

# **The Supreme Court's Countermajoritarianism? What Impact Does Public Opinion Have On the Supreme Court Decisions?**

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## **Abstract**

*Although normative questions about the role of the Supreme Court as a countermajoritarian institution have been commonly debated in political science research, an updated empirical question on Mishler and Sheehan's (1993), study on public opinion and its impact on the Court must be asked. It has been 25 years since the publication of their study and numerous high profile cases such as Bush v. Gore, Citizens United v. FEC, and Obergefell v. Hodges have brought nationwide attention to the Supreme Court and how it interacts with public opinion. Results from empirical measurements of the Supreme Court's decisions and what impact public opinion has, indicates no existence of a significant relationship. The Supreme Court's ideological composition changes in response to the ideological orientation of the president rather than a shift in public opinion. Mishler and Sheehan described the Court's ideological balance since 1981 as being upset and undermined because of an unbroken string of conservative-to-moderate appointments. In the 25 years since the study, the countermajoritarian trend they noted at the beginning of the early 90's seems to be continuing.*

## **Introduction**

Beginning with the pioneering work by Robert Dahl, legal scholars have looked at the Supreme Court as a majoritarian institution that swayed with and was directly influenced by public opinion. Scholars have debated for decades on whether the Supreme Court was a catalyst for social movements, or were rather flowing with the tide of changing public perceptions. Theories of legal scholars go back and forth regarding the Supreme Court's role in the social working of the United States public domain. Many court cases seem to direct towards an

institution that listens to and modifies its messages to that of the public's sentiment. In response to these findings, legal scholars identify monumental court cases, in which the Supreme Court swings hard against the majority thought and rules in favor of the minority. Often the analogy of a brakeman is used to describe the Supreme Court, unable to bring public opinion on issues to change, but possesses the ability to cease them from continuing down a path the Supreme Court deems "unconstitutional". Today the debate rages on, as the theory of whether the Supreme Court is a countermajoritarian institution, or is simply changing as society ages and shifts in beliefs.

## **20th Century Findings**

Dahl, Robert A. (1957) revolutionized how the legal field views the Supreme Court and their rulings. No discussion of the Supreme Court and how it revolves around United States' public opinion would be complete without referencing his work. Dahl examined the Court and how it ruled on cases in relation to the public's feelings towards the case, pre and post ruling. The worry among legal scholars and of policy makers is of an overly powerful Supreme Court, which independently acts as the sole decider of what is right or wrong, and is not democratic. These scholars had concern that the elite minds would dictate the country and place its judicial decisions within the control of a legal oligarchy. Dahl, (1957) found, however, that the "Court is rarely out of sync with the political majority; its exercise of its power of judicial review should not be seen as a threat to democratic theory". With a relatively high turnover rate of the justices, the public opinion would wiggle its way into the courtroom as new minds replaced the older

traditional minds. According to Dahl, the theory of an elite countermajoritarian Supreme Court could be extinguished before it caught public ignition.

Dahl's findings would be thrown under scrutiny, and consequently after every Supreme Court ruling the question of whether the Court was actually democratic would be raised. Franklin and Kosaki, (1989) studied whether or not the Supreme Court actually influences the public enough to notice a shift in the direction of Court rulings. To do this they investigated the relationship when the Supreme Court issued their ruling on *Roe v. Wade* and if there was any shift in the number of abortions, as well as the opinion on the subject. During deliberation of the case and following the Court's ruling Franklin, (1989) conducted polling on individuals and how they felt on the topic of abortion and whether the Court ruling would affect their personal beliefs on the matter. They found that there was an impact on public opinion on the subject in response to the Court's ruling. They discovered that the Court's ruling caused an increase in polarization and contradictory to what Dahl theorized decades prior. There was a strong negative public reaction to how the Supreme Court decided on the case. The polls showed people grew more passionate and firmly held to their original beliefs on the subject. If the Court was truly reflecting the public's opinion, and evolving with constant turnover of judges, then there should not be such negative reactions and polarization towards rulings. The judicial decisions should echo the majority opinion and act as a bridge in bringing the people together. People thought the Court should be viewed as a "Republican Schoolmaster" requiring the will of the people to function and succeed as a functional, effective branch of the government. Franklin and Kosaki's, (1989) research presented a rebuttal to Dahl's work. Maybe the Supreme Court is not acting on the public's behalf but rather using their "elite minds" to decide policy for the country.

If the Supreme Court is truly free to rule upon cases without concern for public opinion and with the ability to go against the grain, then what influences these judges? Rosenberg, (1992) attempted to identify this question by examining whether the Supreme Court was impacted by the political preferences of elected officials. He charted case rulings, ranking them on a scale from “pure independence to total subservience” to Congress and documented the Court’s views on each individual case. He found that while the Court may not be under direct pressure from the elected officials to make decisions that favor these views of the electorate; in six out of the nine cases Rosenberg examined, the Supreme Court ruled in favor of what Congress had initially proposed. He found that the Court is not able to shake away from the idea that it is uninfluenced by the public and its opinion on matters. Although it did not directly fall in line with the public opinion that is illustrated in Franklin and Kosaki’s, (1989) research, the Court tends to follow the elected officials opinions. These officials are subject to election by their corresponding district population, so they are obligated to react to their constituent’s positions on matters, thus making the Supreme Court subject to public’s opinion and influence. Reflection on the work by Dahl, it becomes apparent that the Court is indirectly responding to the public’s outlook in their rulings on cases. Whether it is direct influence from the public or the refrain of going against “elite” minded peers of Congress, the Supreme Court and public opinion share some relation on how cases are decided and the effect they have on society.

Social movements have been a large part of the 20th century, but they have not had as large an impact as perceived. Carter, (1992) explored whether The Supreme Court had any impact on how society evolved and how public policy followed. His theory is that the Court is not the large voice that determines how social movements will be shaped, but rather is just a

regular part of a traditional social movement. Carter, (1992) reviewed two tremendous 20th century social movements that were ruled on by the Supreme Court to see if they had the positive transcending impact, as is commonly thought. Carter looked at the matters of environmental issue and women's rights, two topics fought over feverously in the Court and which seemingly trended more liberally in the eye of public opinion. Upon examination of these two cases, he found there were only modest advancements in their fight as a result of the law-making process of the Supreme Court. Polling at that time found that people still held a conservative belief that women should have a more traditional role in society and that the preference of males over females in the workplace was still prevalent. While seeming to make advancements in suffrage and title IX rights, women were still being discriminated against. Carter, (1992) found that if the Supreme Court is a catalyst of social change then chauvinistic views should be trending substantially downward, as opposed to being prevalent at such a high rate. In theory, with all the rulings the Court has issued on the subject of women's rights, society should be changing positively towards equality. His findings indicate a positive trend in the way women are treated, but it is not the substantial upswing that a catalyst should bring. During the 20th century environmental protection has been a heavily debated topic, with the Court ruling on many cases. Carter, (1992) found that the environment battle is still contested no matter how many pro-environmental rulings were handed down by the Supreme Court. The theory that global warming is a hoax had become a sensitive issue, with several national surveys indicating doubt that the Earth is warming. With all the progress that had apparently been made in this century, public consensus remains more concerned with economic issues as opposed to environmental issues. He found that in order for change to occur, it is not through the Supreme Court rulings but

rather through change of “heart from electors and national leaders”. The Supreme Court is unable to elicit across-the-board adaptations, however Carter contends that the Court works to prevent change, and in order to successfully make change the people must avoid the Supreme Court. He finds that the Court is not swayed by public opinion, and that it is an independent force that actually has very little impact on policy and opinion.

## **21st Century Findings**

Are the American people focusing on the court and its decisions, or are they not invested in the cases being ruled upon? Hoekstra, V. J. (2000) studied whether or not the American people pay attention to the Supreme Court and their rulings. If the public did not care for or examine the Court’s decisions, then the Supreme Court would have no need to accommodate the public’s opinion. Through polling, he found that there is a relationship amongst the people of the affected community where the cases were transpiring. Through his research, Hoekstra was able to find that public opinion did in fact adapt to that of the Supreme Court and of the case being decided upon. On a basic level, the public viewed the Court as the last safeguarded haven of constitutional freedom, holding it in regards as a benevolent institution. He argues that people examine the opinions of the Court and values its decisions and impact on the lives of U.S. citizens. His polls are conducted in the communities in which they present an interest in the subject. He investigated how religious communities viewed the Supreme Court and its rulings on abortion. Prior to the ruling, these communities held the Court highly favorable, and generally supported it and their decisions. After the pro-women's choice ruling, these same communities

no longer held the Court in such high regards. The ruling appeared to bring about a feeling of distrust and skepticism of other matters the Supreme Court's ruled on as well. This emotion demonstrated that the American people were cognizant of the Supreme Court and reacting to their decisions. Further demonstrating that the hypothesis of public opinion impacting Supreme Court decisions is in fact plausible.

A growing concern with the idea of checks and balances in the United States government system is the worry that the judicial branch is has become too powerful. With the conception of judicial review post *Marbury v. Madison*, the Supreme Court gained the ability to review the other branches and determine what was "constitutional". This provided controversy as it gave the Court tremendous capacity to decide how laws shall be interpreted and used. Post, R.C., and Siegel, R.B. (2004) examined this controversy and attempted to discern whether there is merit to the concern of the perception of judicial supremacy. The authors found that initially there was a fear that the public was without a voice, essentially being stripped of this right by the Supreme Court. Was the Court "counter-majoritarian" and acting independently of the majority opinion and retaining all power to interpret. Post and Siegel found that the United States is not a victim of judicial supremacy, through the "ultimate virtue of popular constitutionalism" that is the appointment process of judges and through the examination of data regarding Supreme Court rulings, they discerned that the public holds the "active and ongoing control over the interpretation and enforcement of constitutional law". This finding shares that societies' unrestricted participation in constitutional issues are important and impact the Supreme Court's decision.



The Supreme Court undergoes prodigious pressure from the public and Executive branch and thus places a semi-constraint upon itself. Each justice is tasked with making a decision and then facing the scrutiny of their judgment and sometimes the demand to flip positions. Hall, (2013) examines the external pressures placed upon the Supreme Court Judges and their willingness to flip stances. He finds that the Court is relatively independent when it comes to administrative and criminal rulings; however the Court is subject to influence when attempting to alter public principles and political ideology. With the topic of public policy, there comes a media frenzy, as it is no longer a specialized issue. The populace is affected, and therefore everyone has a stake in his or her ruling. The justices are then found to stick to their political ideology and move away from the independent middle ground. Hall, (2013) found that while under this stressful public scrutiny, justices are vastly more likely to flip their judgment to the other side to “gain relief” from the pressure. This study showed that the Supreme Court justices are not independent rulers of policy who are beyond susceptibility to persuasion. Hall concludes that there is correlation between public opinion and Supreme Court case outcomes.

### **Call for Re-evaluation**

There exists a relationship between the Supreme Court and public opinion; however there is no consensus on the significance, direction of the connection, or impact from judicial rulings. For two centuries, many legal scholars have theorized on the causations for the Supreme Court rulings. Theories include that there is significant political pressure from the Executive branch while others imply that ordinary citizens, rather than the Supreme Court, ultimately are the final

interpreters of the Constitution (popular constitutionalism). It is theorized that the Court is composed of individuals who have views consistent with the rest of society. As justices transition within the Court, the opinions adapt and evolve. To provide merit to the hypothesis that the relationship between public opinion and Supreme Court decisions is caused by changing court composition, an analysis of current data must be used. By taking the Segal-Cover score, each justice's ideology is ranked either conservative or liberal. A sum of each of the justices sitting on the Court in any year is then compared with the Stimson's public "Policy Mood", which illustrated the public's ideology each year on a scale of conservative or liberal direction. The resulting index will be able to show whether there the linkage between public opinion and Supreme Court decisions are mediated through changing composition of the Court. The essential question is whether the Supreme Court is impacted by public opinion or if they determine their judgment prior to considering the universal impact. To analyze this question, an examination of updated data must be completed prior to examining whether or not there is a connection between the Supreme Court and public opinion. By analyzing data retrieved from the Spaeth Supreme Court Database (n.d), and Stimson's public "Policy Mood", the relationship of the Supreme Court and public opinion can be explained. The analysis will compare whether the Supreme Court's decisions and public mood in each year since 1993 were of either, conservative or liberal direction. The results will demonstrate if the Supreme Court acts independently of public opinion or if there exists a correlation. It is plausible that the effects of public opinion on the Supreme Court may be mediated by the power of the President and Congress. This can answer the theory that the Court may be more persuaded by political pressure rather than that of public opinion. When Mishler, W., & Sheehan, R. S. (1993) published their study in 1993, it found that the

Court was in fact, listening and responding to public opinion. The Court was functioning just how it was designed, efficient enough to satisfy the progressives and at a slow enough pace to put the conservatives at ease. In the time since 1993, the ideology of the Court and the country has changed. In this time, the nation entered an age of progressiveness, with only one Republican president in over 23 years. The mood of the country transformed, as well. Progressive movements such as gay rights, universal healthcare, and gun control became a common rallying cry and the public demanded action. The Court changed as well, however not in the way that would be theoretically anticipated. Since 1993, the Supreme Court moved further towards the political-right than it had been since 1953. Reassessment of why this occurred requires a focused study of how the Court operates, as well as the mechanisms for public opinion within the Court. With updated data being available, it is possible to replicate Mishler and Sheehan's testing and reach a modern conclusion on the relationship between the Supreme Court and public opinion. Thus the question must be evaluated; has the Court, since 1993, spun on Mishler and Sheehan's findings? Many legal scholars already believe the Court to have become a countermajoritarian institution. Secondly, is the Court responding to the shifts in public opinion or instead evolving their philosophical rulings, as membership within the Court transitions?

## **Methods and Analysis**

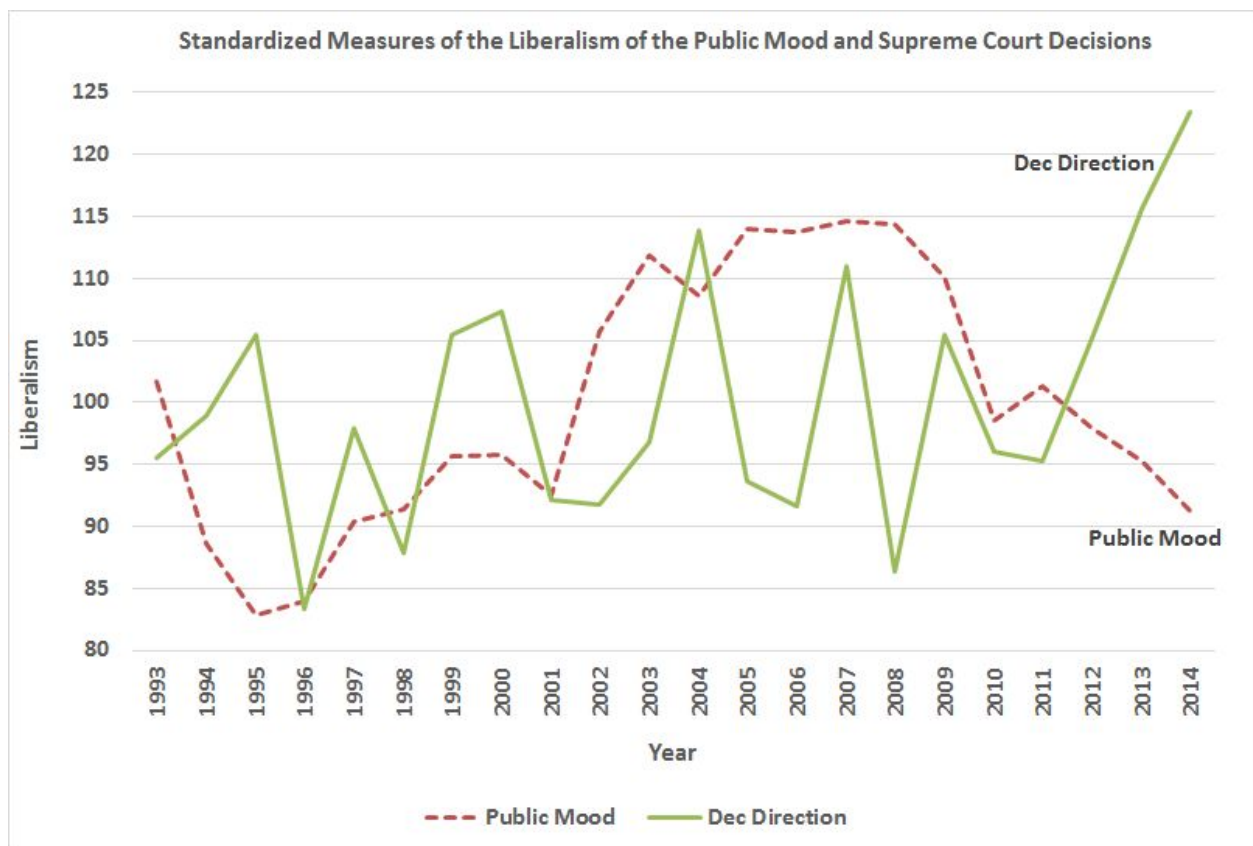
There exists a relationship between the Supreme Court and public opinion; however there is no consensus on the significance or direction of the connection; or the impact of judicial rulings. The question at hand is whether the Supreme Court is impacted by public opinion or if

they determine their judgment prior to considering how the nation will react second. To analyze this question, an examination of updated data must occur to test whether or not there exists a connection between the Supreme Court and public opinion. By using data retrieved from the Spaeth Supreme Court Database (n.d), and Stimson's public "Policy Mood", the relationship of the Supreme Court and public opinion can be explained. The analyses will compare whether the Supreme Court's decisions and public mood in each year since 1993 were of either, conservative or liberal direction. To re-consider the hypothesis that linkage between public opinion and Supreme Court decisions is caused by changing court composition, an analysis of current data must be used. By taking the Segal and Cover score, each justice's ideology is ranked either conservative or liberal. A sum of each of the justices sitting on the Court in any year is then compared with the Stimson's "Public Policy Mood", which illustrated the public's ideology each year on a scale of conservative or liberal direction. The resulting indexes will be able to show whether or not linkage between public opinion and Supreme Court decisions are mediated through changing composition of the Court. These measurements will demonstrate if the Supreme Court acts independently of public opinion or if there exists a correlation.

Mishler and Sheehan in their study (1993) found that the Supreme Court was in fact listening to the public however over time begun to diverge and grow countermajoritarian. In the time since their study was published, there exists the possibility of public opinion effecting the Supreme Court decisions directly. The Supreme Court is composed of individuals who have views consistent with the rest of society and as such, modify and adapt their opinions to match the liberalism of public opinion. If the Court is listening to the public and also being shaped by its views on the Supreme Court's cases, then a positive correlation between Supreme Court

decisions and the public mood should exist. If, by contrast, the Supreme Court does not in fact listen to the public's opinion and acts as a countermajoritarian institution, then the results should vary with little correlation between the two.

**Figure 1**

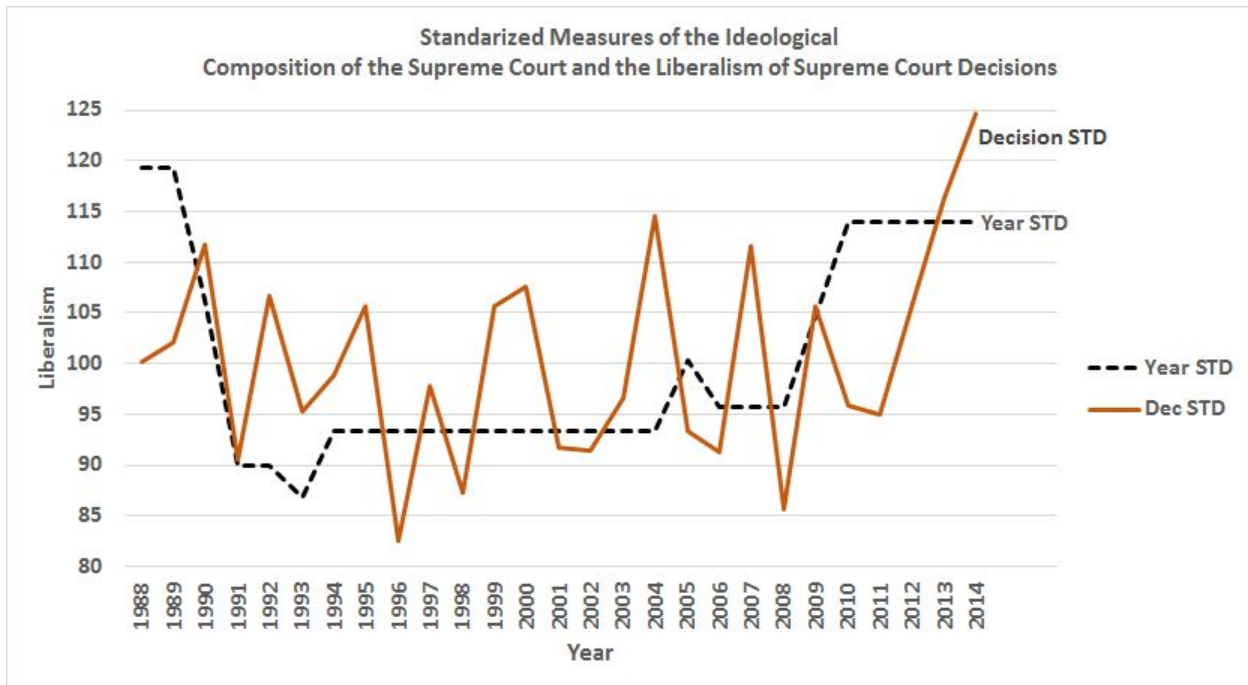


The trends of Figure 1 do not appear to coincide with what was found in the beginning of Mishler and Sheehan's research. Despite a few instances of correlation, when the viewed as a

whole, any relationship fluctuates with very little indication that the Supreme Court decisions match the public's liberalism. This is especially evident in the years following 2011 with the Court ruling in a liberal direction in landmark cases such as *Obergefell v. Hodges* and *Utility Air v. EPA*, as well as *National Federation of Independent Businesses v. Sebelius*, despite a downtrend in public opinion liberalism. The hypothesis that the Supreme Court is listening directly to the public opinion and correlating itself in response to the public's liberalism was not confirmed and the proposition that the Court is growing countermajoritarian as Mishler and Sheehan concluded in their findings grows stronger.

Public opinion may gain access into the Supreme Court through means outside of direct influence from the public. It may find its way into the Court's decisions by the process of changing membership within the Court. If the public is becoming increasingly liberal, it is reasonable to argue that new Supreme Court members should have increased liberalism and as such, rule more liberally. An analysis of Supreme Court decisions and the ideology of the Court membership should demonstrate congruence between ideological composition of the Court and trends in liberalism in the Court's decisions. If the Court, despite becoming increasingly liberal does not rule in a more liberal direction, then the resulting graph should indicate that of little correlation with decisions appearing not to be grossly affected by the ideological composition of the Court. Alongside this hypothesis is the Dahl-Funston hypothesis which states that it takes time for the Supreme Court decisions to reflect the ideological composition of the membership. If the Dahl-Funston hypothesis is true, then there would be a predictable period of time i.e. "lag" between increases in liberalism membership within the Court followed by an uptick in liberal decisions in the years subsequent to the Court's shift in liberal ideology.

**Figure 2**



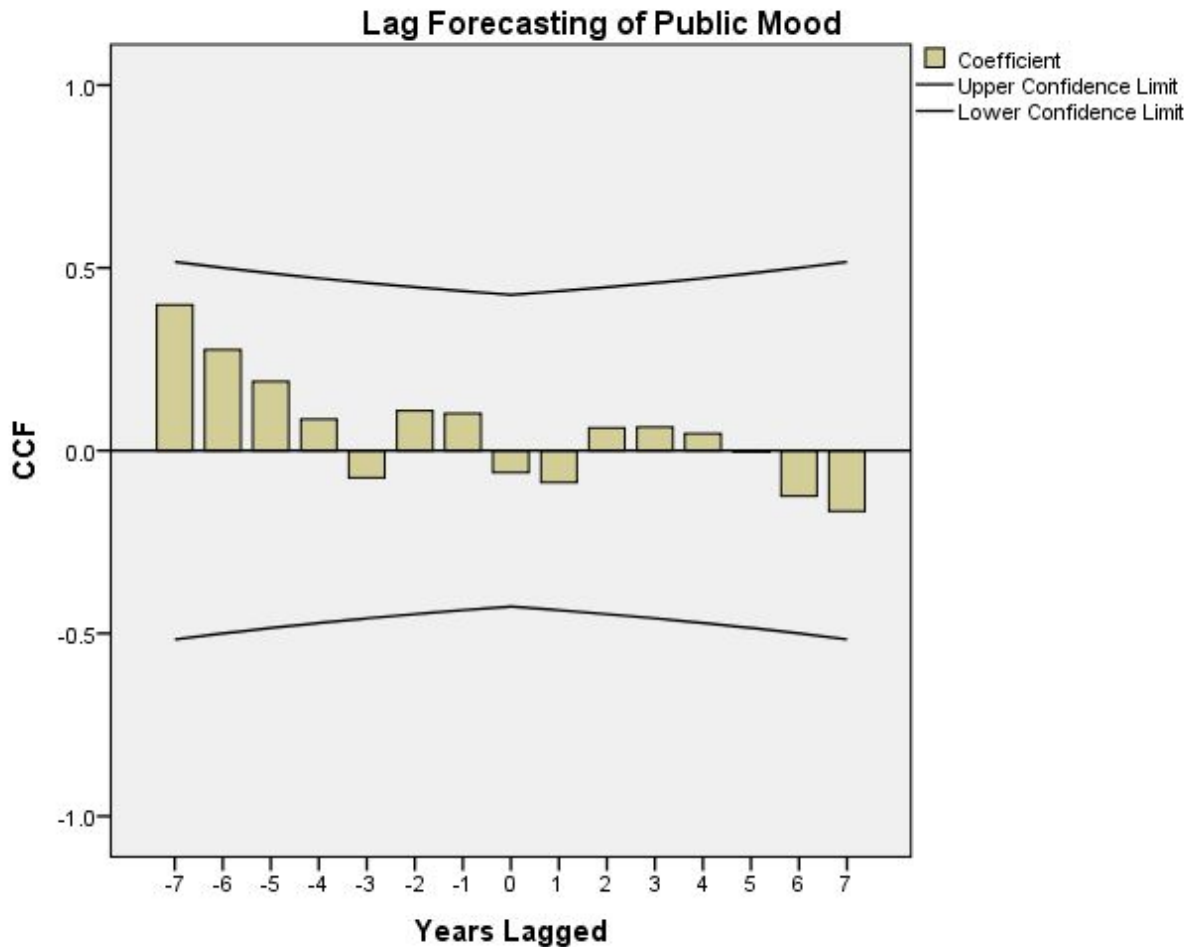
The results in Figure 2 does not indicate a strong relationship between Supreme Court ideological composition (Liberalism) and their decisions. Throughout the years examined; the Court experienced upward shifts in ideological liberal membership; however maintained its lack of consistent liberal decisions subsequent to the shift. The Supreme Court's decisions did not become increasingly more liberal and if there were any positive correlations it was with a perceived lag. This lag is most profound in the years following 2010 with a tremendous liberal spike in its decisions in the years following. This lag may also explain the results demonstrated

after 2011, observed in Figure 1, where public mood and Supreme Court decisions split in an unprecedented manner. These results appear to refute the hypothesis that decisions are directly affected by membership; however support the Dahl-Funston hypothesis that with a lag in time the ideology does eventually affect Supreme Court decisions.

According to the Dahl-Funston hypothesis it takes time for a shift in public opinion to be reflected in the Supreme Court's decisions. Societal trends do not immediately become absorbed into the Court. It must be assumed that if they these ideological trends are to be reflected by the Courts decisions, it will be after a certain number of years so that the Court has had time to become convinced that the change is in the best interest of the country. If the Supreme Court's decisions are affected by public opinion with a lag in time, then the empirical results should be found to be statistically significant with the confidence threshold to be exceeded. If a lag in public mood has no effect on the Supreme Court's decisions, then the confidence threshold would not be met and a public opinion lag would not impact Supreme Court decision.



**Figure 3**



The confidence of lag affecting Supreme Court decisions in Figure 3, is at no point close to being met and is therefore statistically insignificant. This demonstrates that public mood, even with a lag in time and no matter the direction of the lag, does not affect the Supreme Court's decisions. Figure 3 supports Figure 1 in its indication that public mood does not impact the Court's decisions. From these figures it is indicated that the Supreme Court is a

countermajoritarian institution and operates independently of the public's mood and attitude on its cases. The hypothesis that the Supreme Court's decisions are impacted by the public's mood at a lag in time is proven false.

To test the observed lag in Figure 2 and the empirical validity of the Dahl-Funston hypothesis, a measurement of the statistical significance must be conducted to conclude if the Supreme Court's ideological composition does affect decisions at a lag in time. The statistical significance of whether the Court's ideological composition impacts their decisions shall be confirmed if the confidence threshold is met in the figure. In their study, Mishler and Sheehan demonstrated the existence of a lag, as well as confirmed the Dahl-Funston hypothesis. If the Supreme Court ideological composition does affect the Court's decisions following a lag in time, then the threshold will be met and be found to be statistically significant. If the threshold is not met then the hypothesis can be rejected, the Court will have spun on Mishler and Sheehan's findings, and the perceived lag in Figure 2 can attributed to chance coincidence.

**Figure 4**

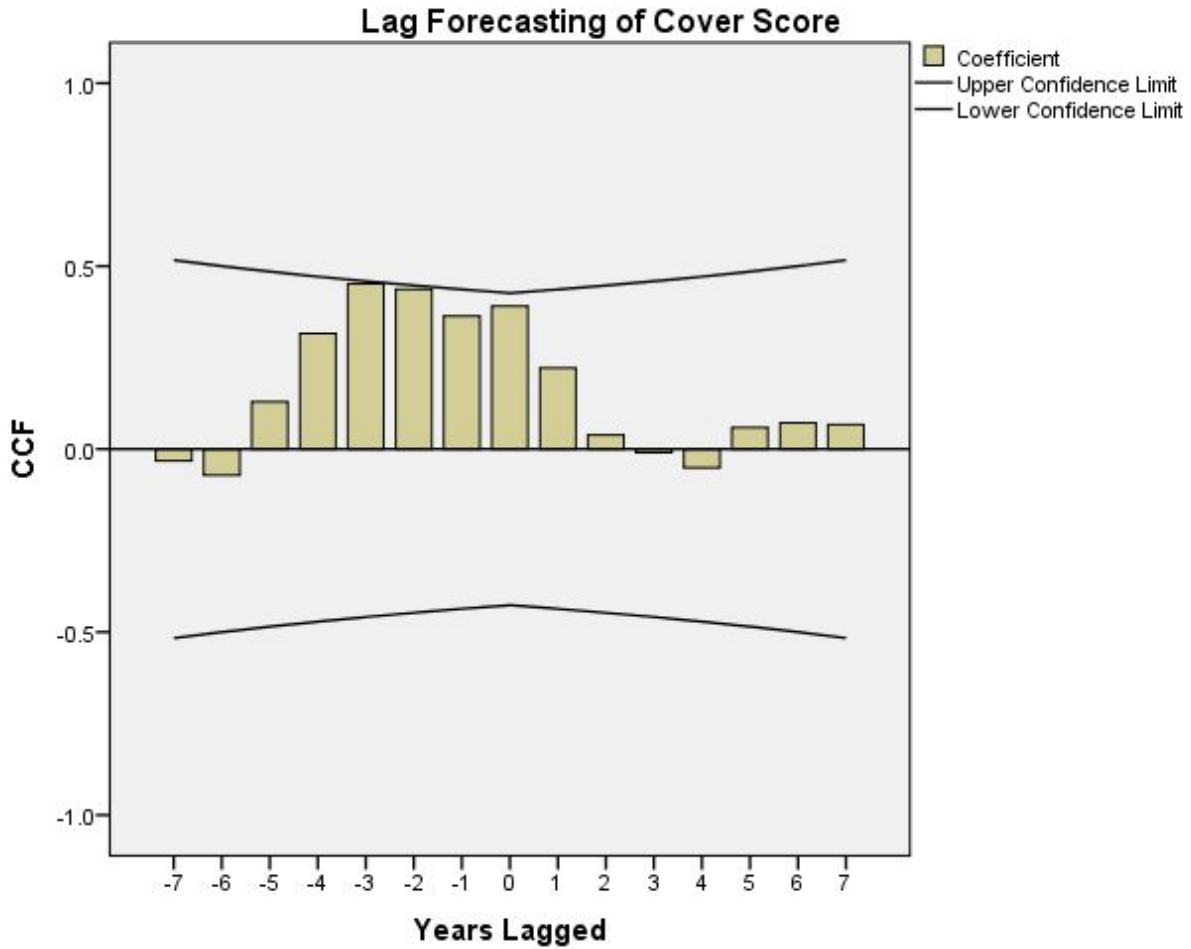


Figure 4 indicates that the perceived lag in time that it takes for the Supreme Court's ideology to be reflected by its decisions to be statistically significant. It just eclipses the threshold in year three, fulfilling the requirements to be significant. Contrary to Figure 3, this indicates much more confidence that lag occurs beyond mere coincidence. The results suggest that a lag of three years is needed for the Supreme Court's ideology to be shown through its

decisions. In Figure 2, this becomes increasingly evident where after experiencing a liberal ideology spike in 2010, three years later the Court reached its most liberal decisions throughout this study. Figure 4 confirms the hypothesis that the Supreme Court's ideology does affect their decisions at a certain lag in time. This also confirms the Dahl-Funston hypothesis, as well as reflects what was found in Mishler and Sheehan's research.

## **Conclusion**

The relationship of public opinion to the Supreme Court is obviously both delicate and abstruse. I cannot completely portray the subtleties that manifest within the Court and have not attempted to claim my results as law. My analysis is much rather a replication of the theorem that Mishler and Sheehan's 1993 study formulated. The results of my research review is a vast overview of the relationship between the public's opinion and that of the Supreme Court. Through my research I sought to identify and evaluate possible influences or causations that directly impact Supreme Court decisions. I was successful in my research goal and was able to reach a conclusion on my study.

Empirically, the results of my inquiry required little in-depth analysis. Despite some correlation, the Court's decisions experienced very little matching of the public's liberalism. The data in this study provided limited evidence that a direct linkage between the public's opinion and the Court's decisions existed. This is especially evident in the years following 2011 where the public's opinion moved more conservative and subsequently the Court exhibited the most liberal decisions in the twenty years examined for this study. I propose this ensued because

during this time-period, the Supreme Court acquired more ideologically liberal justices than conservative, resulting in an upsurge in liberal cases to be heard by the Supreme Court. More profound research must be conducted in the coming years in order to completely explain and analyze this non-reciprocal relationship. My investigation, unfortunately, does not give me a clear answer as to why the Court is countermajoritarian; however has provided me with plausible explanations. It is one of my beliefs that the Court would become countermajoritarian because of the Justices, possessing firm convictions and ideological values, would remain unwavered, despite changing public opinion climate. Supreme Court Justices, unlike members of the Legislative and Executive Branch, are not required to have their ideology correspond with that of the public. In our democratic republic, Justices maintain a rare power of elitism and thus do not need to adhere to the public's interpretation of the Constitution. Presidents will nominate potential justices that will preserve their interpretation of the Constitution and will not sway too far towards the opposing ideology spectrum.

Throughout the entirety of my study, I was unable to identify a relationship between the Court's ideological membership and the Court's decisions. Despite upward shifts in ideological liberal membership, the Court maintained inconsistent decisions that have characterized my analysis. Any reciprocal relationship that does occur is found to exist following a modest lag of time and with limited. This suggest there exists some judicial responsiveness; however as Mishler and Sheehan concluded, it is weakening. The lag develops as the membership within the Court changes and the Court's decisions integrate with the shift. The ideological change is noted approximately three years after the ideological transition in the Court. This lag suggests that the public opinion itself does not directly affect Supreme Court decisions but may possess the ability

to find accessways into the Supreme Court Chamber. With the President possessing the power to nominate Justices, the public moderately holds the same power. Since the public elects the President, the President will seek to nominate a Justice with an ideological tenor that is approvable to their constituents. This is not to suggest that the Justices will become in tune with the public and become a demi-politician. The Justices will decide on cases as they deem fit to their own interpretation of the Constitution.

Evidence suggests that public opinion does not exercise direct impact on the Supreme Court. Any impact that may occur, due in part by the public, is a result of the public electing the President and the Senators that oversee the nomination process and approving of Justice nominees. The lag of three years in time it takes for the Justice's impact to be felt in their decisions is most likely the time it takes for public opinion to be reflected in Presidential elections. It may not be just a coincidence that the average time before a new President has to fill a Supreme Court vacancy is similar to the approximate lag time observed in my research. It is found that the public's opinion does not demonstrate significant influence on the Supreme Court's decisions in the absence of changes in the Court composition.

The Supreme Court is functioning as an independent power that is unswayed by outside factors, specifically that of public opinion. Mishler and Sheehan found a rise in countermajoritarianism towards the conclusion of their study and their discovery has continued to be detected throughout my analysis. The Supreme Court has begun to rule more liberal than they had ever before and the public's ideology has run contrapositive. This is a direct flip on what was observed in Mishler and Sheehan's 1993 study. It is to my belief that the Court will evolve to which more closely emulates the public's liberalism. My study is not a forecast of the

future for the Supreme Court but rather a brief window study that analyzed how the Court operated in a specific time frame. It is to my belief that the Court will return to majoritarianism and eventually find congruence with the public's opinion as transition within the Court occurs in the coming few decades.

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