

LOYOLA UNIVERSITY CHICAGO

PUBLIC OPINION AND THE SUPREME COURT:
THE EFFECTS OF PUBLIC OPINION ON THE SUPREME COURT'S FIRST
AMENDMENT FREE SPEECH JURISPRUDENCE

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ABSTRACT

Past research has shown that the Supreme Court does respond to public opinion in its decision making. I am looking specifically at the effect that public opinion regarding freedom of speech issues has on the Supreme Court's First Amendment freedom of speech decisions. Using a measure of public opinion on free speech constructed from survey questions from 1950 to 2010, I will look at the how the Court responds to shifts in public sentiment in this particular issue area. Scholarship has demonstrated that the Court is responsive generally to shifts in public mood but has not shown exactly how specific their responsiveness is to issue area. I believe that this analysis will show how the Court does respond according to issue-specific public opinion.

SECTION ONE

INTRODUCTION

Decades of research has confirmed what those who follow the Supreme Court have observed over and over again: the Supreme Court does not base its decisions solely on the law. Of the many non-legal factors that affect the Court's opinions, public opinion has the most significant implications for our democratic government. The Court is decidedly undemocratic in that its members are not elected and not beholden to a constituency, and yet, scholarship has made it clear that they are responsive to changes in public opinion. This phenomenon is among Federalist 78's incorrect predictions about how the judiciary would operate. Alexander Hamilton wrote that the "the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society," without considering that those judges are inevitably a part of that society (Hamilton, 1788). Chief Justice Rehnquist acknowledged this in a 1986 speech: "Judges go home at night and read the newspapers or watch the evening news on television; they talk to their family and friends about current events." Rehnquist went on to say, "somewhere 'out there,' beyond the walls of the courthouse, run currents and tides of public opinion which lap at the courthouse door," (Rehnquist, 1986). Except public opinion does not stop at the door, but often those tides seep into the Court's decision-making process and final opinions.

Scholars agree that the Supreme Court does not base its decisions on the law alone. The Court's decisions are, of course, shaped by countless factors such as the Court's membership and characteristics of the cases they are reviewing. Personal ideology, the attorneys involved in the case, the amicus briefs submitted for review, and the attorney general's involvement are all more

unconscious influences on the Court. Beyond these, the justices will often intentionally constrain themselves and limit their own power for strategic purposes (Epstein and Knight, 1998).

Prior research has indicated that public opinion does play a role in the strategic considerations that justices make when voting on and writing their opinions. This paper will look at the relationship between public opinion on the issue of free speech and how the Court rules in free speech cases. Using time-series analysis, I will compare the measure I have constructed for public opinion regarding freedom of speech with the direction of the Court's opinions in these cases over the span of about 50 years. This analysis will begin in 1953, the first year of Earl Warren's tenure as Chief Justice, and end in 2008. Although I expected to see a relationship between shifts in public sentiment on the issue of free speech and how the Court decided their free speech cases, the only discernable relationship was in the opposite direction, most likely because time acted as a confounding variable in these models. These findings are important because they expand on our understanding of the Court's responsiveness to the public. The Court does not appear to directly respond to shifts in public opinion regarding freedom of speech, and likely the same is true for issues related to other civil liberties as well.

In the next section I will discuss the literature related to this topic. Then, section 3 will describe my analysis. Sections 4 and 5 will deal with the results and discuss the implications of my findings.

SECTION TWO

LITERATURE

With Article 3 of the Constitution's relative brevity and the limited number of statutes pertaining to the Court, there are very few codified restrictions that actually constrain its decision-making. This means that justices constrain themselves usually out of the potential for reward (which is generally the advancement of their personal agenda or legal philosophy) or out of fear of non-implementation and loss of legitimacy. There are many bases on which they constrain themselves including the public's opinion of the issues in their cases, public support for the institution as a whole, and ideological alignment with the President and Congress.

First suggested by Dahl in his 1957 piece and later confirmed by empirical evidence, research has shown that the Court is responsive to public opinion (Barnum 1985; Marshall 1988). One way in which the Court is affected by public opinion is as expected: the public chooses the president who chooses the membership of the Court (Funston 1975; Hurwitz, Mishler, and Sheehan 2004; McGuire and Stimson 2004). Still, Flemming and Wood (1997) establish a more direct link between the public and the justices. They show that individual justices have policy preferences and they directly and actively compete with the other branches for control. In order to achieve their goals without sacrificing the integrity of the Court, they adjust their decisions in response to mass public opinion. Their results suggest that individual justices are affected by public opinion across issue areas. This demonstrates that individuals on the Court are impacted by public opinion, and not simply because they are also members of the public, being impacted by the same factors which sway public opinion. The article shows that the individual justices themselves respond to public opinion and they respond quickly, within one term of a shift in public opinion.

This evidence is corroborated by the Court's history. Some of the Supreme Court's most prominent reversals have come because of a change in public sentiment. The infamous precedent set in *Plessy v. Ferguson* (1896) of "separate but equal" was completely reversed in *Brown v. Board of Education* (1954) 58 years later. *Obergefell v. Hodges* (2015) also marked the end of a line of cases, including *Lawrence v. Texas* (2003) and *U.S. v. Windsor* (2013), which made sodomy and gay marriage protected under the substantive due process clause of the 14th amendment, even though the Court had upheld bans on both for decades.

These changes were due to changes in public sentiment toward the issues in those cases over time, although it is not clear if the same forces which shifted the tide of public opinion also shifted the opinions of the justices. It could also be that the justices are impacted as members of the public, and that the public influences the justices, as those occurrences likely are not mutually exclusive. In the case of *Brown*, it is hard to distinguish between those possibilities. In the sodomy and gay marriage cases, it is possible that the public acted on some of the justices, especially Justice O'Connor who had voted to uphold a ban on sodomy in *Bowers v. Hardwick* (1986) and later reversed in *Lawrence*. Even in the oral arguments of *U.S. v. Windsor* (2013), which concerned the Defense of Marriage Act, Justice Scalia noted that there had been a "sea change" in public opinion on gay marriage since the Defense of Marriage Act was passed in 1996.

Some scholars have postulated that the justices can also influence the public, making the relationship between the Court and the people more of a feedback loop than a one-way interaction. Tankard and Levy (2017) demonstrated that Supreme Court rulings in favor of gay marriage affected individuals' perception of social norms as well as their personal attitudes. Linos and Twist (2016) found that media coverage of Supreme Court rulings influence opinions

on not only the decision, but the issue the Court decided. They saw these results on issues related to immigration and the Affordable Care Act.

Although the relationship between the Court and public opinion is complicated, the Court itself has shown its attentiveness to public sentiment explicitly in their opinions. The cornerstone case of the Supreme Court's 8th amendment cruel and unusual punishment clause jurisprudence cites public opinion as the legal standard for determining what punishment can be considered "cruel." The opinion outright says that the 8th amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" (*Trop v. Dulles*, 1958). That standard for 8th amendment interpretation has been upheld for over 50 years, and it is based entirely on public opinion, not law.

While we know that public opinion affects the Court and its rulings, it is unclear exactly how this manifests. I intend to look at the variation in the Supreme Court's first amendment jurisprudence in conjunction with the variation in popular support for freedom of speech over time. If there is in fact a relationship between these two, it would show that the Court is even more intentionally attentive to, or subliminally impacted by, public opinion than previously thought. This is significant because of the ongoing debate as to the undemocratic nature of the Court. The justices are appointed, not elected, and because of that, they are completely unaccountable to the public in any formal way. Demonstrating that they consider the public's collective stances on specific issues rather than just in a general sense would show that the Court is much more democratic than it appears, and brings the Court closer in terms of responsiveness to the public than the other two branches of our government.

The justices of the Supreme Court, consciously and unconsciously, factor many considerations into their rulings besides public opinion. Segal, Westerland and Lindquist (2011)

demonstrate the justices' attention to what they call "institutional maintenance." They find that the Court perceives Congressional overrides of their decisions as a threat to their institutional legitimacy. Because of this, the Court steers away from striking down statutes when the Court's ideology is further away from Congress'. This behavior is a major contributing factor in the way the Court constrains itself.

Hall (2011) shows that the Court tends to have more implementation power in decisions that are enforced by the lower courts than by the other branches. He considers the lower court enforced decisions to be "vertical cases" and those enforced by other branches as "lateral cases." His findings indicate that because the Court has power over lower courts and can reverse their rulings, they are very likely to enforce the Supreme Court's precedent. Because Congress and the President have the power to effectively overrule the Court's decisions, they have less implementation power. Due to this ability, the Court tends to constrain itself more in all lateral cases, and is more responsive to public opinion in those cases as well (Hall, 2014). In lateral cases, the Court actually tends to fail in enforcing their decisions when they face "strong public opposition" (Hall, 2011).

Because Hall shows that the Court has different implementation power in different types of cases, it would be more beneficial in this study to look at an issue area where the Court has vertical implementation power. This will make it more likely that if the evidence indicates justices are responsive to public opinion in this one issue area, it is for the sake of public opinion itself, and not for fear of lacking the power to enforce its rulings. The Court's interpretation of the first amendment's freedom of speech clause is enforceable in the lower courts and has very little to do with the other branches, making it a vertical issue area (Hall, 2011).

Bartels and O'Geen (2015) utilized free speech cases to reexamine jurisprudential regimes theory: the idea that the Court has relatively stable rulings until a landmark precedent drastically alters the line of jurisprudence and all subsequent cases. The theory has been largely disproven in favor of the idea that legal change in this issue area is neither wholly revolutionary or evolutionary. This still leaves open the question of what causes the variation in free speech jurisprudence over time, and I suggest that one of the major factors involved is issue-specific public opinion. This article further supports the use of free speech for testing this theory. Bartels and O'Geen (2015) explain that "because free expression is a fundamental constitutional right and has comprised a significant part of the Court's jurisprudence over time, the Supreme Court would seemingly have an interest in imposing stability on the law." Despite this incentive, there is substantial variation in their free speech rulings, and some of that variation is likely due to changes in public opinion on the matter.

Looking at freedom of speech as a single issue to measure a broader phenomenon is clearly not unprecedented in the literature. Schmidt and Yalof (2004) also examine free speech jurisprudence and use it in their study to find whether justices individually behave differently in different areas of jurisprudence. In this study, they look at Justice Kennedy's behavior as a swing vote on the Court, specifically examining free speech cases. They use free speech jurisprudence because:

Free speech cases often defy the traditional liberal/conservative divide that tended to dominate discussions of Court issues and lineups in the recent years. Campaign finance restrictions, for example, are generally supported by liberals and opposed by conservatives (Schmidt and Yalof, 2004).

The fact that free speech cases do not necessarily follow the usual liberal/conservative divide is advantageous in this study as well, because it makes ideology less likely to factor into the judicial decision-making process.

Drawing on all of this, I expect that the data will show that the justices respond to public opinion specific to issue areas. I believe that freedom of speech is an appropriate issue area to test for such a relationship because it is an issue of civil liberties which members of the public generally form opinions about, and yet, it is not entirely a liberal-versus-conservative issue. Most of the literature I have cited related to public opinion and judicial decision-making regards civil liberties, so using free speech is in line with previous research. From this analysis, I expect to find that as public mood on freedom of speech becomes more favorable, the Court will more often rule liberally on freedom of speech cases.

SECTION THREE

METHODS

In order to measure public opinion on free speech to use for my comparison, I collected every survey question pertaining to the topic that was available in the Roper database. To identify which questions were relevant to freedom of speech, I used two search terms: “speech” and “speak.” After reading each question, I sorted the relevant questions from the irrelevant ones. Many of the questions from these search results were about an individual’s feelings on immigrants speaking or not speaking English, so I had to filter my results to remove all questions that included the words “English” or “Spanish.” After this process, I was left with 351 total questions, dating back to 1939 and as recent as 2018. I coded each one as being in support of or against freedom of speech as defined by the opinions issued by the Supreme Court. For example, since the Supreme Court ruled in *Texas v. Johnson* that flag burning is a form of speech protected under the first amendment, I coded answers in favor of allowing or legalizing flag burning as being pro free speech. Because the Court has found campaign spending to be protected speech, answers that reflect that idea (allowing for more campaign spending, deregulating campaign spending, etc.) I again coded as pro free speech.

Some of the answers I found reflected that freedom of speech extends beyond how the Court has defined it, but those answers were still coded as pro free speech. This measure is not seeking to show how in favor the public is of what the Court has done in its first amendment freedom of speech jurisprudence, but instead, lets the Court define what is and is not speech and then measure the level of freedom the public wants when it comes to these forms of speech.

There were some questions that did not have dichotomous response options, for example:

“Would you be willing or not willing to give up or limit some of your civil liberties, such as censoring television programs, or limiting free speech, or making it harder to obtain a divorce, in order to improve the nation's moral climate or don't you think you have to give up or limit some of your civil liberties in order to improve the moral climate of the nation?”

For this question, I coded "Not willing" and "Don't have to give up civil liberties to improve moral climate" both as positive feelings about free speech because if individual denies the premise saying that they do not have to give up their civil liberties, then they probably also are not willing to forfeit those liberties. For other similarly formatted questions, I likewise had to extrapolate whether the answer was truly in favor of or opposed to greater freedom of speech, but there were very few of these cases out of the 351 total questions.

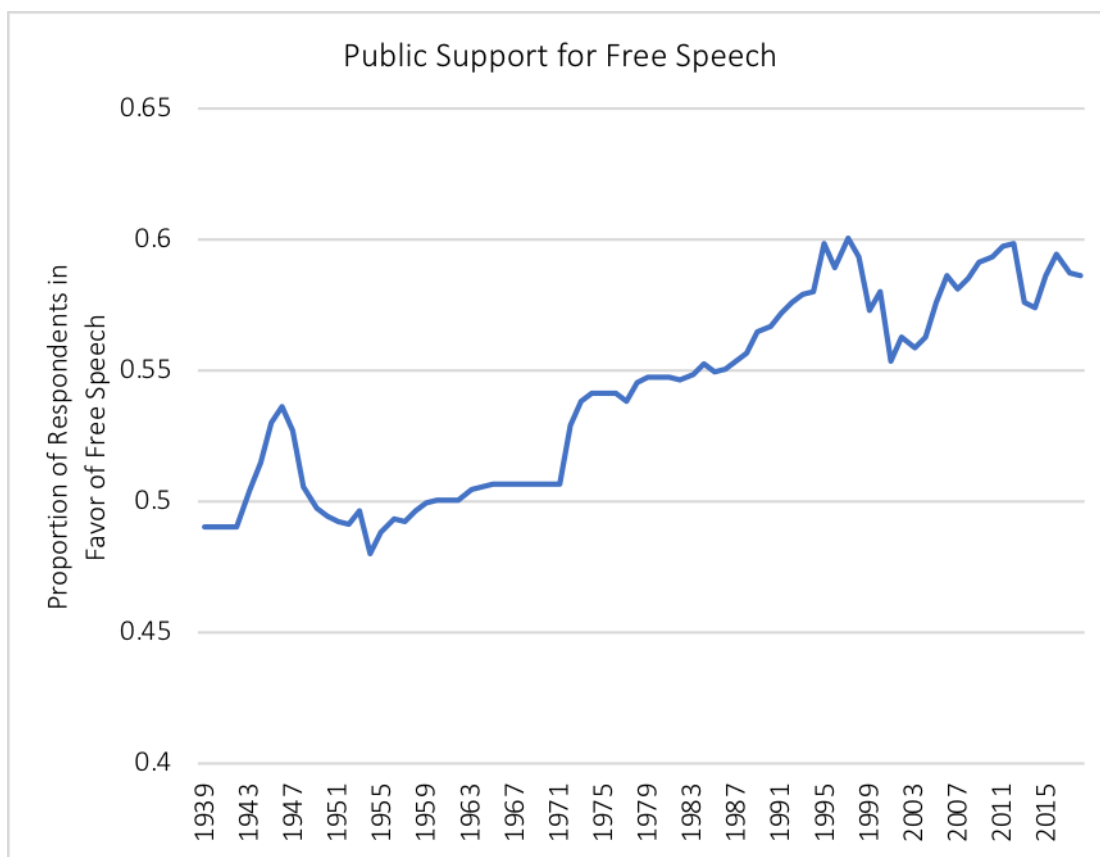
I compiled this data to create a completely new measure of public mood toward freedom of speech, using Stimson's (2012) Policy Mood Indicator algorithm to construct the measure. This algorithm combines different survey questions to create a measure of mood over time where it would otherwise be impossible to do so because of many survey questions are asked only once, or in the case of large national surveys, only one survey question is relevant to a particular topic. As Stimson (2012) said, “In the real - and very imperfect - world of public opinion research, most opinion queries are posed once and then never again.” Stimson constructed his algorithm to overcome the fact that surveys questions are often one-and-done by combining a large volume of a variety of survey questions.

In this case, the questions were often unique to particular eras in time, which made them better able to capture true feelings about freedom of speech. For example, many of the survey questions in the 1940s and 1950s were asking about whether a communist ought to be able to speak on the radio. If that same were asked today, respondents would likely be ambivalent. People today do not listen to the radio very much, and do not see communism as an existential

threat like they did in the past. Because of that, most would answer “yes” (or even more likely, an apathic “sure”), and that response would not tell us much about the public’s feelings toward free speech. When that question was asked in the early Cold War Era, people had to grapple with how strongly they felt about the ideal of free speech when it was in direct conflict with a perceived threat. This example illustrates the strength of using an algorithm like this, instead of relying solely on questions from a national survey like the GSS or ANES, although questions from each are built into this measure as well.

The result of compiling this data produced a completely new measure for public opinion on freedom of speech that has never been used before. I scaled the measure from 0 to 1 reflecting the public’s support for free speech over a period from 1939 to 2017.

Figure 1



This graph demonstrates only a very slight shift in public sentiment on this issue, although it definitively increases overtime. Notably, there is a marked increase after the end of World War II and from 1971 to 1972 following the release of the Pentagon Papers. From 2000 to 2001, there is a decrease in this measure from 0.58 to 0.55, which is likely due the September 11th, 2001 terrorist attacks. The measure seems to logically align with key events in American history that would be expected instill or discourage support for freedom of speech.

For my model, I used the replication data available from Hall's 2014 article. Hall's data is largely based on a data set from the Supreme Court Database with the addition of several control variables, including a measure of case salience which is constructed from how the case was reported on by the media. Hall's article was looking at whether the Court is influenced in its decision-making by the way its decisions are implemented, but since my study is focused on public opinion, I removed the variables Hall used for this analysis. I kept only his control for Court membership, as well as his measures for congressional ideology and case salience (in my second model). The congressional ideology measure was based on an average of the Poole Rosenthal Common Space scores (1997) and is intended to be a stand-in for the "influence of elite preferences" (Hall 2014). For the salience measure, Hall used the Epstein and Segal (2000) measure of case salience that identifies the cases which appear on the front page of the New York Times. This is an appropriate measure for this analysis because the front page of a major newspaper demonstrates not only the most important issues of the day, but indicates on what most media outlets are reporting, and by extension, of which issues members of the public are most aware. The justices of the Supreme Court are not blind to that. In all, Hall's data is most appropriate for this analysis because this study's objective is quite similar to what he aimed to

achieve: looking at the specific factors that affect Supreme Court decision making the most and controlling for influences we know the Court tends to reflect in its opinions.

From there, I imported my free speech measure according to year and dropped all cases that had issue areas which did not concern free speech, according to the Supreme Court Database's codebook.

My dependent variable was the ideological direction of the decision, liberal or conservative, as coded by the Supreme Court Database. My independent variable was my measure of public mood toward freedom of speech. I expect that as public mood on freedom of speech becomes more favorable, the Court will more often rule liberally on freedom of speech cases.

I used logit models for this analysis because the outcome variable is whether the Court made a liberal or conservative ruling. The first model left out the measure of salience to see only the relationship between public opinion on free speech and liberal or conservative rulings in free speech cases. Included in this model are controls court membership as well as the liberalness of Congress at the time of a given decision. This is included because the Court is often less likely to stray from the ideology of Congress, especially in cases of lateral implementation--where the Court's ruling is to be enforced by another branch of government. Hall's article "The Semiconstrained Court" shows clear evidence that this is the case, making it appropriate to control for Congress' ideology, and to control for the general direction of elite opinions that may influence the Court and confound the effect of public opinion.

SECTION FOUR

RESULTS

Model 1

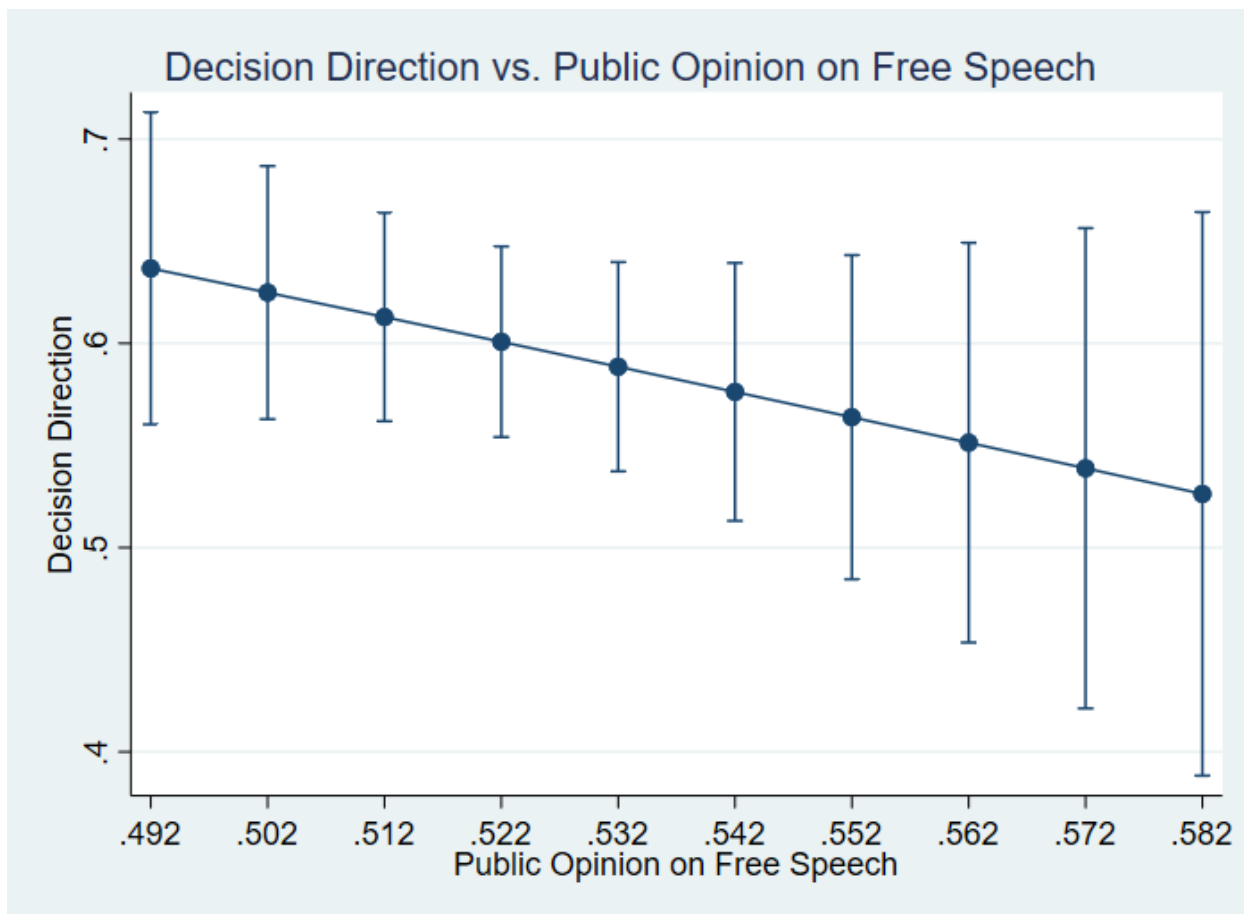


Table 1

| Decision Direction | Coeff. | Robust Standard Error | P> z | 95% Confidence Interval | 95% Confidence Interval |
|-------------------------------|--------|-----------------------|-------|-------------------------|-------------------------|
| Court Membership | 0.484 | 0.104 | 0.000 | 0.281 | 0.688 |
| Public Opinion on Free Speech | -5.368 | 4.655 | 0.249 | -14.492 | -3.756 |
| Congress' Ideology | -0.144 | 0.109 | 0.185 | -0.357 | 0.069 |
| Constant | 3.209 | 2.431 | 0.187 | -1.555 | 7.975 |

The first model shows that there is actually a negative relationship between higher public support for free speech, a traditionally liberal position, and conservative rulings in free speech cases. This model does not include a control for case salience, and it is likely that public opinion does not factor into the justices' decision making in cases of which the public is unaware.

Model 2

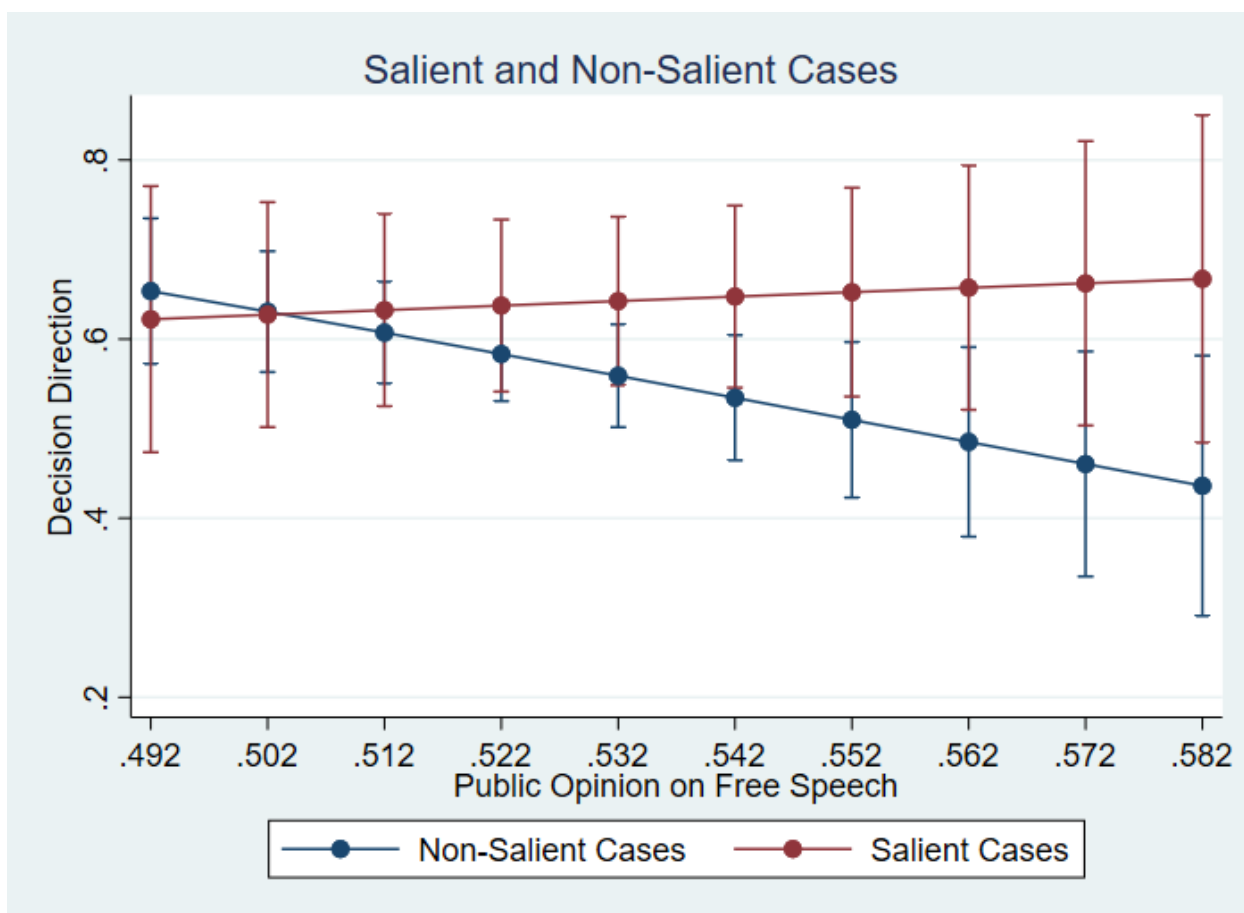


Table 2

| Decision Direction | Coef. | Robust Standard Error | P> z | 95% Confidence Interval | 95% Confidence Interval |
|-------------------------------------|--------------|------------------------------|-----------------|--------------------------------|--------------------------------|
| Court Membership | 0.478 | 0.103 | 0.000 | 0.277 | 0.679 |
| Public Opinion on Free Speech | -10.501 | 4.881 | 0.031 | -20.066 | -0.934 |
| Issue Salience | -6.442 | 3.886 | 0.097 | -14.059 | 1.173 |
| Public Opinion/Salience Interaction | 12.801 | 7.308 | 0.080 | -1.522 | 27.126 |
| Congress' Ideology | -0.141 | 0.111 | 0.202 | -0.357 | 0.075 |
| Constant | 5.812 | 2.555 | 0.023 | 0.803 | 10.821 |

The second model accounts for issue salience with a measure based on if coverage of the case appeared on the front page of the New York Times. If it did, the case is coded as 1, and if it did not, the case is coded as 0. There is a slight upward trend in the relationship between free speech and judicial decision making when the case is salient, however, based on the confidence intervals seen in the graph, the relationship is not statistically significant. Still, the downward trend, indicating that the Court has decided against the tide of public opinion in non-salient cases, persists.

The relationships in each of these graphs are and substantively insignificant. This is due partly to the fact that the variation in the public's perception of free speech has been small, although there has been a steady increase over the past 75 years. Even so, the negative relationship in both of these models suggests that the Court is not truly considering public opinion specific to issue matter in its free speech cases. The relationship in these models is likely due to membership change and ideological shift in the Court over time.

Model 3

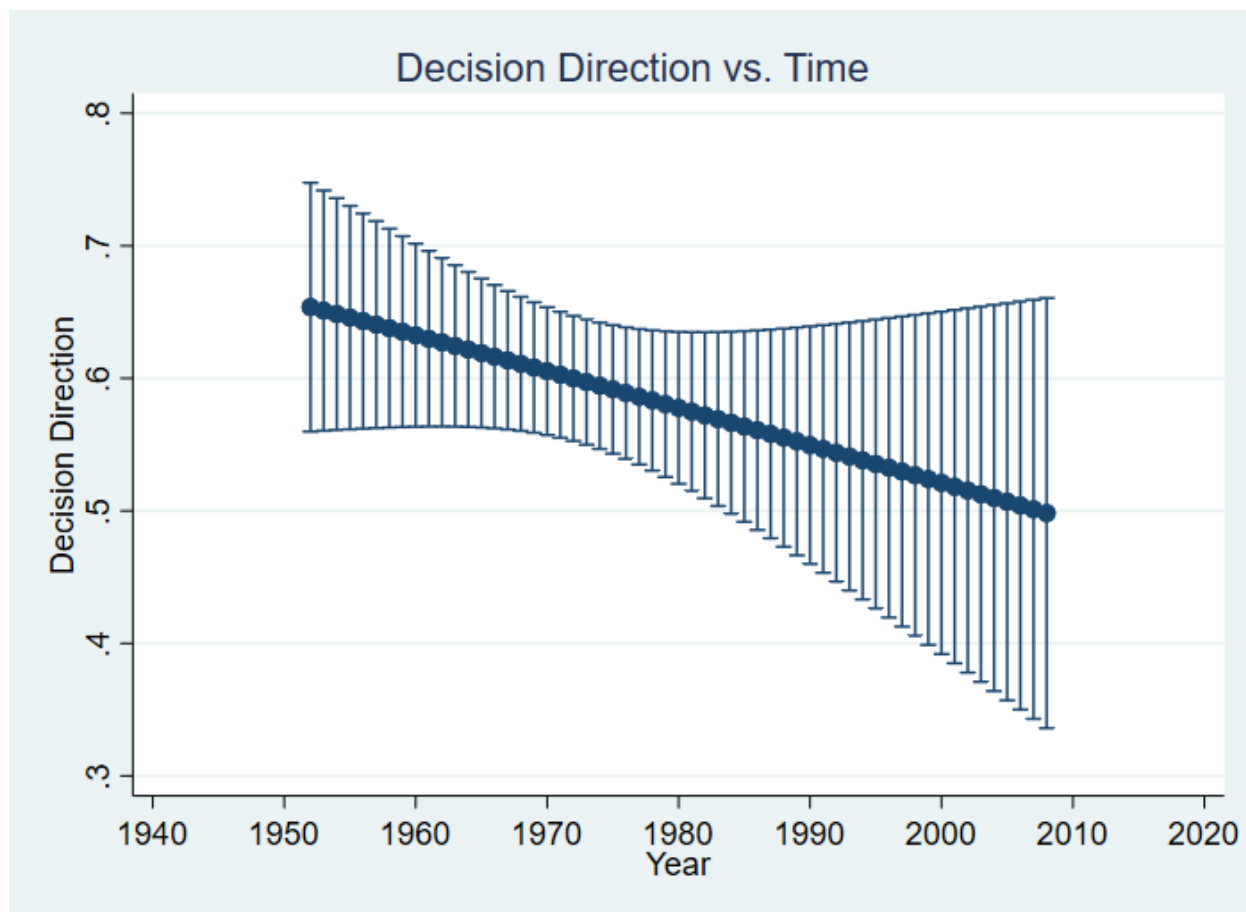


Table 3

| Decision Direction | Coeff. | Robust Standard Error | P> z | 95% Confidence Interval | 95% Confidence Interval |
|--------------------|--------|-----------------------|-------|-------------------------|-------------------------|
| Court Membership | 0.507 | 0.093 | 0.000 | 0.325 | 0.689 |
| Year | -0.012 | 0.009 | 0.197 | -0.031 | 0.006 |
| Congress' Ideology | -0.168 | 0.111 | 0.131 | -0.386 | 0.049 |
| Constant | 24.504 | 18.701 | 0.191 | -12.149 | 61.158 |

In Model 3, I replaced the free speech measure with year. This is because the free speech measure trended upward so consistently with time, that the relationship in the measure could have just been standing in as a variable for time. In this model, we can see a strong negative

relationship between liberal rulings and year, showing that in the area of first amendment cases, the Court has gotten more conservative overtime. This idea is consistent with the conventional understanding that the Warren Court Era (1953-1969) was a time of liberal rulings, especially pertaining to civil liberties. Since then, the Court has been working to roll back and restrict a lot of the changes during that time. These restrictions present as conservative rulings in these data which creates a trend toward conservative decisions over time in free speech cases.

SECTION FIVE

CONCLUSION

Overall, this analysis indicates that the Court does not consistently consider public opinion about free speech in its decisions in those cases. While past literature has shown that the justices are generally responsive to public opinion, it appears that it is not specific to issue area in a systematic way. Yet, there is qualitative evidence to indicate that the justices are attuned to public sentiment in certain issue areas in a much more nuanced way than simply if their decision is liberal or conservative. Future research in this area may reveal a more substantial relationship looking at a smaller time frame and measuring individual votes rather than case outcomes. It may also be worth considering that some justices are extremely unlikely to have been influenced by the public compared to others. For example, Clarence Thomas is famous for largely disregarding the Court's precedent and not speaking at oral argument. This could indicate that he simply does not care about outside opinions and writes his opinions exclusively based on his own philosophy. A justice like Sandra Day O'Connor may have been more likely to be swayed by the public since she was a politician before she became a judge and is understood to be a very politically oriented justice during her tenure. These factors cannot be controlled for in a logit model like the ones I have presented, but could ultimately affect the results of a similar analysis. From this study, however, it is clear that the Court does not systematically follow public opinion specific to the issue area of a given case.

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VITA

Elyse Burns was born and raised in Batavia, Illinois. Before joining the graduate school, she earned a Bachelor of Arts in Political Science and History, graduating Magna Cum Laude in 2018. While at Loyola, Elyse participated in Mock Trial and Moot Court and was president of the Student Trial Advocacy Group. Elyse also won the Tuma-Gravett award for academic excellence in the Political Science Department in 2019. Currently, Elyse is a student at Duke University School of Law in Durham, North Carolina.