a measure of the Court's ideology but otherwise tend to vary from study to study.[24]

Also varying from study to study are the results, though perhaps it is worth starting with a common finding: virtually all the studies demonstrate an *indirect* effect of public opinion via the appointments process. That is, they tend to show that changes in the Court's composition can lead to a higher or lower percentage of liberal decisions each term. Political scientists deem this "indirect" because the public does not directly affect the percentage of liberal decisions; its role comes in electing the President and the Senate, who appoint and confirm Justices reflecting the public's preferences.[25] Accordingly, "the ideological orientation of the Court generally corresponds to the attitudes of the electorate"[26] and the ruling regime.

The more controversial matter is whether the public *directly* influences Court decisions (as Friedman claims). The answers from the existing literature, as Table 1 suggests, run the gamut. Perhaps the strongest supporters of a direct, causal link between public mood and Court decisions, McGuire and Stimson, are as unequivocal as Friedman: "[P]ublic opinion is a powerful influence on the decisions of the Supreme Court. . . . [The evidence shows that] a system of popular representation is alive and well in the Supreme Court."[27] In direct juxtaposition comes Norpoth and Segal's famous reanalysis of Mishler & Sheehan's 1993 study, in which they declare that "contrary to

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24   *E.g.*, Flemming & Wood, *supra* note 10, at 468 (controlling for different areas of the law); Giles, Blackstone & Vining, *supra* note 8, at 296 (distinguishing salient and non-salient cases); Link, *supra* note 14, at 69–70 (controlling for the preferences of Congress and the President).

25   Justice Antonin Scalia put it this way: "Ultimately, the [J]ustices of the Court are taken from the society, . . . and however impartial they may try to be, they are going to bring with them those societ[al] attitudes." DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 343 (5th ed. 2000) (alteration in original).

26   McGuire & Stimson, *supra* note 9, at 1020; *see also* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 293 (1957) (arguing that the Supreme Court supports the major policies of the dominant political power because doing otherwise risks undermining its own legitimacy if its rulings are not enforced).

27   McGuire & Stimson, *supra* note 9, at 1033.

Mishler and Sheehan, [we find] no evidence for a direct path of influence from public opinion to Court decisions."[28] Charting a more moderate course are those scholars who identify some "direct" but relatively small effect. Stimson et al., fall into this category:

> Norpoth and Segal (1994) argue that the role of public opinion on Court decisions is wholly indirect through the election-nomination-confirmation process. Mishler and Sheehan (1993, 1994) claim a direct public opinion influence. Our results, with similar data but quite different model specification, leave us in the middle of this debate. We believe there is a trace of influence for both processes, but our results are too weak to leave us confident about the matter.[29]

III. OUR STUDY

Although the studies listed in Table 1 are thoroughly professional efforts, published in top disciplinary journals, features of their research design raise some red flags. Of particular concern is that they cannot incorporate controls at the case level because they aggregate by term. To provide but one example: we know that the Justices tend to reverse the decisions of the court below (usually a U.S. court of appeals).[30] To account for this tendency, researchers modeling the ideological direction of the Court's decisions (liberal or conservative) almost always incorporate a variable encoding the direction of the lower court's decision (liberal or conservative).[31] The idea is that even a very liberal (conservative) Supreme Court would be inclined to reverse a liberal (conservative) lower court decision given the majority's general propensity to reverse.

It is easy to add this variable if the study models decisions on a case-by-case basis; it is impossible to do so if the study models decisions on a term-by-term basis—as the existing public opinion research does—without running the risk of ecological fallacy. The same holds for many other covariates of Court decisions. Although some are annual (such as the ideology of the median Justice), others are not, including the issue area and the parties. Aggregating by term is not

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28   Norpoth & Segal, *supra* note 15, at 711.

29   Stimson, MacKuen & Erikson, *supra* note 13, at 556.

30   Between the 1953 and 2008 terms, the Court ruled for the petitioner in 64% of the 6286 orally argued cases in which the Supreme Court Database specifies the direction of the decision and a winning party. THE SUPREME COURT DATABASE, *supra* note 22.

31   *See, e.g.*, SEGAL & SPAETH, *supra* note 3; Lee Epstein et al., *Circuit Effects: How the Norm of Federal Judicial Experience Biases the Supreme Court*, 157 U. PA. L. REV. 833, 872 (2009) ("controlling for the ideological direction of the lower court's decision" in an analysis of the effects of Justices' circuit court experience).

even an especially good strategy for considering the effect of the public's mood on the Court because it fails to exploit Stimson's quarterly data.

For these reasons, our analysis of Friedman's thesis proceeds at the case level. The dependent variable is the ideological direction of each decision in all orally argued cases between 1958 and 2008[32]— and not the percentage liberal each term. That is, we intend to study the decisions in 5,675 cases, rather than a single percentage in 50 terms.

By "ideological direction," we mean the direction of the decision (liberal or conservative), as coded by the U.S. Supreme Court Database, the same source most of the other public opinion studies use.[33] The database's classifications generally comport with conventional understandings. "Liberal" decisions are those in favor of defendants in criminal cases; of women and minorities in civil rights cases; of individuals against the government in First Amendment, privacy, and due process cases; of unions over individuals and individuals over businesses in labor cases; and of the government over businesses in cases involving economic regulation. "Conservative" decisions are the reverse. Table 2 provides basic summary information about this variable (and all others in our analysis).

TABLE 2

Summary Statistics (N=5675)

Variable	Description	Mean (Std. Dev.)
Dependent Variable		
Direction of Decision	Whether the Court reached a liberal (=1) or conservative (=0) decision	0.501 (0.500)
Key Independent Variable		
Public Mood	Stimson's quarterly measure of public mood (the higher the score, the more liberal the public)	61.062[34] (4.628)

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32 Quarterly public mood data begin with the fourth quarter of 1958 (covering all but two cases in the 1958 term) through the fourth quarter of 2008 (covering only four cases of the 2008 term).

33 THE SUPREME COURT DATABASE, *supra* note 22.

34 The minimum is 51.363; the maximum is 74.18.

Control Variables		
Direction of the Lower Court Decision	Whether the court whose decision the Supreme Court reviewed reached a liberal (=1) or conservative (=0) decision	0.463 (0.499)
Ideology of the Supreme Court	Martin & Quinn's estimate of the ideology of the median justice (the higher the score, the more conservative the median)	0.364[35] (0.495)
U.S. Liberal Party	Whether the United States (or an agency), as petitioner or respondent, argued for a liberal decision (=1) or not (=0)	0.065 (0.247)
U.S. Conservative Party	Whether the United States (or an agency), as petitioner or respondent, argued for a conservative decision (=1) or not (=0)	0.134 (0.340)
Civil Liberties	Civil Liberties case (=1) or not (=0)[36]	0.549 (0.498)
Economics	Economics case (=1) or not (=0)[37]	0.275 (0.446)
Judicial Power	Judicial power case (=1) or not (=0)	0.129 (0.335)
Federalism	Federalism case (=1) or not (=0)	0.048 (0.214)
Ideology of the	Poole's Common Space score (the	-0.211[38]

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[35] The minimum is -.85; the maximum is 1.027.

[36] The Civil Liberties category includes Criminal Procedure, Civil Rights, First Amendment, Due Process, Privacy, and Attorneys (i.e., "issueArea" = 1, 2, 3, 4, 5, 6) in the U.S. Supreme Court Database. THE SUPREME COURT DATABASE, *supra* note 22.

[37] The Economics category includes Unions, Economic Activity, and Taxation (i.e., "issueArea" = 7, 8, 12) in the U.S. Supreme Court Database. THE SUPREME COURT DATABASE, *supra* note 22.

President	higher the score, the more conservative the President)	(0.519)
Ideology of the House	Poole's Common Space score (the higher the score, the more conservative the House)	0.057[39] (0.114)
Ideology of the Senate	Poole's Common Space score (the higher the score, the more conservative the Senate)	0.069[40] (0.106)

The independent variable of primary interest is Stimson's quarterly public mood measure. Because lower scores are more conservative, we expect this variable to be positively related to the direction of the decision. In other words, if Friedman is right and public opinion influences the Court, then the more liberal the public mood, the higher the likelihood of a liberal decision.

Finally, we include in the model a host of variables that might also affect the Court's decision (see Table 2). Seven are case-level variables: the direction of the lower court's decision, the side represented by the U.S. government (if it was a party to the suit, liberal or conservative), and four issue dummies ("Federalism" is the omitted category in the model). Given the Court's tendency to reverse (and our coding of the relevant variables), we expect the direction of the lower court decision to be negatively related to the Court's decision. As for the U.S. government, the existing literature suggests that the side it represents will prevail more often than not.[41] If so, "U.S. Lib-

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38   The minimum is -.724; the maximum is .503.

39   The minimum is -.226; the maximum is .194.

40   The minimum is -.199; the maximum is .183.

41   *See, e.g.,* REBECCA MAE SALOKAR, THE SOLICITOR GENERAL: THE POLITICS OF LAW 145 (1992) ("[B]etween 1959 and 1986. . . . [t]he party that the government supported with an amicus brief won 71.9 percent of the time."); JEFF YATES, POPULAR JUSTICE: PRESIDENTIAL PRESTIGE AND EXECUTIVE SUCCESS IN THE SUPREME COURT 96 (John Kenneth White ed., 2002) (noting the "overwhelmingly successful record" the solicitor general has before the Court); *see also* RICHARD L. PACELLE, JR., BETWEEN LAW AND POLITICS: THE SOLICITOR GENERAL AND THE STRUCTURING OF RACE, GENDER, AND REPRODUCTIVE RIGHTS LITIGATION 5 (James P. Pfiffner ed., 1st ed. 2003) ("The Court . . . grants a higher percentage of the solicitor general's petitions and the government is more successful on the merits than any other litigant."); ROBERT SCIGLIANO, THE SUPREME COURT AND THE PRESIDENCY 177 (Samuel Krislov ed., 1971) ("Throughout its history the United States has won most of its cases in the Supreme Court."); Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making,* 86 AM. POL. SCI. REV. 323, 325 (1992) ("[W]e have several reasons to suspect that Congress and the [P]resident affect Supreme Court decision making . . . ."); Jeffrey A. Segal & Cheryl Reedy, *The Supreme Court and Sex Discrimina-*

eral Party" should be positively signed; "U.S. Conservative Party" should be negatively signed.

This leaves the four term-level covariates, all of which attempt to assess the ideology of the various branches of government. For the U.S. House of Representatives, the U.S. Senate and the U.S. President, we use Poole's Common Space scores. These reflect roll call votes in each House or, in the case of the President, his position on bills before Congress.[42]

We measure the Court's ideology using Martin and Quinn's ideal point estimate of the median Justice each term.[43] The Martin and Quinn measure is also based on votes—all those cast by the Justices in non-unanimous cases. Table 2 supplies summary statistics on all four measures of ideology; Figure 3 depicts them over time.

FIGURE 3. IDEOLOGY OF THE THREE BRANCHES OF GOVERNMENT

3a. The Senate, House, and President

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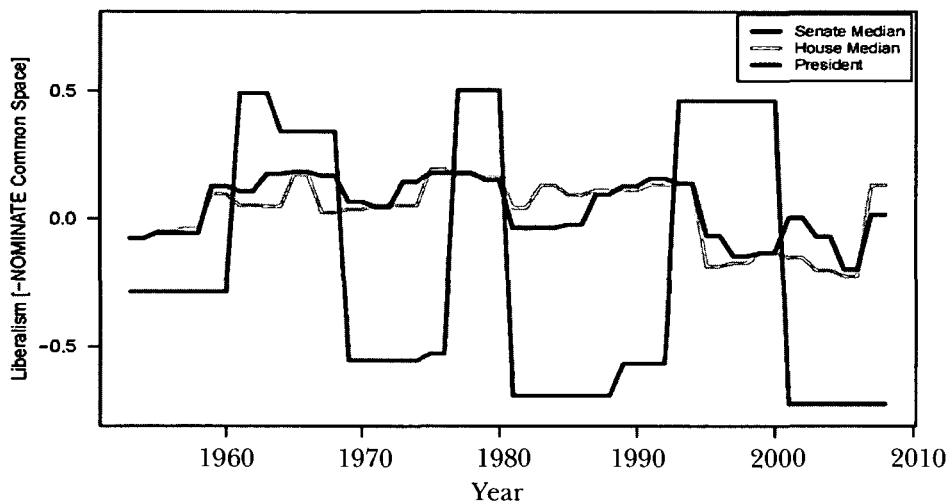
tion: The Role of the Solicitor General, 41 POL. RES. Q. 553, 555–56 (1988) ("[T]he Supreme Court is responsive to the executive branch of government through its support for the solicitor general.").

42   VOTEVIEW.COM, http://voteview.com/ (last visited Oct. 7, 2010); *see also* KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING 7 (1997) (analyzing the dynamics of roll call voting using a liberal/conservative structure).

43   MARTIN-QUINN SCORES, http://mqscores.wustl.edu/ (last visited Sep. 22, 2010); *see* Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 152 (2002) (investigating judicial preferences and finding that ideal points of many Justices change over time).

3b. *The Court*
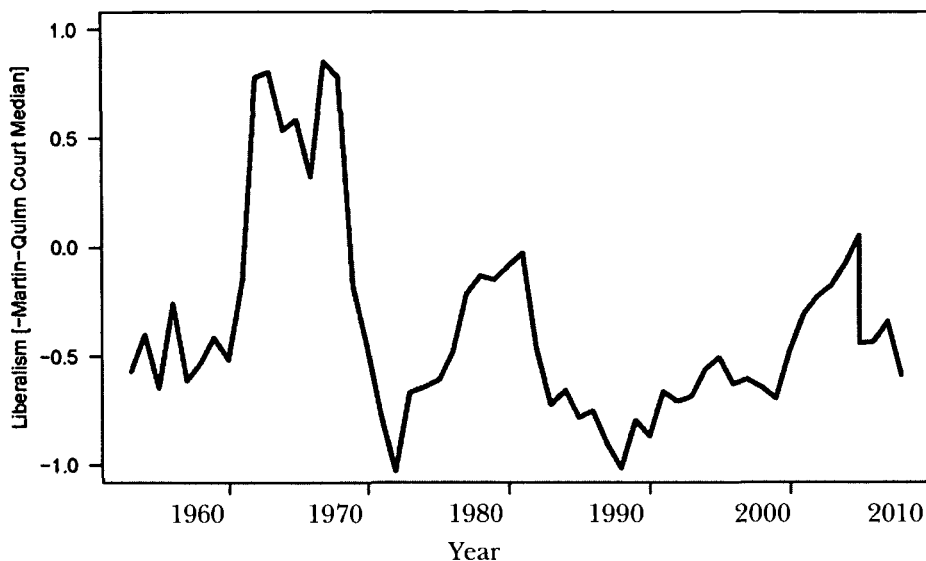
Under Poole's and Martin and Quinn's coding schemes, the lower the ideology score, the more liberal the branch. Hence, if these variables affect the Court's decision, we expect negatively signed coefficients (i.e., the lower the score, the higher the likelihood of a liberal decision).

IV. RESULTS

To assess the effect of the public's mood on the ideological direction of the Court's decision, we use logistic regression (with various robustness checks).[44] Table 3 displays the results. Note that we cluster the observations by term, which helps account for any term-to-term correlations in the data (and results in higher standard errors).

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44   For example, we reestimated the model using a random effects logistic regression. The results are virtually identical to those displayed in Table 3. Most importantly, the coefficient on *Public Mood (Quarterly)* remains statistically significant (.023, with a standard error of .007).

TABLE 3 RESULTS OF REGRESSING THE DIRECTION OF THE COURT'S DECISION (1=LIBERAL; 0=CONSERVATIVE) ON THE PUBLIC MOOD AND OTHER COVARIATES

Variable	Coefficient	(Standard Error)
Public Mood (Quarterly)	0.023	(0.008)
Direction of the Lower Court Decision	-1.041	(0.070)
Ideology of the Supreme Court	-0.547	(0.049)
U.S. Liberal Party	0.316	(0.131)
U.S. Conservative Party	-0.757	(0.095)
Civil Liberties	-0.287	(0.134)
Economics	-0.033	(0.135)
Judicial Power	-1.015	(0.148)
Ideology of the President	0.017	(0.056)
Ideology of the House	-0.140	(0.331)
Ideology of the Senate	0.283	(0.412)
Intercept	-0.367	(0.459)

Note: Robust standard errors reported, clustered by term. Italicized variables are statistically significant at the α =0.05 level. Federalism is the omitted category. N=5675.

Beginning with the primary variable of interest, *Public Mood (Quarterly)*, we find support for Friedman's basic claim. The coefficient is statistically significant and positively signed, indicating that the more liberal the public mood, the higher the likelihood of a liberal decision.

But how much higher? Keeping in mind that the Court usually takes cases to reverse,[45] the predicted probability of a liberal decision is .59[46] when the Justices review a conservative lower court decision and the public mood is very conservative.[47] If the public mood is very liberal, the probability jumps to .71.[48] Alternatively, if the Court reviews a liberal lower court decision when the public is very conservative, the probability that it will affirm (i.e., reach a liberal decision) is just .33,[49] but it increases to .46[50] when the public is very liberal. Figure 3 shows the predicted probabilities in between these extremes, along with the 95% confidence intervals.

45   *See* THE SUPREME COURT DATABASE, *supra* note 22.
46   The 95% confidence interval is [.54, .63].
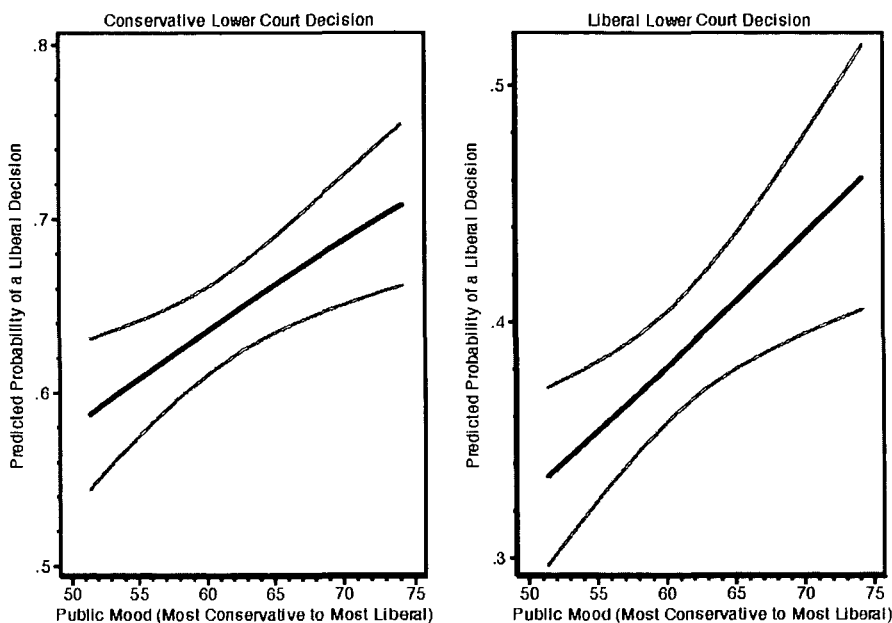47   All other variables are set at their mean or mode.
48   The 95% confidence interval is [.66, .75].
49   The 95% confidence interval is [.30, .37].
50   The 95% confidence interval is [.41, .52].

FIGURE 4. PREDICTED PROBABILITY OF A LIBERAL DECISION IN A CIVIL
LIBERTIES CASE AS THE PUBLIC MOOD MOVES FROM VERY
CONSERVATIVE TO VERY LIBERAL

Note: This figure is based on the model in Table 2. The black lines indicate the predicted probabilities in civil liberties cases and the gray lines shows 95% confidence intervals. To generate these quantities of interest, we used S-Post. *Civil Liberties* is set at 1. All other variables are set at their means (*Ideology of the Supreme Court, Ideology of the President, Ideology of the House, Ideology of the Senate*) or at their mode, which is 0 (*U.S. Liberal Party, U.S. Conservative Party, Economics, Judicial Power*).

Whether the difference in the predicted probabilities displayed in Figure 3 is large or small is a question readers must answer for themselves. For what it's worth, we think they are large—actually quite large—given that we control for many other variables that have an appreciable effect on the direction of the Court's decisions.

The ideology of the Court, as represented in our model by the ideal point of the median Justice, provides an example. Table 3 tells us that the effect is statistically significant, such that the more conservative the median, the less likely a liberal decision, and Figure 4 reveals that the effect is quite dramatic. All else being equal, the likelihood of the Court reversing a conservative lower court decision (i.e., reaching a liberal decision) when the median Justice is very liberal is

a high .78.[51] The likelihood plummets to .55 when the median is very conservative.[52]

FIGURE 5. PREDICTED PROBABILITY OF A LIBERAL DECISION IN A CIVIL
LIBERTIES CASE AS THE MEDIAN JUSTICE MOVES FROM MOST
CONSERVATIVE TO MOST LIBERAL

Note: This figure is based on the model in Table 2. The black line indicates the predicted probabilities in civil liberties cases and the gray line shows 95% confidence intervals. To generate these quantities of interest, we used S-Post. *Civil Liberties* is set at 1 and the *Direction of the Lower Court Decision* is conservative. All other variables are set at their means (*Public Mood, Ideology of the Supreme Court, Ideology of the President, Ideology of the House, Ideology of the Senate*) or at their mode, which is 0 (*U.S. Liberal Party, U.S. Conservative Party, Economics, Judicial Power*).

This finding is not especially surprising. On most realist theories of judging—especially judging on the Supreme Court—the Justices' ideology affects their decisions. What is surprising is that even after taking into account ideology, *Public Mood* continues to be a statistically significant and seemingly non-trivial predictor of outcomes (see Table 3 and Figure 4).

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51   The 95% confidence interval is [0.75, 0.81].
52   The 95% confidence interval is [0.53, 0.58].

IV. DISCUSSION

No doubt, our results should encourage Professor Friedman and others who believe that "the Court and the public will come into basic alliance with each other."[53] At the least, our results indicate that an association exists between the public's mood and the Court's decisions.

Whether that association is something more—whether public opinion "influences" the Court, as the subtitle of Professor Friedman's book asserts—we cannot say. This is so for two reasons. First, despite our efforts to control for the more obvious determinants of the Court's decisions, our statistical model undoubtedly misses some important variables. One indication of under-specification comes from our own model. When we reestimated it, retaining the main effects of *Public Mood (Quarterly)* and the issue area dummies but interacting *Mood* with the issues, we found that public opinion was not a good predictor of the outcome in Judicial Power cases. Because litigation in this area tends to fly under the public's radar screen, the (non-)result implies the need to control for the importance of each case.[54] Future research could take this step by deploying any number of measures of salience, including the Epstein-Segal "*New York Times*" approach,[55] the number of participating amici,[56] or even future citations to the opinion.[57]

A second reason we are unwilling to make the leap from association to causality is we have neither posited nor tested a mechanism for the effect of public opinion on the Court. Certainly, Professor

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53   FRIEDMAN, *supra* note 1, at 15.

54   *But see* Giles, Blackstone & Vining *supra* note 8, at 15 (finding that "the effects of public opinion on liberalism appear to be consistently less in salient cases" because "case salience may actually intensify the operation of [the Justices' own ideological] preferences").

55   Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66, 72 (2000) (measuring issue salience by whether the *New York Times* carried a front page story about the case).

56   FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL J. WAHLBECK, CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME 46 (2000) (measuring political salience by "determin[ing] whether a case had more amici filings than the average case heard during a term").

57   *See, e.g.*, James H. Fowler et al., *Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court*, 15 POL. ANALYSIS 324, 326 (2007) ("It . . . seems reasonable to determine how relevant a particular opinion is by considering how it is embedded in the broader network of opinions compromising the law."); Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis* 14 (John M. Olin Law & Econ., Working Paper No. 510, 2d series, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542834 ("We proxy importance by the number of Supreme Court and court of appeals citations to the opinion.").

Friedman and others could be right: the public has a direct influence on the Court because the Justices are concerned about their legitimacy in the short and long-terms. But it is equally plausible, as Flemming and Wood explain, that the Justices are simply "social beings confronted with the plethora of stimuli emanating from American culture, media and politics."[58] In other words, the same things that influence public opinion may influence the Justices, who are, after all, members of the public too.

Until we can behaviorally distinguish and assess these and other mechanisms, statistical confirmation of Professor Friedman's causal story must wait yet another day. What we can say, and what our results suggest, is that his account is not as implausible as some of the political science literature suggests.

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58   Flemming & Wood, *supra* note 10, at 471.