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**JUDICIAL DECISION MAKING AND PUBLIC OPINION
IN THE WARREN AND BURGER COURTS**

by

Nancy L. Siemion

**A Thesis
Submitted to the
Faculty of The Graduate College
in partial fulfillment of the
requirements for the
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JUDICIAL DECISION MAKING AND PUBLIC OPINION IN THE WARREN AND BURGER COURTS

Nancy L. Siemion, M.A.

Western Michigan University, 1993

For many scholars, the Warren Court is the epitome of antimajoritarian policy making since many of the Court's decisions overturned legislation passed by Representatives of the people. By examining nationwide public opinion polls in that era that ask the public their thoughts about particular issues the Warren Court has ruled on, it is evident that most of these rulings were truly majoritarian and received public approval. In addition, this thesis analyzes some recent studies that discern national attitudes with respect to government policy making (public mood), assessing congruity or incongruity between the Court's liberalism and public policy mood which provides insight about the Warren Court's role perception. The Burger Court is analyzed with similar methods to provide contrasts and comparisons with the Warren Court. Finally, a normative study concerning the influence of public opinion is undertaken to better understand the role of the Supreme Court in American society.

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CHAPTER I

INTRODUCTION

Review of Literature

Since the beginning of American Constitutional thought, there has been a common debate concerning judicial independence and the provisions to foster that independence. Much of the deliberation in Alexander Hamilton's day, focused on such provisions as life tenured justices, and the most controversial, judicial review. Hamilton, in Federalist #78, notes life tenure as necessary for proper judicial deliberation without the interference of political factors, while judicial review was deemed essential for constitutional supremacy. Still, many of today's scholars, such as Alexander Bickel, argue that these provisions for judicial independence were institutionalized at the expense of representative democracy, and lead to decisions that thwart the will of the majority. Reviewing these acclamations and criticisms, from Hamilton to Bickel and others, the Supreme Court's position in a representative democracy remains that of an institution unique in procedure and function.

Hamilton adamantly supported the need for life tenured justices, whose position remained constant given their "good behavior" (1961, 522). Like Madison, Hamilton feared the acts of a representative body driven by majoritarian passions. He spoke of life tenure of Justices as an "excellent barrier to the encroachments and oppressions of the representative body" (Hamilton 1961, 522). Further, he remarked that this stable position isolates the Court sufficiently enough to keep them from being "overpowered, awed, and influenced" by representatives (Hamilton 1961, 523). It is

precisely for these reasons that Hamilton felt that the Court should lead in the realm of Constitutional interpretation.

Judicial review, the Supreme Court's power to invalidate those laws and policies that contradict the Constitution, is arguably a necessary function of the Court in order to preserve the supremacy of the Constitution. Hamilton wrote, "whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former" (1961, 526). Hamilton even suggested that the Court is not only the final interpreter of those laws deemed (un)constitutional, but that, in addition to this oversight function, a life tenured Court would act as a bulwark against ill social policy: "But it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society" (1961, 528).

Hamilton's views have not settled the debate over judicial review for he did not seem concerned with whether or not the procedures of the Court were perceived as democratic, as long as the Court provided a sufficient check against the legislature. Scholars today continue the onslaught of criticism concerning the seemingly undemocratic nature of judicial review and the decisions that result. Probably the most outspoken is Alexander Bickel.

Throughout his years of scholarship Alexander Bickel has remained a staunch believer that judicial review is the process that defines the Court as remote from the democratic system given the fact that this review allows Justices to overturn laws enacted by Representatives: "The root difficulty is that judicial review is a counter-majoritarian force in our system" (Bickel 1986, 16). Further, he not only stresses that the process is undemocratic, but also that the *outcome* (i.e. the Court decision) is anti-majoritarian; "...when the Supreme Court declares unconstitutional a legislative act or

the action of an elected executive, it thwarts the will of the representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it" (Bickel 1986, 17). In essence, Bickel argues for popular government with representation directed by the people in the representative's deliberative functions; "We have, and ought to have, majoritarian government in the sense that an essentially numerical majority has, and knows it has, the reserve power to discredit decision makers, putting in others who will in future resist what has displeased it" (Bickel 1955, 184). Obviously, a life tenured Court comprised of nine individuals with ultimate power to determine the constitutionality of law overrides this concept of representative democracy. Alexander Bickel does not stand alone in his views.

Jesse Choper in *Judicial Review and the National Political Process*, also focuses on the anomaly between representative democracy and the provisions meant to foster judicial independence. He explains that the procedures of appointment and removal of Justices preclude the democratic nature of representative government. "Federal judges not only are appointed rather than elected but they are removable only by exceedingly intricate and extra-majoritarian process of impeachment" (Choper 1980, 5). Although he acknowledges the "broad boundaries of democratic government" that appointment and removal procedures stay within (Choper 1980, 6), Choper wholly denounces judicial review as undemocratic;

But when they exercise the power of judicial review to declare unconstitutional legislative, executive, or administrative action-federal, state, or local- they reject the product of popular will by denying policies formulated by the majorities elected representatives... Not merely anti-majoritarian, judicial review appears to cut directly against the grain of traditional democratic philosophy (Choper 1980, 6).

In the book, *Politics, the Constitution, and the Warren Court*, Philip Kurland expresses his firm convictions concerning the Court and its procedures: "There are few strong beliefs that I have about the Supreme Court. The first is that the Court is not a democratic institution, either in makeup or function" (Kurland 1970, 204). Kurland attacks the function of judicial review not only because it allows the Court to be the ultimate decision maker with respect to constitutionality, but also because this review sometimes results in minority, not majority rule (1980, 204).

In light of these discussions, it becomes apparent that the Court has been classified as undemocratic in both the formal/procedural and functional areas. The formal realm reveals a Court whose procedure of judicial review is highly questionable in light of representative democracy. The fact that five justices can determine the constitutionality of laws initiated at any local, state, federal level without any executive or legislative check runs counter to most concepts of democracy. Although many of the authors above also point to the appointment and life-tenured positions of justices as undemocratic procedures, many have qualified their statements noting that appointments are based on senate (representative) approval and that impeachment procedures are possible.

In many scholarly discussions, the primary function of the Court has also been labeled as undemocratic. This function of the Court, derived from its procedure of Judicial review, is to form decisions about cases based on Constitutional text and precedent. These functional decisions, an outcome of judicial review procedures, have been studied in an empirical fashion in recent decades. Some of these studies, particularly Robert Dahl's (1957) and Thomas Marshall's (1989), support an uncommon view that the decisions of the Court tend to reflect law-making majority or public opinion of the times, thus revealing an institution that is reflective of popular

opinion. If this be the case, the natural assumption that the decisions of the Court must surely be antimajoritarian given the Court's undemocratic procedures deserves re-examination.

Throughout history there has been an ipso facto assumption made on the part of many scholars that since judicial review was an undemocratic procedure that decisions resulting from this review are necessarily antimajoritarian with respect to the people of this land. This logic assumes that all laws supported by a majority of lawmakers (representatives) are also supported by a majority of the people they represent. Although this may be a reasonable hypothesis, is it a correct one? Some past and recent empirical analysis challenges this assumption.

Robert Dahl, in his article "Decision-Making in a Democracy: The Supreme Court as National Policy-Maker" (1957), attempted to determine whether or not decisions handed down by the Court were truly pro-minority, thus antimajoritarian. During Dahl's time, accurate nation-wide public opinion polls whose content correlated with recent Supreme Court decisions were not available. Hence, the most direct route for him to find out if the majority of the nation agreed with the Court's decisions was an unattainable project. To overcome this obstacle he needed to study this topic in an indirect fashion. Dahl assumed that since representatives are chosen by the people that their laws and policies would reflect the national majority. He calls these representatives the "law-making majority." This law-making majority is used as a substitution, a representation, of public opinion. Dahl concludes that if decisions of the Supreme Court reflect the will of the legislative branch, the Court could be deemed substantively "democratic."

Dahl's research led him to conclude that "the policy views dominant on the Court are never for long out of line with policy views dominant among the lawmaking

majorities of the United States" (1957, 285). Essentially, though not in every case, the Court upholds rather than repudiates policy decisions of the legislative bodies. Thus, the institution that was set in motion to be the great defender of minority rights proved to be more a legitimator of majority will. Also, as I will discuss later, this study raises questions concerning the relationship between the Court, the legislature, and public opinion. Mainly, the Court appears to be following some principle of deference to the legislature (indirectly to the public) and possibly to a broad sense of what the public wants (i.e. liberal or conservative decisions). Despite these questions, the conclusion of Dahl's study firmly established that the Court's decisions resulting from judicial review in the realm of majoritarian representation.

Subsequent critical and empirical study has resulted from Dahl's original research in 1957. John Casper of Stanford University points out some inadequacies in Dahl's study. First, Dahl's study did not include the entirety of the Warren Court period, a period traditionally thought of as antimajoritarian. Second, the 1957 study also did not include actions of judicial review over state legislators. Casper, of course, extended Dahl's study to include cases from 1958-1974, and cases arising from the states, and suggests that the Court is not as majoritarian as Dahl's study reports; "But examination of the state and local cases does reveal that the arena in which the Court makes policy is substantially broader than the limited area Dahl selects for discussion. Moreover, it suggests that the Court can and does get its way a good deal more frequently than his [*Dahl's*] analysis implies" (Casper 1976, 59).

Conflict between the Court and the lawmaking majority has also been the basis of a 1973 study by David Adamany. Adamany's primary focus involved the realigning period of parties. This method uncovered deep conflicts between the Court and the lawmaking majority following each realignment election. This finding led Adamany to

conclude that the Court does not seek to legitimize the policies subsequent to historical realignment periods (1973, 843). A similar study by Richard Funston, "The Supreme Court and Critical Elections," analyzed realigning periods to find that the overturning of recently enacted laws was three times more frequent during realignment (1975, 809).

Despite the conclusions that suggest the Court is more antimajoritarian than not, Bradley Canon and Sidney Ulmer (1976) examine the question further. Canon and Ulmer point out some methodological errors in Funston's study and sought to correct them. Redefining the historical realignment periods, Canon and Ulmer argue that the Court remains as much a majoritarian force in transitional periods as in non-transitional eras. This final analysis of realignment periods continues to stress the majoritarian emphasis of the Court's decisions. Yet, these previous studies lack a direct methodological analysis that truly focuses in on judicial decisions and popular opinion.

As Robert Dahl first suggested back in 1957, the most direct route to defining whether or not the Court tends to be majoritarian or not, is to correlate nationwide public opinion polls with Supreme Court decisions. Simply, the question is: Does the court reflect popular opinion or, more specifically, does popular opinion influence the Courts? These previous studies have not utilized this direct route, but there has been some more recent analysis of specific Court cases and corresponding public opinion. Although these studies are an essential part to understanding the Court's relationship to public opinion, they also exemplify the many difficulties with public opinion analysis.

David Barnum (1985) in "The Supreme Court and Public Opinion: Judicial Decision Making in the Post-New Deal Period" identified eleven policy areas and

correlates the rulings to trends in public opinion polls. Barnum finds that on many issues including birth control, school segregation, interracial marriage, and abortion, the Court, over the long run, reflects public opinion trends (1985, 663). Yet, without multivariate analysis, Barnum's study (as well as others) does not address the possibility of intervening variables. As is probably the case, other sources may also be affecting the Court's decisions.

Another specific policy study by Judith Blake, Erik Uslanner, and Ronald Weber sites abortion rulings as reflective of an exaggeration of support for abortion, despite an upward momentum in trend line data. Although they admit that there were dramatic increases in support of abortion (from 18% to 46%), the subsequent polls find opinion leveling at less than 50% (1980, 220). This, they entertain, is not a mandate for unrestricted abortion laws. Once again, the prospect of intervening variables that might impact the outcome of the Court's decision on abortion may have shown other causal factors. Here, it is assumed that the Court differed directly to majority-public opinion (or at least what was perceived as the majority).

In 1983, Benjamin Page and Robert Shapiro analyze the relationship between public policy and public opinion. With reference to a number of varying policies they look for a congruence between policies and opinion. In this study they find that among social, economic, and welfare issues, the greatest congruence is with social issues. And, even though the Court is not a duly elected body, there is "little difference between the executive, Congress, and the federal courts" with respect to overall levels of congruity between policy and opinion. One question that plagues this analysis is: What is congruence? Page and Shapiro may only wish to suggest a similarity between opinion and policy, yet often we must be in tune with the factors that brought about this congruence in order that we fully understand the model posed.

One factor not presented in many of the above studies is the difficulty in measuring the concept of public opinion. Since many of the above analysts did not include multivariate analysis in their studies, it becomes difficult to say what public opinion is. Often, it is not just the majority answer of "agree" or "disagree" in relation to a particular issue, but an aggregation of varying levels of agreement on multiple indicators of public attitude over a period of time. As James Stimson points out in his book, *Public Opinion in America: Moods, Cycles and Swings*, "Where one presumes that public opinion is no more than the answers to opinion, belief, and preference questions in surveys, ...then no further substantive model is required. But this approach can't yield a set of rules for how we might measure a concept. It simply tells us that the measure *is* the measure" (1991, 18).

In addition to the difficulties represented above, there is often the question of "the chicken and the egg;" does public opinion influence the Court or does the Court influence the opinion? My study addresses the former, but some scholars have grappled with the latter. A 1987 study by Page, Shapiro, and Dempsy concluded that the Court has a notable impact on public opinion, yet negatively. They remark that many of the controversial issues of the 1970's and 1980's were contradictory to popular opinion. This analysis was of limited sample size which, on an inferential basis, lends it open to criticism. In fact, limited sample size is another common barrier to many studies of this nature signifying the need for a comprehensive analysis which includes a wide span of Court history which increases sample size, incorporates a wide range of causal models, and is methodologically sophisticated. Thomas Marshall's 1989 study does this.

Marshall compiles an index that matches Supreme Court cases with public opinion poll data that correspond to the case content. Essentially, if Gallup, NORC,

and other polling agencies ask specific questions that tap into the issue of a Supreme Court case, then this is considered a match. For example, *Roe vs. Wade* is possibly matched with a February 1973 Gallup Poll that asks: "Would you favor or oppose a law which would permit a woman to go to a doctor to end pregnancy at any time during the first three months?"

From these matches he analyses how majoritarian behavior varies over time, between types of cases, between individual Justices, and develops models to test several common hypotheses. Although his research takes into account the normative arguments surrounding the Court and judicial review, his is primarily an empirical approach. In addition to his empirical analysis outlined above, Marshall also researches twelve possible linkages between mass public opinion and Court decisions, and he discusses major theories that the modern court has developed to explain what role public opinion should play in judicial policy making. In Marshall's final analysis he concludes "that over three-fifths of the modern Court's decisions reflect public opinion majorities or pluralities. While precise comparison's are difficult to make, the modern Court appears to be as majoritarian as other American policy makers" (1989, 7). Hence, the assumption that the legislature is more characteristic of the populous, than the Supreme Court, by virtue of its obvious representative nature (i.e. elections) can not be granted automatically.

Empirical Design

Marshall's research will provide the foundation for my thesis. Based on Marshall's design of matching Supreme Court decisions with public opinion poll results, I am choosing to use his index as a sampling frame for my research (1989, 194-201). Since public opinion polls generally typify issues of interest to the nation,

these cases exemplify those of the last six decades that are most salient. Marshall's time frame of cases extended from 1935-1986. Although this study is comprehensive, I wish to alter the focus for purposes of my research.

Throughout my personal review of literature, many scholars including Alexander Bickel (1955), Jesse Choper (1980), Philip Kurland (1970), and Robert Carp (1990) have criticized or mentioned the criticism concerning the liberalism of the Warren Court. Many perceive this criticism as an indication that this Court was especially anti-majoritarian in its final decisions. I am simply asking, was this the case? By using Marshall's index and all the Warren Court cases matched with poll results contained in this index (numbering 22), I will follow Marshall's coding procedures in order to classify the Court decisions as majoritarian, anti-majoritarian, or unclear (1989, 75-77). If the decision agreed with the poll majority then this is a majoritarian decision, if not, the decision is antimajoritarian. Based on the determined frequency distribution and percentages associated with the distribution I will be able to answer whether the Court has represented majority will at least most of the time. Of course, a percent of Court decisions that reflect public opinion must surpass a random-choice base level of 50% when unclear majorities are removed. Finally, if the Warren Court has decided a majority of decisions in congruence with majority-public opinion, then the assertion that the Court function of judicial review necessarily promotes anti-majoritarian decisions will be brought into question.

As I referred to in the review of literature, it must be remembered that public opinion as an independent variable is not a direct causal link that predicts 100% of the variance in Court decision making. Many other factors such as political socialization, realigning events, or state policies may also be factors in the equation. Also, my operationalization of majority-public opinion through poll data is not the same as

measuring the whole of public opinion since there are often varying levels of agreement and a number of intervening variables that together comprise what public opinion may be at any one time with reference to any one issue.

Secondly, I think it will be important to contrast a liberal Court with the results obtained from study of a Court widely classified as conservative-- the Burger Court. Since Marshall provides 75 matches (starting in 1969) of Burger Court decisions with existing poll content, I will draw a random sample from the cases in the Burger time frame of 1975-1986. A sample of 30 cases will be drawn from this lot of 49. I have chosen to delete the cases from 1969 to 1974, since it was not until 1975 when the Burger Court forms its conservative majority. This will not only sharpen the ideological differences between the two eras, but also enhance my comparative view.

Within this comparative mode, I would like to assess several factors. The first relates to public opinion on a broader level than examined above. Essentially, I am asking: What was the national trend of attitudes of the eras before and during the Warren and Burger Courts. By locating trend data (i.e. Tom W. Smith, 1989) that relate to this variable (attitude), an analysis could provide ample insight concerning the context in which decisions were handed down. Did people in the nation reveal more liberal attitudes in the 1960's than in the middle 70's to mid-80's? History tells us this is so, but could it be that national attitude is a predictor of how a Court perceives its role in policy making? If in fact the nation is calling for more liberal or conservative policies is it possible that the Court is deferring to this national attitude or mood? If it is found that there are upward trends of liberal attitudes in the nation that coincide with the Warren Court era, and downward trends in liberalism during the Burger era, this thought may have some salience.

As I mentioned before, there may be some deference to public opinion via national attitudes(direct perception) and/or legislative will (indirect perception). Legislators are commonly known as representatives of the people, and are often assumed to be in touch with "the pulse of the nation." Therefore, it has been widely believed that if a legislative action is overturned by the Court that the decision is forthwith anti-majoritarian. Hence, the Court may at times chose to restrain itself in a particular decision (uphold the law) so as not to bring criticism upon itself. While addressing this factor (i.e. overturning or upholding laws) in a comparative mode I ask whether the Burger and Warren Court's differed in this respect.

Even though I have separated deference to national attitude and deference to the legislature (representatives), the results could be one in the same or dramatically different. For example, a Court decision to defer to the legislature could coincide with both the legislative will and public opinion, or a decision of this nature could agree with the representatives yet not the populous. If the last scenario occurred frequently, then the focus of antimajoritarian behavior may need to shift to the legislature. Even so, a finding of this nature would further weaken the notion that lawmaking majorities are always indicators of popular opinion. Still, I will compare the Warren and Burger Court's in these aspects to enhance this thesis.

One last aspect will be considered in relation to both the Warren Court and the Burger Court. Who is activist and who is restraintist? The Warren Court is often classified as "activist" since they often reversed many lower court decisions. On the other hand, the Burger Court often chose to affirm lower court decisions, or defer to the lower court by the denial of certiorari, and was therefore deemed "restraintist". This procedure of classification does not address the issue of public opinion. For if a decision is allowed to stand in the lower court, but a majority of the public do not

agree with it, is this really a restrained decision? I say no. Likewise, a decision that is a reversal of the lower court, yet popular with the majority of Americans is not activist. I would like to borrow Thomas Marshall's approach for determining activist vs. restraintist judiciaries. The identification will follow as such: if a law is overturned *or* upheld but it conflicts with majority-public opinion, it classified as activist. Likewise, if a law is upheld *or* overturned but is in agreement with majority-public opinion then it will be classified as restraintist. Here, the emphasis is not on whether or not a reversal occurred, but on how the public identifies with the decision. This, I believe, is a more accurate operation for determining the classification of these Court eras.

In conclusion, there may be a need for today's scholars to rethink the stance that the Court is an undemocratic institution in the function of decision making. To recapitulate, the Court's procedure of judicial review is arguably undemocratic, but does this lend credence to the thought that the Court's decisions resulting from judicial review are thus antimajoritarian? This is a question that Thomas Marshall has convincingly answered "no." By redefining the terms "activist" and "restraintist," many Court cases can no longer be perceived of as undemocratic since a majority of the people were agreeable to these decisions. Still, the recent debate concerning the undemocratic decision making of the Court has focused in on the differences in the Warren and Burger eras. Many have denounced the Warren Court as "left wing liberalism" that is continually out of touch with mainstream American values and opinion, and given the Burger Court the benefit of a doubt due to its "temperate" positions. With this study I will examine both the Warren and Burger Courts relationships to public opinion and assess if these many associations are justified.

CHAPTER II

THE WARREN ERA AND PUBLIC OPINION: REDEFINING THE ACTIVIST COURT

In the previous discussion, many questions were asked about the Warren Court with respect to its role in majoritarian/antimajoritarian decision making. Basically, the view of many scholars remains that the Warren era was one that sought to change social attitudes and responses through discretionary decision making. Also, it is argued that the Warren Court sought to "force" policy objectives, concerning desegregation, school prayer, and criminal rights (just to name a few), that they personally preferred without adequate consideration of state's rights and/or public disposition. In the view of many Warren Court critics, this was done by over-extending constitutional provisions in order to address the day's social concerns not explicitly dealt with in the Constitution. All of this, identifies a Court which gives minimal regard to popular opinion and shows little deference to lower court interpretation. An excerpt from *Politics and the Warren Court* lists proposed efforts by Congressional quibblers to reverse the Warren Courts actions:

an ample and continuing series of proposals to reverse not only the desegregation cases but all other racial decisions, and leave the states entirely to their own devices in regulating the relations between races; and finally, an equally ample and continuing series of draft amendments that would make structural changes in the Court, such as requiring unanimity before a state statute can be declared unconstitutional (Bickel 1955, 149).

Probably the most renowned and frequent dissenter of the Warren Court, Alexander Bickel, vents his opposition as such:

It follows inexorably that the 'radical' justices who are engaged in 'amend-ing' the Constitution are simply a body of electorally irresponsible politicians, and that there can be no excuse for letting them exercise a veto over the actions of other politicians, who are responsible to the voters (Bickel 1986, 78).

The problem with these criticisms is that most have relied upon visceral notions of how the Warren Court decisions, or even Court decisions in general, are received by the people of this country. Without utilization of any objective measures of public opinion, the Warren Court was characterized as undemocratic. So what makes an institution democratic? I would suggest that the overall concern for any democratic institution is that it, more than not, expresses the will of the people in its decision making. So the Court, although not a puppet of public sentiment, should assess a good number of its final decisions with regard not only to constitutional principles, but also generally shared values and ideals in the society. The abortion debate is a prime example of the Court's reflection of nationwide attitudes, even when these attitudes are conflicting or ambiguous. Today, much of the country remains variable about the morality of abortion and the extent of circumstances under which it shall be allowed. The Court's decisions over the last ten years reflects this uncertainty with decisions that have limited a women's rights to an unconditional abortion, while refraining from completely banning abortion.

This research attempts to answer questions, with empirical support, concerning whether or not the criticisms mentioned above are sound and justified. Prior to answering such questions, it important to emphasize and introduce my definitions of an "activist" versus a "restraintist" Court decision. The following definitions for each role orientation (label) are quite different from those of critics such as Bickel .

For many critics, activist court decisions are labeled as such because the Court has overturned a previous lower court judgment or legislative decree. The theory behind this classification is such that lower courts and elected legislative bodies are far

more "in touch" with the values and ideals of "their" people than a high court located in Washington and isolated from the masses. Representatives and local courts, by their nature and proximity, have a greater understanding of the cases as they relate to the people. Since this is believed to be the situation, the high court should show deference to lower court decisions only with exception to those cases that pose obvious constitutional threats. Even when this occurs, the Supreme Court should refrain from "reaching" outside the bounds of issues the Constitution addresses. In light of these thoughts, a decision that has reversed the lower court ruling, or succumb to any interpretation other than literal Constitutional premises is deemed "activist".

Definition in these terms is often disassociated with the majoritarian focus I have proposed (i.e. Thomas Marshall 1989). We are seeking to address the question of whether or not a particular decision or group of decisions in a particular era can be classified as activist. The main criterion should not simply be whether or not a lower court decision was reversed by the Supreme Court, but rather, what is the relationship of the Supreme Court ruling to popular opinion? Public opinion polls, Gallup and Harris, whose wording is similar to specific Court decisions or directly asked about the decision, will account for the measuring of nationwide opinion with respect to that specific ruling. This is the criteria that is applied to a specific Court case and poll to produce a "match." The frequency distribution in the poll will determine the majority-public opinion (i.e. the highest percentage), and the majority's relationship to the Supreme Court ruling will allow for a classification as activist, or restraintist. Simply, the poll states the plurality which is then compared to the decision to determine whether or not the decision is congruous or incongruous to the majority's opinion. In some cases the classification is indeterminable due to the close frequency distribution (e.g. favor-49%, oppose-51%). From this point, it is asked: Did the majority of

people agree or disagree with the decision of the Supreme Court? If they agree, the ruling is not activist-- *even if the Supreme Court ruling was a reversal of the lower Court or legislative judgment*-- since the majority of the public are favorable to that Supreme Court ruling.

Similar majoritarian criteria are used to classify decisions as restraintist. If a decision of the high court simply upholds a lower court decision, but leaves a vast majority of Americans outraged, is this truly restraintist?--not by my stated criteria. The ruling and its relationship with the people should be the primary concern here. A restraintist decision would be classified as such if, and only if, the decision was agreeable to a majority of Americans, just as a decision that is not agreeable to a majority must be classified as activist. I believe these altered criteria for identifying particular Court periods as activist or restraintist are important to fully understanding the Court's rulings and their relationship to the people. Again, I agree that some of the Court's procedures (i.e. life tenured justices and judicial review) are undemocratic, but does this confine the Court to rulings that do not reflect a democracy's will? I do not believe this is the case.

In light of the criticisms surrounding the Court under Chief Justice Earl Warren, the main question remains: Was this an activist (i.e. antimajoritarian) Court in which a majority of rulings were without a plurality of public support? My analysis includes 21 cases from the original 22 (one had to be dropped for lack of poll data). Table 1 delineates the data outlined by year of the Court decision, name of case, whether I have the case classified as: restraintist(R), activist(A), or not determinable(ND); percent agreeing with decision, and percent disagreeing with decision. Prior to reviewing this data, some explanations need to be made. First, the categories indicating percentage of agreement and disagreement with decision, in most

Table 1

Warren Court Case List with Frequency Distributions

Year	Supreme Court Case	% Agree w/decision of Court	% Disagree w/decision of Court
1)	1954 Brown v. Board I-R	54%	41%
2)	1955 Brown v. Board II-R	54%	39%
3)	1958 Cooper v. Aaron-ND	46%	44%
4)	1960 Boynton v. Virginia-R	66%	28%
5)	1963 Gideon v. Wainwright-A	24%	46%
6)	1963 Abington v. Schempp-A	24%	70%
7)	1963 AFSCME v. Muskeg.-R	50%	38%
8)	1964 Ht. Atl. Mot. v. U.S.-R	61%	31%
9)	1964 Reynolds v. Sims-R	47%	30%
10)	1966 S. Carol. v. Katzenb.-R	76%	16%
11)	1966 Schmer. v. Californ.-R	84%	12%
12)	1966 Glaser v. California-R	84%	12%
13)	1967 Loving v. Virginia-ND	48%	46%
14)	1968 Jones v. Mayer-A	35%	54%
15)	1968 Ferrell v. Dallas ISD-R	80%	17%
16)	1968 Green v. New Kent -A	21%	72%
17)	1969 Powell v. McCorm.-A	20%	63%

Table 1-Continued

Year	Supreme Court Case	% Agree w/decision of Court	% Disagree w/decision of Court
18)	1969 Shapiro v. Thomps.-A	30%	58%
19)	1969 Alexander v. Holmes -A	38%	48%
20)	1969 Oatis v. Nelson-R	86%	14%
21)	1969 Chimel v. California-ND	48%	46%

cases, are not the exact response categories asked for by the polling agency. For example, the poll used to measure public opinion concerning the some issues in the Gideon vs. Wainwright case reads as follows:

The Supreme Court has ruled that as soon as the police arrest a suspect, he must be warned of his right to remain silent and to have a lawyer. Only if he voluntarily waives these rights may the police question him. If he wants a lawyer, but cannot afford one, the state must pay the fee. The lawyer has the right to be present during the questioning and advise the suspect to say nothing. The following question was asked of those who said they followed the issue: Do you think the Supreme Court's ruling on confession was good or bad? (Gallup 1966, 7/8-13/66)

Here, the question pertains to whether the decision was "good" or "bad." In order to uniformly classify the data from the responses I must translate the percent who said this was "good" into, that they agreed with the decision. Essentially, the response category that indicates affirmation of the Court decision or the issue in the decision is recorded under "% agree w/decision," while those responding negatively to the decision or related issue are recorded under the "% disagree with decision."

Secondly, A few poll responses were not categorized by the polling agency in a dichotomous fashion (i.e. an affirmative response, a negative response, and no

opinion). In these cases response categories were collapsed into a dichotomous fashion. There are two instances where this was done. The first, is the polling question that asked respondent about integration and the issues associated with the Brown II case of 1955. The question and responses follow:

In many communities in the Deep South states, the number of colored school children is greater than the number of white school children. Would you say that these communities in the South should be required to integrate schools immediately, should they be given a few years to do this, should they be given a longer time such as 10 to 20 years, or should they not be required to integrate at all? (Gallup 1958, 9/10-15/58)

Immediately	29%
In a few years	25%
10 to 20 years	8%
Never	31%
Uncertain	7%

With these responses, I collapsed the "immediate" and "in a few years" categories as affirmative responses, while the "10 to 20 years" and "never" categories were classified as negative responses. The "uncertain" response is retitled as no opinion.

The second occurrence where response categories were collapsed is the polling question which reflects opinion on issues raised in the Alexander vs. Holmes Co. Board of Education case. The question and responses follow:

Do you think that racial integration is going too fast or not fast enough? (Gallup 1970, 2/27-3/2/70).

Too fast	48%
Not fast enough	17%
About right	21%
No opinion	14%

Here, the response categories labeled "Not fast enough" and "about right" are collapsed into one response category as in agreement with issues decided in Brown II,

while the "too fast category" remains intact, but recategorized as in disagreement with Brown II. No opinion remains intact.

Getting back to the question of whether or not the Warren Court is an activist (antimajoritarian) Court, data collected provides insight. Looking at Table 1, the reader can see that the cases are listed in chronological order with their classification of the decision listed, and percentages of response categories. Within this listing, 11 of the cases are classified as restraintist, 7 activist, and 3 unclear. From this sample, it appears as if the Warren Court is mostly restraintist from 1954-1967, with the majority of the activist rulings occurring in the last two years of the Court (1968-1969). In this sample, the last two years of activist ruling when compared to the previous 13 years of mostly restraintist decisions is interesting. I do not assume to know why this is the case, but it appears that in each block of time (the 13 year and the 2 year) the Warren Court was either strongly reflective of nationwide opinion or strongly nonreflective. When the "not determinable" cases are removed, all restraintist decisions were classified as such by at least a 12 percentage point spread between those agreeing and those disagreeing. There is a similar result with the activist decisions. Here, the public opposed the rulings by at least a 10 percentage points over those who agreed with the decision. This condition in of itself would have posed problems for the Court. The fact that the last two years of the Court may have been more activist-with less popular support probably increased saliency for Court critics such as Bickel. On a more empirical note, it is apparent that the Warren Court overall lost some credibility among the population. Table 2 shows a series of ratings of the Supreme Court over the length of the Warren Court period. As is evident, the Supreme Court's "excellent" and "good" ratings decline significantly from 1963 to 1969, while the "fair" and "poor" ratings increased 5% and 8% respectively from 1963

to 1969. Still, when the focus is placed on the entirety of this Court period, the Warren Court remains a restraintist Court. Table 3 addresses this.

As you can see, the Warren Court rulings are congruent with majority-public opinion over 52% of the time, in this sample, when unclear majorities are included. Unclear majorities are those in which the approval and disapproval ratings are within 0-5 percentage points of one another, which is the threshold for .05 alpha/95% significance. More importantly though, is the fact that the Warren rulings are in line with majority opinion 61% of the time, in this sample, when the unclear majorities are *excluded*. This 61% exceeds the 50% random-choice base level necessary when unclear majorities are dropped.

In and of themselves, these numbers say that the Warren Court era did reflect the opinion of most people in the United States at the time of those decisions. Consequently, the Court can be redefined as a restraintist court. The question addressed later in this thesis is whether or not the Warren Court was as restraintist as the Burger Court (assuming the Burger Court qualifies for restraintist classification). Going back to Thomas Marshall's original time period, where he evaluates the Court from 1935-1986, we can assess how the Warren Era compares to this broader time frame. Since I wish to discuss the Burger Era in the next chapter, I will exclude that era from this discussion.

Court eras from 1936 until the Warren Era include the Hughes Court, the Stone Court, and the Vinson Court. Thomas Marshall records the majoritarian and antimajoritarian percentages from his study in *Public Opinion and the Supreme Court* (1989). For these eras see Table 4.

Comparisons to these preceding Court eras shows the reader that the Warren Court appears not to differ dramatically from majoritarian/antimajoritarian ruling

Table 2
Gallup Supreme Court Public Opinion Ratings

In general what rating would you give the Supreme Court-excellent, good, fair, or poor?					
7/18-23/63	(E) 10%	(G) 33%	(F) 26%	(P) 15%	(No Opinion) 16%
6/22-27/67	(E) 15%	(G) 30%	(F) 29%	(P) 17%	(No Opinion) 9%
6/26-7/1/68	(E) 8%	(G) 28%	(F) 32%	(P) 21%	(No Opinion) 11%
5/22-27/69	(E) 8%	(G) 25%	(F) 31%	(P) 23%	(No Opinion) 13%

Source: Gallup, George H. 1972. *The Gallup Poll: Public Opinion 1935-1971*. Volumes 1-3. New York: Random House.

Table 3
Warren Era Ruling Classifications and Frequency Distributions

Classification	Raw #	% includes unclear	% excludes unclear
# restraintist(majoritarian)	11	(53%)	(61%)
# activist(antimajoritarian)	7	(33%)	(38%)
# unclear(closely divided)	3	(14%)	
Total	21	100%	99%

percentages of the previous Vinson Era. The overall mean of percent majoritarian rulings for all the predecessors equals 65%, from which the Warren era does not significantly differ. Therefore, it would have to be said that the Warren Court should not be considered "out of the ordinary" in the context of past High Court rulings in relation to majority percentages.

Table 4

**Supreme Court Agreement with Public Opinion, by Court Period, 1935-1969
(excluding instances of "unclear" polls)**

	Hughes	Stone	Vinson	Warren
% majoritarian	73%	54%	68%	61%
% antimajoritarian	27%	46%	32%	39%
	100%	100%	100%	100%
Number of cases	(15)	(13)	(19)	(18)

Marshall, Thomas. 1989. *Public Opinion and the Supreme Court*. Boston: Unwin Hyman. 87.

Still, critics of the Warren Court point to the subject matter of that time which brought the Court into greater prominence than its predecessors. Issues in the Civil Rights arena were greatly debated, and in the South, Civil Rights rulings were significantly opposed. Perhaps the most renowned case of the Warren era is *Brown vs. Board of Education of Topeka Kansas*. Although the overall poll results comprised a majority of the people in favor of the Court's ruling, the South intensely differed. The following is a recreation of the 1954 Gallup Poll results:

The United States Supreme Court has ruled that racial segregation in the public schools is illegal. This means that all children, no matter what their race, must be allowed to go to the same schools. Do you approve or disapprove of this decision? (Gallup 1954, 1249).

Approve	54%
Disapprove	41%
No Opinion	5%

By Region

	East	Midwest	South	West
Approve	72%	57%	24%	65%
Disapprove	23%	37%	71%	31%
No Opinion	5%	6%	5%	4%

As one can see, the South was adamantly opposed to this ruling, in particular the act of desegregation. Even so, in this landmark case, where the Court outright overturned its own precedent (i.e. Plessy case), the majority of Americans agreed with the position and action of the Court at the time the ruling was handed down. Subsequent race relations decisions, such as *Boynton vs. Virginia* (1960) and *Heart of Atlanta Motel vs. U.S.*, continued to hold the support of a majority of Americans despite the Court's change of mind and the South's disapproval.

These dramatic reversals of lower court and past High Court opinion lead me to ask whether or not an overturning of a lower court decision is conducive to a lack of popular support. More precisely, I am asking if those cases that were classified as antimajoritarian were predominantly reversals of lower court decisions. These questions get at the heart of many Warren Court criticisms, since it is believed that those local entities (i.e. county and state courts) who are reversed, often have greater insight concerning the needs and desires of the residents within their jurisdiction, and therefore, should be given greater discretionary power in lawmaking. critics, such as Bickel, have inferred that when the Court overturns a lower court decision that this is specifically undemocratic and antimajoritarian for the reasons I just stated. Therefore, if a vast majority of the reversals of the lower courts were unpopular with the nation, Bickel's inference that the lower courts are more "in touch" with the public may have some salience. Once again, I do not deny that judicial review is an undemocratic

public consistently opposes? This line of thought is brought into question if Supreme Court reversals tend to reflect nationwide popular opinion in the majority of cases.

As the Brown case has pointed out, dramatic regional differences do occur. Yet, the questions concerning judicial review become far more prominent if not only one region of the nation disagrees with a reversal, but a majority of all Americans. It can often be expected that the "home" court ruling being reversed would stir disenchantment among the regions citizenry. What would be most detrimental though, would be a situation where High Court reversals of lower court decision continually spawned resentment from the nation.

Of the 21 cases studied in the Warren era, the Court's rulings reversed a lower court judgment in seven instances. The national public reaction to these seven cases is quite mixed. In three of the seven, the public opinion polls indicate a majority in agreement with the decision. (i.e. Brown (1954), Brown (1955), and Boynton (1960).) Also, in three, the nation as a whole disagreed with the reversal decision. (i.e. Gideon (1963), Abington (1963), and Jones (1968). The seventh case, Loving vs. Virginia (1967), had a related poll which were split so close in public sentiment so as to be determined "unclear."

Probably the most adamantly opposed ruling by the Court was that of Abington vs. Schempp. This 1963 case disallowed recitation of Biblical passages or the Lord's prayer in public schools by reason of the fourteenth amendment. An overwhelming 70% of Americans disagreed with this decree despite the clarity of the Constitution. Notwithstanding this enormous lapse of congruity between the Court and public sentiment concerning one High Court reversal, the Warren era fared 50-50 with the public overall in this sample. Three of the six reversal had the support of the public, three did not, while the seventh case was too close to be determined. These

reversals of the lower court do not account for all of the antimajoritarian behavior of the Court, only half. It is then apparent that we cannot draw the conclusion that simply because the Court reverses a lower court ruling that the nation will disagree since the frequency of occurrence was split. Neither can we conclude that judicial review necessarily leads to antimajoritarian decision making given the fact that in half of the reversals, the Court was reflecting nationwide majority opinion (i.e. the "local" courts were not). Within the context of the Warren era and these case samples, it is fair to say that the Court ,when exercising judicial review to reverse a lower court decision, is less majoritarian than when in the process of affirmation-- but it is not *antimajoritarian*.

CHAPTER III

THE BURGER COURT AND PUBLIC OPINION: COMPARISONS WITH THE WARREN ERA

The Burger Court is recognized by many scholars to be a restraintist Court, since a vast majority of its decisions were affirmations of lower court opinion. Due to its restraintist approach, the Burger Court was less likely to "force" social policy initiatives than the Warren era (Lamb 1982, 7). This Court's deference to lower court decisions, and its inclination to an increasingly narrow interpretation of the Constitution are characteristics that set it apart from its immediate predecessor. Although there is always room for debate concerning the virtue of lower court deference and narrow Constitutional interpretation, the 30 cases studied here support the conclusion that the Burger Court was a restraintist court--in the classical sense(i.e. the Burger Court did affirm lower court decisions in a vast majority of cases). Of the thirty cases in this study, 73% (21) were rulings affirming lower court decision or denials of certiorari, which have the same effect.

A sample of rulings of the Burger Court (1975-1986) will now be compared with related public opinion polls so that this restraintist classification can be assessed within a majoritarian and representative context. The Burger cases are drawn from this latter period since 1975 is when the Court comprised its "conservative" majority. As with the Warren cases, the Burger Court decisions are rulings designated for the public arena, and it is the public that must abide by the consequences of these judgments. Paradoxically, these important decisions are in the hands of an unelected,life tenured Court not directly accountable to those it rules on behalf of.

Yet, as we have already seen with the Warren Court in Chapter II, these factors, although undemocratic, do not necessarily compel antimajoritarian rulings. Using the same methodology as used to analyze the Warren Court decisions, the Burger Court rulings will be classified restraintist or activist based on whether or not they agree with majority-public opinion.

The Burger Court cases are chronologically ordered in Table 5, and classified as restraintist(R), activist(A), or not determinable(ND). These classifications are based on public opinion poll data that specifically or generally reference a Burger Court case or issues of a Burger Court case, and whether or not the public agreed with the ruling. Without regard to lower court rulings, these decisions are restraintist if the majority of the public, determined by polls, agree with the ruling, activist if the majority did not agree, or not determinable if there is no clear majority. The frequency distributions of the polls that are "matched" with the particular cases are also listed (See Appendix A for poll questions). All poll frequencies are listed in the table as "% agreeing with decision" and "% disagreeing with decision." Due to the fact that poll response categories change frequently from poll to poll, these two categories were devised to standardize the relationship between the poll frequencies and the case they are "matched" with.

The thirty case sample outlined in Table 5 shows the Burger Court to be greatly restraintist from 1976-1978 with 10 of the 11 *determinable* poll majorities agreeing with the Court's decisions. On the other hand, in 1979 the Court disagreed with public opinion in 4 of the 6 available cases. This concentration of activist decisions may be one reason for the overall level of public confidence in the Supreme Court dipping to its lowest point since 1973 (Gallup 1983, 175). Only 45% of the nationwide respondents replied that they had a "great deal or quite a lot" of confidence in the

Table 5

Burger Court Case List with Frequency Distributions

Year	Supreme Court Case	% Agree w/decision of Court	% Disagree w/decision of Court
1) 1976	Doe v City of Rich.-ND	43%	43%
2) 1976	Wood. v. Nrth. Cr.-A	28%	72%
3) 1976	Buckley v. Valeo-R	65%	24%
4) 1976	Buckley v. Valeo-R	72%	21%
5) 1976	Gregg v. Georgia-R	65%	28%
6) 1977	Gaylord v. Taco. -R	65%	27%
7) 1977	Coker v. Georgia-R	53%	32%
8) 1977	Carey v. Population -R	90%	8%
9) 1977	N.Y. & N.J. v. Brit.-ND	45%	48%
10) 1977	Smith v. U.S.-R	56%	38%
11) 1978	Zurcher v. Stanford-ND	48%	43%
12) 1978	Un. of Cal. v. Bakke-R	65%	31%
13) 1979	Delaware v. Prowse-R	53%	44%
14) 1979	Moore v. Duckwort-R	75%	20%
15) 1979	Goldwater v. Carter-A	18%	68%
16) 1979	U.S. v. Rutherford-A	22%	53%
17) 1979	Smith v. Maryland-A	13%	81%

Table 5-Continued

Year	Supreme Court Case	% Agree w/decision of Court	% Disagree w/decision of Court
18) 1980	Harris v. McRea-A	44%	56%
19) 1980	Fullilive v. Klutzn.-R	70%	22%
20) 1981	PATCO v. U.S.-R	68%	28%
21) 1981	Rostker v. Goldberg-R	80%	15%
22) 1981	Rostker v. Goldberg-R	50%	43%
23) 1981	Beller v. Lehman-A	36%	52%
24) 1981	Kass. v. Con.Frht.-ND	45%	43%
25) 1982	Ed. Isl. Trees v. Pico-R	62%	28%
26) 1983	Bob Jones v. U.S.-R	71%	23%
27) 1983	Quilici v. Mort. Gr.-ND	44%	48%
28) 1983	MVMA v. St. Farm-R	50%	44%
29) 1984	N.Y v. Quarles-R	53%	41%
30) 1986	Stamos v. Spring Br.-R	91%	6%

Court--this is down from 49% who responded similarly in 1975. The years, 1980-1986, profile a mostly restraintist Court with 9 of the 12 cases agreeing with majority-public opinion.

A compilation of this data in Table 6 exemplifies the majoritarian decision making of the Burger Court. Of the 30 cases studied, 19 are classified as restraintist, 6

as activist, and 5 were unclear due to very close frequencies (within 5% points of each other). With the inclusion of the unclear cases, 63% of the 30 case sample of the Burger Court is restraintist decisions. The exclusion of the unclear cases results in restraintist decisions increasing to 76% of the 30 case sample. With over three quarters of all decisions in this sample qualifying as restraintist, the Burger Court may be one of the most representative Courts in recent history.

It is important to note that my results of the Burger sample differ substantially from Thomas Marshall's 1989 study. Table 7 outlines Marshall's results. From a database of 65 cases and "matching" polls, Marshall reports that only 62% of the Burger Court cases qualify as majoritarian when unclear cases are excluded. Marshall's findings reveal the majoritarian percentages of the Burger Court to be almost identical to those of the Warren Court. Thus, despite the indignation of many scholars about the supposed overwhelming antimajoritarian behavior of the Warren Court, Marshall's report suggests that the amount of Warren Court antimajoritarian decision making does not significantly differ from either the Burger Court nor the Warren predecessor, the Vinson Court.

A statement by Alexander Bickel invites further questions about the "overwhelming" antimajoritarian behavior of the Warren Court and its extensive use of judicial review: "judicial review is a counter-majoritarian force in our system...[W]hen the Supreme Court declares unconstitutional a legislative act or action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it" (Bickel 1986, 16-17). Bickel did not rely upon any empirical evidence to support his claims, and in chapter two, it was evident that in cases where the Court's power of judicial review overturned a previous ruling, 50% were *not* antimajoritarian. The

Table 6

Burger Era Ruling Classifications and Frequency Distributions

Classification	Raw #	% includes unclear	% excludes unclear
# restraintist(majoritarian)	19	(63%)	(76%)
# activist(antimajoritarian)	6	(20%)	(24%)
# unclear(closely divided)	5	(17%)	
Total	30	100%	100%

Table 7

Supreme Court agreement with Public Opinion, by Court Period, 1935-1986
(excluding instances of "unclear" polls)

	Hughes	Stone	Vinson	Warren	Burger
% majoritarian	73%	54%	68%	61%	62%
% antimajoritarian	27%	46%	32%	39%	38%
	100%	100%	100%	100%	100%
Number of cases	(15)	(13)	(19)	(18)	(65)

Marshall, Thomas. 1989. *Public Opinion and the Supreme Court*. Boston: Unwin Hyman. 87.

Burger Court data reveals similar results. In the 30 case sample, 8 cases were reversals of lower court opinion. If Bickel is right, these exercises of judicial review should result in unpopular, antimajoritarian rulings. This is not the case. The eight reversals were comprised of three decisions which defied popular opinion, four cases which sided with the nationwide majority, and one case where the polling frequencies

were too close to determine a majority opinion. Hence, 57% of the Burger Court reversals were favorable to the majority of Americans (when the unclear case is removed). As with the Warren Court, the Burger Court was less frequently majoritarian when reversing the lower court ruling, but not predominantly antimajoritarian.

Thus far, the Warren and Burger Courts have proven quite similar when empirically compared. Yet, an interesting statistical difference among the two Courts exists. As reported in Chapter II, the Warren Court, when in agreement with public opinion, averaged a 12 percentage point spread between those favoring the ruling and those opposed. When not in agreement with majority opinion (activist rulings), the frequencies of those opposed were, on average, greater by 10 percentage points. This seems to suggest that the Warren Court rulings were either predominantly favorable, or predominantly unfavorable. Yet, when these average frequency distribution differences are compared to those existing within Burger Court polls, the interpretation changes. On average, the Burger Court frequency difference between those agreeing with the Court's rulings and those opposed was 36 percentage points for both restraintist and activist decisions. This Court era had extremely strong support when ruling favorable to the majority, while suffering a tremendous lack of support for activist policies.

Using Thomas Marshall's statistics for the Burger Court (Table 7), which suggest that it ruled similar percentages of majoritarian and antimajoritarian cases as the Warren Court, the differences in support for the rulings of each Court eras may indicate one reason for the indignation of some Warren Court critics. Even though the majority of Warren Court cases were reflective of majority popular opinion, that opinion was not particularly strong in light of the solid support for restraintist Burger

Court decisions. Not only was the Warren Court drawing considerable attention to itself (at least among scholars) because it overturned a number of lower court rulings and past Court precedent (i.e. Brown), but the Warren Court did not receive a popular "mandate" for its decisions. In other words, the Warren Court did have popular approval for most rulings, but it was not the overwhelming majorities needed to contradict criticisms that the Warren Court was thwarting popular will. On the other hand, the Burger Court was, during the mid to latter seventies, hailed as a restraintist Court because of its deference to lower court opinion, but the Court also enjoyed concrete popular support for its majoritarian cases--dimming the negative effects of its antimajoritarian rulings.

One reason the Warren Court did not experience substantial majorities in its restraintist decision making may be that public opinion was in the process of change on many issues during the middle fifties to latter sixties. David Barnum in "The Supreme Court and Public Opinion" points out that upward trends in public opinion support for several issues dealt with by the Warren Court were increasing favorable of the Court's rulings (1985, 655). Issues such as abortion, busing, and a women's role were gaining in support during these trying years. The problem remained that many still comprised a minority of support, and in those that consisted of a majority, the majority was not substantial. Much of the evidence today shows that these issues (i.e. abortion, busing, and women's roles) tend to level off somewhere at the mid to upper forty percentiles. Public opinion concerning issues addressed by the Burger Court may be quite different . It is possible that a number of the majoritarian decisions of the Burger Court benefitted from relatively stable and determined opinion on many issues. The sizable majorities encountered in the restraintist decisions of the Burger Court suggest this may be so. Issues such as capital punishment and school prayer were typically

one-sided issues with respect to public opinion. The Burger Court, by ruling agreeably with the majority opinion, put itself in favor with the public.

In the following chapter, I will address this possibility in more length by assessing the policy preferences of Americans in these two eras and how these preferences have varied. It may become evident that the Warren and Burger Courts ruled in very different social "climates" by which each has been judged. Although history tells us this is so, I will rely upon the studies of several authors whose research looks at this topic in depth. There is a need to research whether the labels of the Warren Court's "liberalism" and the Burger Court's "conservatism" are valid. This "validity" deals not only with the labels inherent meanings, but also with the concepts of "liberalism" and "conservatism". As may become apparent, these labels and concepts change their meanings from generation to generation. Rulings made in the times of the fifties and sixties may be far removed from the policy preferences of justices and the public in the seventies and eighties. Analyzing each of these Court periods within its own context is the best approach since the factors and experiences of the times may differ considerably from what is known in the present age.

Was the Warren era a particularly "liberal" era? Was the Burger era an especially "conservative" era? I believe this will be the case since justices are not as willing to "drive" against popular opinion as often as we would like to think. Although each era has its unpopular decisions, most remained agreeable to the public. Assuming that these Court eras are "liberal" and "conservative" eras respectively, this would suggest that it is the public that has changed in its ideology, along with the Warren and Burger Court eras.

The following discussion will take these factors into account. By defining what is meant by the terms "liberal" and "conservative" it will become evident how each

of the Court period's labels are justified. The regulatory and humanitarian rulings of the Warren era are indicative of its liberalism, while the Burger Court's conservatism is evident in rulings that tend to be of the status-quo and supportive of federalism. Despite these differing approaches to the rule of law, each Court era ruled favorable to the public in a majority of their cases. Just how public opinion and the Court changed over these few decades is discussed in the following chapter.

CHAPTER IV

NATIONAL LIBERALISM AND THE WARREN AND BURGER COURTS

The purpose of this chapter is to analyze the relationship, if any, between the level of national liberalism and the liberalism of Court rulings. The basic question being asked is whether there is some association between the rulings handed down in the Warren Era and Burger Eras, and a rise or fall in liberalism. Specifically, did the Warren Court hand down liberal rulings during a nationally liberal climate, and did the Burger Court hand down rulings during a nationally conservative climate? This analysis assumes the Warren Court label of "liberal" and the Burger Court label of "conservative." These labeling assumptions are in no way pejorative. There is no reason to believe that each Court era does not conform to these labels given the liberal policy outcomes reflective in such Warren Court decisions as desegregation (Brown, 1954), securing criminal rights (Gideon, 1963), and safeguarding civil rights (Jones, 1968), while the Burger era is marked with conservative stances on homosexual behavior (Doe, 1976), the death penalty (Coker, 1977) and abortion (Harris, 1980). Still, there is a need for more accurate measurement criteria by which one can determine what is conservative and what is liberal.

Those Americans in tune with politics often hear about liberals and conservatives, the policies they support, the groups that are associated with them, and the policy preferences each group may have. Still, the labels are ambiguous to a large percentage of the electorate who do not understanding the meaning of "liberal" and "conservative" nor the issue positions they imply (Knight 1985). For those Americans

who do find some understanding in these terms, the understanding remains abstract simply because these terms can change within the diversity of the descriptor and his or her concept of liberalism. Tom W. Smith's remarks concerning liberalism indicate that it "is a chimera that has changed its emphasis and even some key tenants over time" (Smith 1990). Even though this remains a problem for those studying components of liberalism, there are definitions that reflect these major tenants.

Tom W Smith in his article "Liberal and Conservative trends in the United States," defines contemporary liberalism with respect to its attributes:

(1) reformist, opting for change and generally opposed to the status quo; (2) democratic, favoring a full extension of electoral rights; (3) libertarian, supporting free speech and the right to protest; (4) regulatory and interventionist, backing the management of business and the economy by the government; (5) centralist, using the federal government to set and enforce national standards and regulate state and local governments; (6) humanitarian, favoring a social welfare system for the care and protection of society in general and the lower class in particular; (7) egalitarian, advocating equal treatment for all and perhaps equal conditions for all; and (8) permissive, tolerating and often approving of nontraditional lifestyles and practices (e.g., homosexuality, nudity and the use of drugs) (1990, 481).

Conservatives, on the other hand, typically prefer conditions that are limited to incremental change if not of the status quo, are non-regulatory and noninterventionist, in favor of securing more powers to the states, and perhaps less permissive of nontraditional practices. It can be expected that not all those who call themselves "liberals" or "conservatives" will conform to each of the above criteria, but probably a majority of the criteria.

Determining whether national attitudes were conservative or liberal at particular periods in time is not an exact science. Many polls have asked direct questions concerning political identification such as Gallup's "Do you regard yourself

as a liberal or conservative." Even with this supposed "direct" approach to measuring political identification, there are problems because this type of question assumes the respondent has a clear idea about what "liberal" and "conservative" mean. As James Stimson points out in his book, *Public Opinion in America: Moods, Cycles, and Swings*, respondents often do not identify themselves in either "camp" based on some consistent self-analysis, but a response "is primed more by current events than by lasting conceptions of what the words entail" (1991, 122).

Other analyses concerning liberal and conservative trends measures each position in reference to particular policy preferences. This suggests that conservatives often take opposing stances on policy issues from those of the liberal persuasion. Going back to Tom Smith's definition of liberalism, we would expect liberal policies to be more regulatory, centralist in nature, and perhaps have a greater humanitarian emphasis than those policies called "conservative." Hence, ideological identification would depend on which policies you support and how adamantly you support them.

A third method for measuring liberal trends in the United States also references policy preferences as indicators of liberalism or conservatism, but it takes this many steps further. Using a conglomeration of survey data measuring policy preferences obtained from various survey houses, James Stimson (1991) takes these scores and standardizes them to one scale in order to identify patterns among the data. His findings suggest that Americans, throughout several decades, "cycle" and "swing" in relatively similar patterns of greater liberalism or conservatism from time to time. Stimson suggests that this is indicative of what he calls a "policy mood" within the public; revealing eras in America where policy preferences ebb and flood along liberal and conservative lines.

This is only a brief introduction to the various methods used to measure liberal and conservative identification. I will discuss in more depth these analyses and their impact later in this study. First of all, discussion of the purpose of these studies is needed. At the outset of this chapter I indicated that the focus of this section is to determine the "climate" in which Warren and Burger Court rulings were made. Assuming that the designation of the Warren Court as liberal and the Burger Court as conservative is accurately ascribed, based upon the nature of their rulings and the definitions as proposed, it is possible to describe and compare the political environment that exists during these Court eras by studying the research findings of the aforementioned authors. All have identified somewhat similar periods of liberalism and conservatism in the American polity, although with different measurement techniques. I will then examine these time periods identified as liberal and conservative in the literature, in order to determine whether or not they correspond to liberal and conservative Court eras. Is there a liberal policy trend or identification trend in the Warren era? Is there a conservative policy trend or identification trend in the Burger era? What is the evidence that suggests these associations?

The purpose of this chapter then, is mainly to identify the state of national "policy mood" during these periods, and whether there is any association between liberal court rulings and national liberalism or conservative court rulings and national conservatism. In subsequent chapters, I will discuss what impact this may have had on the Warren and Burger Court rulings, whether or not the Warren Court and Burger Courts may have deferred to this public sentiment, and how these findings are important.

Ideological Identification

Consistent polling questions concerning a person's ideological identification have been around since the early to mid-seventies (Smith, 1990). This data is important in some aspects mainly because researchers are able to see whether or not people perceive themselves as more conservative or more liberal. This, of course, is a aggregated response without knowledge of how an individual might have changed, but overtime trends can be determined on how the group has or has not changed. Has the electorate become more conservative? more liberal? I emphasize the limitations to this type of study which asks the simple question about ideological self-identification ("Do you consider yourself a liberal, moderate, or conservative?"), and assumes that the aggregate response measures exactly what has been asked. Many times, people may be unclear about the "liberal" or "conservative" terms.

The authors of *The American Voter* (1960), revealed the quality of ideological conceptualization among citizens. This research evaluates ideological conception on several levels by coding responses to open-ended questions measuring ideological identification. Further research that utilizes this measurement technique suggests that over 30% of the electorate comprise the two least sophisticated conceptualization categories (Knight 1985, 839). One third of voter's conceptualizations are characterized by either "nature of times" responses, or "no issue content" responses. Individuals within the "nature of times" category "are sufficiently attentive to the political world to praise or blame the party in power for current economic or social conditions" (Knight 1985, 831). These bare associations between current times and the party holding political power are indicative of "simple reward and punishment strategies." "No issue content" responses is either no response at all, or simplistic

identification with the party or candidate's personality. This lack of understanding by many respondents complicates studies on ideological identification that simply ask a person to categorize themselves as a conservative, liberal, or moderate.

Even with all the complications, analysis of this sort is valuable. We may be able to detect major fluctuations in identification, and from there clarify the research to pinpoint the source of the fluctuation. For example, did Americans in the 1980's identify themselves as conservatives, and if so, can a causal explanation be found? Possibly, the Reagan Revolution? A 1970's backlash? Or, is it just a part of the larger cycle of liberal and conservative change in the polity from time to time?

The two studies that I would like to look at are Richard Niemi, John Mueller, and Tom Smith's *Trends in Public Opinion* (1989) and John Robinson and John Fleishman's "Ideological Identification: Trends and Interpretations of the Liberal-Conservative Balance" (1988). The findings provided by these two studies extends from 1972 to 1986.

Each of the data sets (Niemi 1989, 19-21 & Robinson 1988, 141) "paint" a similar picture about ideological identification in America. From the early seventies through the mid-eighties measurements of ideological self-identification has not changed much. Within each classification, response percentages typically remain within a 3-5 percent variance from year to year. Also, there appears to be no consistent increases or decreases in self described liberalism or conservatism. Niemi et al., data reports that an average of 25% of the sample consider themselves liberal, 31% are moderate, and 31% say they are conservative. These finding reflect responses to an "unfiltered" poll question. (The unfiltered version classifies respondents who "haven't thought about it," where as a filtered version does not). Robinson and Fleishman's percentages vary slightly due to different categorization, but remain

consistent with the overall interpretation. Probably the most interesting point to make is that in the Niemi et al., data set for liberal or conservative identification-- the filtered version-- at least 16 to 34% of those surveyed expressed that they had not thought about their ideological identification. Between 1972 and 1986 an average of 25% of the population has not considered their ideological identification important enough to think about it.

From this data it might be assumed that despite some considerable fluctuations in American politics, particularly a change from a Democratic president to a Republican one and a more conservative Supreme Court, that the American polity remains unchanged with respect to ideological disposition. The research of Tom W. Smith (1990) suggests, however, that ideological preference is not so easily measured.

Policy Preferences

In his more comprehensive study, Tom W. Smith in "Liberal and Conservative Trends in the U.S. (1990)" cross-tabulates several issues from the General Social Survey (over time) and the responses with liberal and conservative indicators. In order to define which position or response is to be classified as liberal or conservative, he not only took into account the definition of liberalism posed earlier, but also what the policy preferences of a widely recognized liberal group and a conservative group. The Americans for Democratic Action (ADA) responses are indicative of liberal policy preferences while the American Conservative Union (ACU) responses are reflective of conservative preferences. Three other indicators to measure the liberal/conservative leanings of the GSS respondents were used: presidential vote in the 1972 and 1984 elections, and self-placement on a seven-point liberal/conservative scale. This GSS study yielded 455 survey items which constructed several time-series between the

years of 1945 to 1986-- not all time series are consistent. From these many series and their measures on liberal/conservative scales, Smith is able to identify general liberal and conservative trends in the post World War II era.

Smith's findings suggest that from 1945 until 1974 there is an obvious liberal trend with respect to majority stances on policy issues (i.e. abortion, civil liberties, feminism, etc.). In fact, these trends far outweighed the conservative policy trends until 1974. From 1974 until the early eighties liberalism did dramatically decrease. Smith notes that there is no reversal of the *overall* liberal trend in America, but a halt to liberal advance. In other words, liberal stances on many *issues* did reverse enough to cause an overall "liberal plateau (Smith 1990, 496)." Smith states:

In brief, the balance of liberal/conservative changes since World War II has not been uniform over time. Many liberal trends leveled off and some even reversed direction in the 1970s... overall society did not reverse from liberalism to conservatism, but liberal gains of the post-World War II period did level off. While some liberal trends did reverse direction, the general shift was from liberal advance to a liberal holding-pattern (1990, 499).

Even though Tom Smith has identified some important liberal trends in post-World War II history, I would like to turn now to the final study that describes these trends in a much more comprehensive manner.

Policy Mood

Policy mood is an aggregation of views about government policy. The mood is typically characterized by what a majority of Americans think about policy issues over extended time periods. James Stimson in *Public Opinion in American* (1991) attempts to identify this mood throughout history; how it has changed and how it has remained the same. Stimson's study is similar to Smith's 1990 study, yet quite complex when compared to Smith's.

In order to measure what Stimson calls "policy mood" a myriad of survey data is collected on various issues. These survey responses collectively identify the mood of Americans concerning particular issues over time. For each issue, there may be tens to hundreds of separate surveys completed over several decades with questions directed at how or what the respondent thinks or feels about certain issues. Each survey measures the mood at that particular point. Yet, if several points in time are examined over many decades one can decipher trends and/or cycles in the public mood with respect to that issue.

The most intriguing aspect about this study is that policy mood is an aggregation of majority opinions concerning several issues over many decades. It is not, for example, the majority opinion about abortion over the last 40 years. So then, mood can not be characterized by one issue, but by several issues. This is where the complexity of this study lies. Stimson's main question remains as to whether there is any uniformity among available measures for a consistent mood to be identified. For mood to exist, public opinions on several issues would have to change similarly over time. On a conservative to liberal continuum, public opinion on several issues (such as abortion, crime, and welfare) would need to register consistently over time as conservative or liberal in order that a liberal or conservative mood could be identified. This is very difficult since all surveys are not standardized with one another, and survey questions that seek to measure support for particular policies are not similar over time. James Stimson solves these difficulties through the aggregation of the survey data.

By using factor analysis and many other statistical techniques, Stimson is able to standardize survey responses over time into an aggregate measure of liberalism. The use of these standardized responses, measures aggregate increases or decreases in

liberal attitudes(which were based on policy preferences over time). Figure 1 models this methodology.

Survey data concerning issues of education, health, race, urban problems, and welfare are plotted on a standardized scale of liberalism. As one can see there appear to be some very consistent patterns forming what Stimson calls "policy mood." Particularly, from 1975 through 1989 the trend appears to be heading in a more liberal direction after the more conservative responses of the mid to latter seventies. Hence, on domestic issues of education, health, race, urban problems, and welfare the American policy mood in these areas is becoming more liberal, in the aggregate, during the eighties when compared to responses of the seventies. Expanding this method, Stimson provides a data summary in Figure 2.

With all the survey data collected on the various issues that comprise domestic policy mood, Figure 2 provides a graph of the results. The graph presents the degree of domestic policy mood liberalism and its association with liberalism from 1956-1989. The center horizontal line represents the mean (average) liberal mood for 1956-1889. The widths around the middle line which graphs domestic policy mood across time are "zones of acquiescence." These widths represent plus and minus one standard deviation from the line representing policy mood. From the graph we can see that 1956-1963 was a time of growing liberalism about what government should do in domestic policy areas. After a brief, steep decline from 1963-1966 an upward trend begins with fluctuations through 1974. From 1974-1980 a general conservative ascent(liberal descent) is prominent only to be countered from 1981-1989 with a fluctuating, yet gradual, liberal ascent.

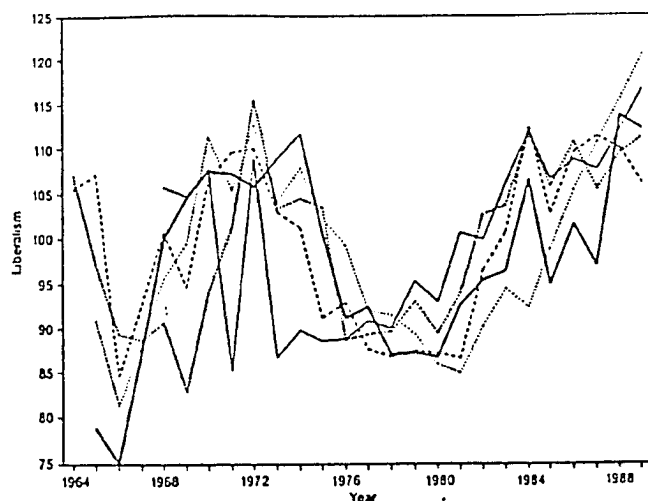


Figure 1. Five Components of the Welfare State on a Common Scale (Stimson 1991, 72).

Source: Stimson, James. 1991. *Public Opinion in America: Moods, Cycles, & Swings*. Boulder: Westview Press.
Used with permission of James Stimson.

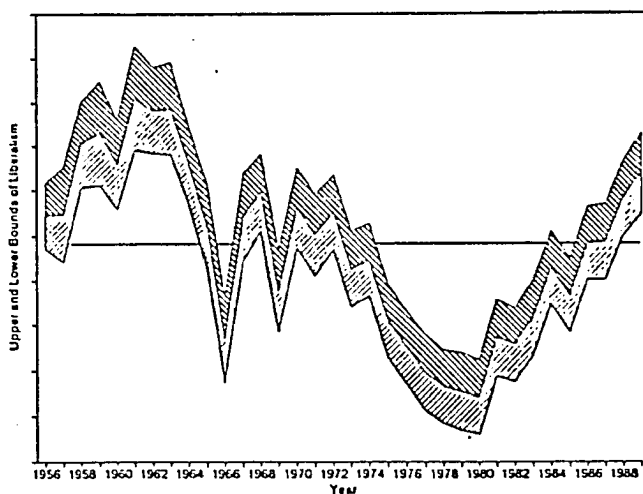


Figure 2. Policy Mood With Zones of Acquiescence Estimated From Standard Regression Errors (Stimson 1991, 118).

Source: Stimson, James. 1991. *Public Opinion in America: Moods, Cycles, & Swings*. Boulder: Westview Press.
Used with permission of James Stimson.

Policy Mood in the Warren and Burger Eras

This last and most comprehensive study measuring liberal policy mood offers some insight about the American "climate" in which decisions by the Courts have been decided. During the Warren years policy mood fluctuated. From 1956-1963 domestic liberalism continued to gradually increase above the mean liberal mid-point. A dramatic decrease from 1963-1965 and fluctuations towards the end of the era pose interesting questions: Is it possible that the "great liberalism" of the Court in the fifties and early sixties created a domestic policy backlash which called for a more conservative approach? Although this measurement of Stimson's does not specifically address the aggregate polity response to Court decisions, the Court was a prominent component in the making of domestic policy. Either way, no concrete response can address this question and any absolute answer should be avoided, but it is this type of question that will be considered in the following chapter.

The Burger Court has experienced quite a different set of liberal indicators. Court activity from 1974-1981 occurs in a "climate" where a gradual slide into greater conservatism is evident. Even so, the Burger Court finishes its final years in a climate of growing liberal domestic policy preferences. In this view, the question concerning a domestic policy backlash asked about the Warren Court could similarly be asked of the Burger Court period. Each Court (Warren and Burger) has delivered decisions in the first half of its tenure within a congenial "climate;" the Warren Court's liberal decisions within a time of liberal policy mood and the Burger Court in a time of conservative policy mood. Still, the second half of each Court's tenure shows a shift away from the liberal and conservative dispositions of the respective Courts. These situations and the questions they pose will be considered in the next chapter.

CHAPTER V

JUDICIAL DEFERENCE

The notion of judicial deference, typically referred to as judicial restraint, embraces several self-imposed standards that limit justices' discretionary powers and restrict arbitrary decision making. Supreme Court deference with respect to lower court decisions involves a yielding of the Courts judicial review power in lieu of the lower court ruling. Amongst the three branches of government, Supreme Court deference implies respect for the separation of powers between the Court, the Congress and the Executive. Although the Court has review power with congressional legislation as well as executive orders, many Court's exhibit a reluctance to scrutinize these laws for fear of crossing institutional boundaries of jurisdiction. These common illustrations of judicial deference will be addressed in this chapter, along with a less common association: judicial deference to the public environment.

This association suggests that the public environment or "climate" that Court periods rule within may have some effect on the nature of those rulings. Levels of national liberalism and the destinations of "policy mood," as articulated in the previous chapter, are thought to help define the role perceptions of particular Court periods. Hence, the Warren Court's liberal rulings are a reflection of national liberalism and liberal policy preferences. The same may be the case for the Burger Court. Conservative Court decisions become a product of declining national liberalism and heightened conservative "policy mood" in the public. The issues of judicial deference posed by each of these illustrations is addressed within the context of democratic

theory, providing an often complex discussion concerning the balance of government power and the proper role of the Supreme Court.

Supreme Court deference with respect to the Court's appellate jurisdiction is defined by familiar phrases such as: original intent, justiciability, and statutory construction. These self imposed restraints place limits on the Supreme Court's power to adjudicate cases arising from the States. Charles Lamb, in *Supreme Court Activism and Restraint* (1982), outlines six important maxims of restraint (Abraham 1980, 373). These maxims are: (1) justices must abide by the intentions of the framers of law, (2) justices should be extremely reluctant to exercise the power of judicial review, (3) the Supreme Court should avoid constitutional questions whenever possible, (4) decide legal issues based on the specific record of the lower courts, (5) the Court will not issue advisory opinions, (6) the Court will not answer political questions (Lamb 1982, 15). Despite these impositions, judicial review is a powerful tool of the Court when in use. Alexander Hamilton, in *Federalist #78*, validates the Court's power should a statute conflict with the Constitution:

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as any meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents (1961, 525).

The Court's review power also extends to congressional legislation and executive orders that contradict the Constitution. Even so, Alexander Hamilton attempts to make it quite clear that this power does not imply the supremacy of the judiciary to either the legislative or executive branch.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental (Hamilton 1961, 525).

With the infusion of judicial review as a mode to check the legislative and executive branch, judicial deference to the separation of powers can become a circumscribed observance in light of the judiciary's obligations. Hence, the maxim that justices should be extremely reluctant to use judicial review. This reveals quite a paradoxical situation for the Court. On one hand, the Court is the guardian of the Constitution with judicial review as its weapon against those forces that may betray the law. Yet, on the other hand, maxims of restraint suggest that this should be used sparingly, if at all! This situation exemplifies the relative nature of restraint. Since there are no formal rules or regulations concerning the use of judicial review, the perceived obligation to invoke review of a congressional or state action is not at all consistent among justices or Court periods. The extent of its use is typically determined by a justice's role perception.

How does the Court think it should function within a democratic society? The restraintist asserts that the arbitration of law is the primary function of the Court, not the practice of social policy making. The emphasis is then placed on the means of decision making, not the ends. If the statute is not in conflict with constitutional law, yet socially inadequate, it still is not the business of the Court, but the duty of the representatives to "cure." Congress' inherent function is that of policy making, and any infringement is in violation of the separation of powers, if not wholly undemocratic. Although this was the adamant viewpoint of the "great restraintist" Justice Frankfurter,

the majority of the Warren Court appointees observed that the law *is* social policy, and felt it impossible to extricate one from the other.

The Warren Court's perception of its role in society was vastly different from those of Courts both before and after. Cases involving race relations, First Amendment rights, rights of the accused, and reapportionment flooded the Court with precedent setting potential. The Warren Court used its abilities to foster some assemblage of racial equality, strengthen the "guaranties" elaborated in the bill of rights, and insure equal representation. The Warren Court years were, at times, years of social turmoil and turbulence for the structures of government. Within this context, there was not only great need for conflict resolution but a prevailing sense among Americans that a change in social policies by government was desperately necessary. As James Stimson points out, the mid-fifties through the early sixties was a time of growing liberalism about what government should do in domestic policy areas (Stimson 1991, 119).

It is this "policy mood" of Americans that may have spawned much of the liberal decisions of the Warren Court. Instead of deferring to lower court jurisprudence or allowing the lengthy deliberative process of Congress to enact legislation for conflict resolution, the Warren Court took an active role that the majority of Americans were calling for and agreed with. By choosing to rule in such landmark cases as *Brown vs. Board* (1955), the Court made it clear that it perceived itself as far more than an adjudicator of the law; the Court was aware of its policy making function.

Just as the political environment changes so to judicial role perceptions change. 1974 through 1980 reveal "policy mood" at its most conservative state in recent history. As Figure 2 indicates, a restraintist (conservative) stance on what role

government should play in society prevails. During this period, the Burger Court embraced many maxims of restraint typically refusing to perpetuate Warren Court policy making. Richard Funston describes the Burger Court role perception: the Court "exhibited a desire to transfer the burden of solving society's difficult problems from the judicial to the political process" (1977, 342).

The difficulty for each of the Court periods is that "policy mood" fluctuates. The Warren Court for almost ten years ruled amidst a liberal "climate" with growing support for a majority of its policies and programs. But for a brief period from 1964-1966, a conservative and restraintist stance concerning the role of government in society is evident. Although the source of this conservatism is not ascertainable, the Warren Court seems to have dealt with the fluctuation. Of the 21 Warren Court case sample, 5 decisions were within this time frame. All five rulings were agreeable to the majority of the public suggesting that the Court was able to adjust to changing sentiment.

The growing liberalism in the latter years of the Burger Court seemed to pose no problems of support for this era either. From 1981 through 1986, liberalism continued to ascend from its greatest decline in 35 years. This time frame consisted of 11 cases from the Burger Court sample. Of these 11 cases only one was antimajoritarian, 2 unclear, with 8 majoritarian rulings. With the exception of one case, the Burger Court ruled favorably to public opinion majorities when the unclear cases are excluded.

These fluctuations in "policy mood" can not be assumed as a reflection of whether the public agrees with particular Supreme Court decisions or not, since liberal "policy mood" comprises public opinion measurements on a compilation of general government activity. The fact there is a dramatic decrease in liberal "policy mood" in

1964, therefore, can not be readily attributable to reaction to Supreme Court decisions. Likewise, the liberal ascent occurring in the mid eighties cannot be assumed as a negative reaction to rulings of the Burger Court. Certainly, the Court is a component in government policy making, but not the only one. Thus, it is almost impossible to ascertain the specific source or reason such "backlash periods" occurred. Even so, it remains important that during these dramatic reversals of policy mood, both the Warren and Burger Courts continued to reflect public opinion majorities. It is surprising that while the public preferences about government policy making suddenly changed, each Court remained reflective of popular opinion.

This situation suggests that Supreme Court justices, if influenced by public opinion, are influenced by *current* opinion. Thus, Court justices are far from being "out of touch" with the people's sentiments and themselves are "political creatures, who are broadly aware of fundamental trends in ideological tenor of public opinion, and that at least some justices, consciously or not, may adjust their decisions at the margins to accommodate such fundamental trends" (Mishler & Sheehan 1993, 89). The idea that the Court is influenced by public opinion is not denied by some of its recent membership. Chief Justice Rehnquist has this to say about the influence of popular opinion:

Judges, so long as they are relatively normal human beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs. And, if a judge coming to the bench were to decide to hermetically seal himself off from the manifestations of public opinion, he would accomplish very little; he would not be influenced by current public opinion, but instead would be influenced by the state of public opinion at the time he came to the bench (Rehnquist, as cited in Mishler & Sheehan 1993, 89).

The most recent study to date concerning the possibility that judges are "in touch" if not influenced by public opinion is that of William Mishler and Reginald

Sheehan. Supreme Court decisions decided with full opinions and coded as to whether the outcome was liberal or not are contained in the U.S. Supreme Court data base. This data base includes almost all of the seven thousand cases decided from 1956-1989. By taking each years decisions and the percent of those decisions coded as "liberal," the percent of liberalism in each year is calculated. It is determined, as expected, that a high percentage of liberalism exists during the Warren years while a low percentage of liberalism exists during the Burger years.

Correlating this measurement of Court liberalism with Stimson's measures of liberal "policy mood" is the second major step of this study, detecting the Court's ability to respond to the public. Although there is somewhat of a lag in Court response (about 5 years) the Court appears to reflect major fluctuations in "policy mood" and the relative liberalism of policy preferences of the public. The evidence of this is particularly clear during the times when domestic "policy mood" is contradictory to the ideological composition of that Court era. As discussed earlier, Stimson's measure of liberal "policy mood" identifies years of conservatism during Warren Court liberal composition as well as years of ascending liberal "policy mood" during the conservative composition of the Burger Court. Even when Court orientation and public attitudes do not coincide, the Court appears to defer to public opinion. In Mishler and Sheehan's study, Warren Court decisions during the years of conservative "policy mood" (1964-67) are far more conservative than at any other year during the Warren Court era (1993, 90-91). The Court decisions of the Burger years, when public mood became increasingly liberal, also are more liberal (Mishler & Sheehan, 1993). The major exception to this trend begins in 1988 to 1989 (at the end of the available data). Here, "policy mood" continues to become increasingly liberal, while the Rehnquist Court decisions are substantially more conservative. Standardized

measures of the liberalism of public "policy mood" and the liberalism of Supreme Court decisions register a 25 point gap, greater than in any other year since 1956 (Mishler & Sheehan 1993). Despite this recent divergence, it appears that the Supreme Court over the last 30 years has reflected popular opinion even when Court ideology is not conducive to "policy mood."

Assuming that justices, and the Court in general, are influenced by public opinion, the Supreme Court's role as a check on the "ill humors in the society" is somewhat questionable. Unjust and partial laws that violate minority rights must be cited for their unconstitutionality and revised. This is the province of the Supreme Court given the fact that this type of relief can not come from anywhere else. Aside from America's representative democracy, it can be effectively argued that the Court, amidst its undemocratic procedures, is intended to be the defender of *minority* rights.

As we can see, unbounded deference to public opinion raises serious questions. In fact, judicial deference of any order appears to contradict the Court's standing as an independent branch. In the subsequent, concluding chapter I will review much of the previous sections of this thesis to offer a normative analysis concerning the role of the Court in a representative democracy, as well as the proper role of public opinion in the Supreme Court. It is evident that the future legitimacy of the Supreme Court as a law making institution is secured in the proper balance of majoritarian decision making as well as the protection of unpopular minority rights.

CHAPTER VI

THE ROLE OF THE SUPREME COURT IN AMERICAN SOCIETY

The proper role of the Supreme Court in society has been debated since the beginning of American Constitutional thought. Today, the debate seems more relevant than ever given the increased effect that Court decisions have on our lives. No longer does the Court deal with minor procedures such as the admission of attorneys, but decides cases in areas from abortion to race relations to interstate commerce (O'Brien 1990, 103). Given the fact that the Court does play a substantial policy making role in American society, it is important to note that these decisions are not made from the proverbial "ivory tower." So that even though justices are accorded life tenure and the Court deemed an independent institution, neither are isolated from the political arena.

Political factors such as majority-public opinion and the public environment that opinion creates are influential in Supreme Court decision making. The Court must, and does, take into consideration the effect a decision may have on those it rules on the behalf of. Generally this situation is not perceived as a condition that undermines judicial independence since general public support is a necessary component for Supreme Court legitimacy. What remains questionable is the extent of public approval the Court seeks, and how public opinion influences Court decisions. Nowadays, when polling agencies can ascertain majority sentiment in a matter of hours on any given subject and relay that sentiment immediately over a variety of communication linkages, the threat remains that the Supreme Court can be excessively influenced by the will of the majority.

The problems that unchecked majority rule poses are not new. A few are depicted by Alexander Hamilton over two hundred years ago including the trampling of minority rights by means of unconstitutional legislation. Recent Supreme Court cases in which the majority is believed to have played a role in influencing the Courts decision to suspend constitutional rights to a minority are identifiable. Probably the most well known is *Korematsu vs. the United States* (1944), where the Court ruled that the internment of Japanese-Americans during World War II was justifiable. Another well known but less recent case, *Plessy vs. Ferguson* (1896), exemplifies how justice can be abandoned when majority sentiment transcends the concerns of a suspension of constitutional rights. For decades after the Civil War, blacks were segregated from whites in all societal aspects under the rule of "separate but equal" which was permitted by the Supreme Court. These situations remind us that there is a need to check public opinion when the majority pursues legislation that undermines constitutionally protected rights.

Simply because a majority of Americans agree on a particular issue does not justify counter-constitutional laws. The Court's proper role in these fragile situations is to mitigate the severity and confine the operation of laws that are unconstitutional (Hamilton 1961, 526). This can be a perplexing situation for the Court given their obligation to uphold the Constitution, while relying upon general support of the people for legitimacy. *Korematsu* exemplifies a dangerous situation when passionate public opinion influenced a Supreme Court ruling, creating an atmosphere where it was evident that it was not in the best interest of *the Court* to disallow Japanese-American internment. Ruling otherwise, the Court retained majority public approval and the public in turn conferred legitimacy to the institution and its members.

Majority-public opinion today has the potential to influence much more now than at any other time in history. The extent of majority support for pending Court cases and the issues they represent can be known in a matter of hours. The support ratings are then presented to the public over various communication networks, in effect letting the justices know what the "right" ruling is. Today's media is also amply poised to "expose" any antimajoritarian rulings by the Court. Therefore, it is possible that Court legitimacy could languish in the midst of a well publicized fury about the undemocratic decision making of the Court. In light of controversy such as this it must be remembered that the role of the Supreme Court in our society is not that of a purely representative, democratic institution.

The appointment and life tenure provisions for justices of the Supreme Court were instituted in order to preserve judicial independence, yet, while doing so they also exemplify the undemocratic nature of the institution. Alexander Hamilton makes it quite clear in *Federalist* #78 that one of the primary duties of the Court is guardian of the Constitution and individual rights, not representation of majority will.

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the friends of the proposed Constitution will never concur with its enemies, in questioning the fundamental principal of republican government, which admits the right of the people to alter or abolish the established Constitution, whenever they find it inconsistent with their happiness, yet it is not to be inferred from this principle, that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions; or that the Courts would be under a greater obligation to connive at infractions in this

shape, than when they had proceeded wholly from the cabals of the representative body (Hamilton 1961, 527).

Given that the Court was not intended to be a purely representative democratic institution, why should the Court be judged according to its relationship with the public? In fact, the methodological foundation for studying the sample of Warren and Burger Courts cases in chapters two and three suggest that the Court's relationship to the public is of principal concern. By redefining the terms by which a Court is deemed restraintist or activist (Chapter II), based solely on the Court's relationship with the public, I am suggesting that this association is essential to understanding the decision making process of the Supreme Court. The answer to the above question lies in the paradoxical situation the Court finds itself in.

While not intended to be a democratic institution, the Court still exists within a representative democracy which holds the Court accountable for its actions. Supreme Court rule of law is only validated by the legitimacy that the public and surrounding institutions confer. Since the Court has neither the enforcement powers of the "sword or purse," it relies upon other institutions and public acceptance to execute its decisions (Marshall 1989, 131). The Court recognizes this situation, and despite Hamilton's warnings or Constitutional support for its actions, the Court is likely to defer to public sentiment particularly when public opinion is one-sided and intense (Monroe 1974, 187-216).

This predicament of the Court verifies that the balance of principles concerning representative democracy and constitutional rights can be a difficult one. The role of the Court must be one where the constitutionally founded rights of the person(s) are not unduly burdened by the will of the majority. Despite pressures from the plurality and its representatives, the Court must work as a check on our system of majoritarian rule in order to secure the rights of all.

Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may not be to-morrow the victim of the spirit of injustice, by which he may be a gainer to-day (Hamilton 1961, 528).

For those disturbed by the thought that the Court may be excessively swayed by public opinion, there is some indication that "the linkage between public opinion and the decisions of the Court is imperfect and occurs after a significant delay" (Mishler & Sheehan 1993, 97). William Mishler and Reginald Sheehan's study, concerning the relationship between public opinion and the Court, suggests that the Court may act "as a temporary buffer against public opinion, shielding the policy process from... passions of the moment" (1993, 97). According to this research, there exists a five-year lag between aggregate policy preferences (policy mood) and Court decisions. In actuality, the Court is typically not an immediate responder to the will of the majority, possibly allowing for public opinion to temper. Also, as we have seen from the data presented in previous chapters, the Court is reflective of majority opinion an average of only 60% suggesting that the Court is not responsive to public opinion an average of 4 out of 10 cases. Given these conditions: the notable delay between majority opinion reaction and Supreme Court response, combined with the imperfect association between public opinion and the Court, it is not apparent that the public will *dominates* the Court's decision making process.

In conclusion, this study of the Court and its relationship to public opinion sketches the real life working of the Court. Notwithstanding the intentions of the framers, students of the Supreme Court must be particularly aware of the fact that the Court is not "above" the reach of politics. The Supreme Court is a policy making institution that exhibits potential for "will" and "force." Their decisions have considerable impact on the daily lives of many Americans as both the Brown (1955) case and the Roe (1973) case have shown. The conclusion that these elements of

"will" and "force" are both tempered or heightened by public opinion illustrates the dynamic and changing role of the Supreme Court in American society.

Appendix A

Survey House Polling Questions for the Warren and Burger Courts

The following are those questions asked of the public that reference Supreme Court decisions. Questions are filed under the survey house and identified by interviewing date. The number of the question (some in parenthesis) corresponds to the case number in Tables 1 and 5.

I. GALLUP (Warren Court Cases Only)

Gallup's typical survey size is 1500. Exact survey sizes for each question are not available

1. The United States Supreme Court has ruled that racial segregation in the public schools is illegal. This means that all children, no matter what their race, must be allowed to go to the same schools. Do you approve of this decision? [5/21-26/54]

2. In many communities in the Deep South states, the number of colored school children is greater than the number of white school children. Would you say that these communities in the South should be required to integrate schools immediately, should they be given a few years to do this, should they be given a longer time such as 10 to 20 years, or should they not be required to integrate at all? [9/10-15/58]

3. A judge in Little Rock, Arkansas, has put off bringing Negro and White children together in the schools there for a period of two and a half years. Do you approve or disapprove of this ruling? [7/10-15/58]

4. The United States Supreme Court has ruled that racial segregation on trains, buses, and in public waiting rooms must end. Do you approve or disapprove of this ruling? [5/28-6/2/61]

5. The Supreme Court has ruled that as soon as the police arrest a suspect, he must be warned of his right to remain silent and to have a lawyer. Only if he voluntarily waives these rights may the police question him. If he wants a lawyer, but cannot afford one, the state must pay the fee. The lawyer has the right to be present during the questioning and advise the suspect to say nothing. The following question was asked of those who said they followed the issue: Do you think the Supreme Court's ruling on confession was good or bad? [7/8-13/66]

6. The United State Supreme Court has ruled that no state or local government may require the reading of the Lord's prayer or Bible verses in public schools. What are your views on this? [6/21-26/63]

7. Should policemen be permitted to join unions, or not? [10/8-13/65]

8. How would you feel about a law that gave all persons-Negro as well as white-the right to be served in public places such as hotels, restaurants, and theaters, and similar establishments. Would you like to see Congress pass such a law, or not? [1/2-7/64]

9. As you know, the United States Supreme Court that the number of representatives of both the lower house and the Senate in all state legislatures must be in proportion to the population. In most states this means reducing the number of legislators from the rural areas and increasing the number from urban areas. Do you approve or disapprove of this ruling? [7/23-28/64]

10. A law has been proposed that would allow the federal government to send officials into areas where the turnout of eligible adults in the last Presidential election was so low that it suggested that some persons were denied the right to vote. These officials would make sure Negroes and whites are given an equal opportunity to register and vote. Would you favor or oppose such a law? [3/18-23/65]

11. In some European countries, automobile drivers suspected of having consumed too much alcohol are required to take a breath test or a blood test. Would you favor or oppose a law in the United States that require such tests. [11/9-14/68]

12. Do you think the use of marijuana should be made legal, or not? [10/2-7/69]

13. Some states have laws making it a crime for a white person and a Negro to marry. Do you approve or disapprove of such laws? [1/28-2/2/65]

14. Would you like to see Congress pass an open-housing law or reject it? [3/9-14/67]

15. As you know, many boys today wear their hair very long. Do you think the schools should require boys to keep their hair cut short? [9/16-21/65]

16. The Federal Government in Washington decides to give money to aid education, should this money go to all public schools, or should it be withheld from schools which fail to integrate white and Negro students? [1/11-16/63]

17. Do you think Powell should be allowed to keep his seat or not. [1/26-31/67]

18. Do you think that persons who have come recently from some other place should be required to live in the community for 60 days before they can get on relief, or not? [n/a]

19. Do you think that racial integration is going too fast or not fast enough? [2/27-3/2/70]

20. Do you think the use of marijuana should be made legal? [n/a]

II. GALLUP (Burger Court Cases Only)

1. Do you think homosexual relations between consenting adults should or should not be legal? [6/17-20/77]
2. Do you favor the death penalty for those convicted of murder?[6-7/82]
3. It has been suggested that the federal government should provide a fixed amount of money for the election campaigns of candidates for the presidency and for Congress, and that all private contributions from other sources should be prohibited. Do you think this is a good idea or a poor idea? [9/7-10/73]
- 4.(5) Are you in favor of the death penalty for those convicted of murder? [4/9-12/76]
- 5.(6) Do you think that homosexuals should or should not be hired for elementary school teaching? [6/17-6/20/77]
- 6.(7) Are you in favor of the death penalty for persons convicted of rape? [3/3-6/78]
- 7.(8) Do you favor or oppose making birth control available to teenage boys and girls? [12/9-12/77]
- 8.(13) Do you favor or oppose police stopping motorists at random to give them a test such as a breath alcohol or coordination test, even though they may not have committed an offense? [6/17-20/77]
- 9.(21) Do you favor or oppose the registration of the names of all young men so that in the event of an emergency the time needed to call up men for a draft would be reduced? [7/11-7/80]
- 10(22) If a draft were to become necessary, should young women be required to participate as well as young men? [3/1-5/79]
- 11(23) Do you think that homosexuals should or should not be hired for the armed forces? [6/25-28/82]
- 12(24) Do you favor or oppose a law in this state that would prohibit tandem-truck rigs on major interstate highways? [4/29-5/2/83]
- 13(27) Some communities have passed laws banning the sale and possession of handguns. Would you favor or oppose having such a law in this city/community? [5/13-5/16/83]

14(28) Would you favor or oppose a law that would require all new cars to be equipped with seat belts that, without any action on the part of the driver, would lock automatically in place when the doors are closed? [5/18-21/84]

15(30) Do you feel that high-school students who participate in sports and extracurricular activities should or should not be required to maintain a minimum grade point average and school attendance record? [5/17-26/85]

HARRIS (Burger Court Cases Only)

1.(4) Do you favor or oppose a law that requires every person who contributes \$100 or more to be identified by name, address and occupation? [9/73]

2.(9) The United States government recently decided to allow the supersonic Concorde to land in the United States for a 16-month trial period. Which statement best describes how you feel about this decision? [10/8-16/77]

3.(11) Should search warrants authorizing police to search newspaper offices be issued by judges, or not? [4/6-9/79]

4.(12) All in all, from what you've read or heard, do you agree with the decision of the Supreme Court in the Bakke case? [10/78]

5.(15) Should we continue our diplomatic recognition of Taiwan, or should we withdraw that recognition in order to have better relation with communist China? [1/5-8/79]

6.(16) Do you favor or oppose the ban by the FDA of the use of laetrile? [6/27/77]

7.(17) Should the following rights ever be suspended? The right not to have one's phone conversations tapped for any reason, except with a court order. [9/5/74]

8.(19) All in all, do you favor or oppose Affirmative Action programs in industry provided there are not rigid quotas? [11/80]

9.(26) Do you favor or oppose the federal government giving tax exemptions to schools that segregate whites and blacks? [2/12-2/17/82]

NBC/AP (Burger Court cases only)

1.(10) Do you agree or disagree with the following statement: "There should be laws against the distribution of pornography, even to adults." [2/81]

2.(15) Do you approve or disapprove of laws that allow someone to be found not guilty of a crime because of insanity? [6/22/82]

3.(25) Do you think school boards should be able to ban controversial books from public school libraries and classes, or should school librarians and teachers have the final say about what books are available? [10/25-26/81]

4.(29) The law now says that judges must throw out evidence which police obtain illegally. Would you favor a change so that more of this evidence can be admitted, or do you think the law should be kept as it is? [1/18-19/85]

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