

## The Supreme Court and the Public Eye

In the aftermath of the Supreme Court's decision in *Burwell v. Hobby Lobby Stores* (2014), which allowed employers to deny their workers contraception coverage based on religious objections, women's rights advocates organized protests outside Hobby Lobby stores across the country to express their disappointment with the ruling (e.g., Evans and Cardine 2014; O'Donoghue 2014). Not only was the Court divided five votes to four, but the case touched on two issues at the center of America's polarized political battle: the clash between supporters of reproductive rights and religious conservatives, and the reach of the Patient Protection and Affordable Care Act—also known as Obamacare—which mandated contraception coverage.

Clearly, those who took to the streets in the summer of 2014 were not persuaded by Justice Samuel Alito's reasoning in the majority opinion. At the same time, there were those who found the Court's decision reassuring. But was anyone persuaded by this opinion? If not, can any of the public be persuaded by other decisions? If the Court can affect popular attitudes at all, what allows it to do so?

Before venturing into the main question of this book—the extent to which division and polarization affect the Supreme Court’s public image—it is necessary to understand the degree to which the Court’s decisions *can* affect popular opinion. This chapter reviews the two streams of scholarly literature. One concerns the Court’s ability to influence public opinion. The other looks at the news media’s coverage of the Supreme Court and its opinions. That is, this chapter explores the Court’s *potential* to affect the public perception of its opinions and the availability of the information necessary to realize that potential. The discussion concludes with some remarks regarding the possible interaction between the Court’s public image and the behavior of the justices.

### Is the Public Swayed by the Court?

Social psychologists have long held that individuals are most easily persuaded by those people and institutions they find to be credible (Pornpitakpan 2004). Psychological models of attitude change, such as the Elaboration Likelihood Model (e.g., Petty and Cacioppo 1986) and Heuristic-Systematic Model (e.g., Chaiken 1980), suggest that the more credible a message’s source, the greater its ability to persuade individuals. Those receiving messages rely on cues to allow them to process and evaluate information quickly, and, thus, high-credibility sources can facilitate attitude change.

Market researchers use this knowledge to show, for instance, the efficacy of celebrity endorsements for commercial products (Ohanian 1991). Just as Michael Jordan’s athletic ability persuaded basketball fans to buy Nike shoes, or busy celebrity parents Kristen Bell and Dax Shepard convinced young families of the benefits of Samsung home appliances, the Supreme Court may rely on its legal prestige and expertise to convince the public to “buy” its interpretation of the law. In essence, Alexander Hamilton’s argument in *Federalist* No. 78 places this psychological phenomenon at the heart of the Court’s power. This opens the question: Is the Supreme Court a credible source?

As it turns out, the Supreme Court as an institution is rather popular. Public opinion researchers have found that, historically, the Supreme Court enjoys a high degree of public confidence, especially when compared to the other branches of government (Smith and Son 2013). Although it appears that confidence in the Court has declined in recent years, this may be due in part to an overall decrease in the approval of American political institutions (McCarthy 2015; Smith and Son 2013). Therefore, it stands to reason that the Supreme Court should have a fair amount of persuasive force with the general public. Corresponding with this, political scientists have found that the Court consistently has a high level of diffuse support, or institutional legitimacy (e.g., Caldeira and Gibson 1992; Gibson, Caldeira, and Spence 2003a, 2003b). If diffuse support can be translated into specific support, or satisfaction with the particular outputs of an institution, then that would be consistent with social-psychological models of attitude change. In fact, this phenomenon is at the heart of the original definition of the concept: David Easton (1965, 273) described diffuse support as “a reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed.”

From this theoretical basis, a body of empirical literature has grown to test this legitimation hypothesis. In fact, many explicitly draw from social-psychological models (e.g., Bartels and Mutz 2009; Boddery and Yates 2014; Johnson and Martin 1998; Mondak 1990). While the results have varied, there are numerous published studies that have demonstrated the ability of the Supreme Court to increase public support for or acceptance of the policies on which it rules. However, the variation across these studies itself reveals some important information about the Court’s ability to persuade.

Table 1.1 groups thirty-seven published studies on this topic according to two factors.<sup>1</sup> The first is the presence and direction

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1. These studies include only those that look at the Court’s ability to change attitudes toward certain policies or sets of policies, not those that examine changes in attitudes toward the Court itself. Michael Zilis (2015, 21) presents a similar table to the one presented here; the studies have been organized slightly differently to convey a different emphasis.

of the effect the study found. These are grouped into four categories: persuasion, polarization, backlash, and no effect. That is, did the study find that the Court moves public opinion in the direction of the decision, in the opposite direction of the decision, in the direction of the Court among some while in the opposite direction for others, or not at all? Some scholars (e.g., Adamany 1973; Mondak 1994) differentiate between different forms of legitimation and persuasion. The term *persuasion* is used more loosely here to refer to any form of positive public opinion reaction to the Court. Thus, those placed in the “Persuasion” column of Table 1.1 may find an increased level of agreement with the policy position of the Supreme Court, while others may simply find increased degrees of acceptance. Although this is an important distinction, they are grouped together because both represent a form of persuasive power.

From just a glance at the table, it is immediately clear that experimental studies skew far more heavily toward showing some sort of persuasion effect than do those using nonexperimental data. Of the thirteen experimental studies, only one—incidentally, the earliest—finds that the Court has no effect on the public’s policy attitudes. The remaining twelve find that the Court, under certain conditions, has the ability to persuade in some form. Thus, the experimental work on the topic is *very* supportive of the legitimation hypothesis.

Research that is not based on experimental data, however, has yielded more diverse results. While a number of studies *do* show the Court has a conditional power to persuade, even more are unable to find any sort of public opinion effect. Further, this effect is present only under certain conditions, according to all but one of the observational studies, while it is found to be more general in several experimental studies. Moreover, a handful of observational studies find a *negative* public opinion effect; that is, rather than persuade the public toward its position, these studies find that the Court either polarizes the public or creates a backlash. Thus, looking at the observational studies alone, there is evidence of the legitimation hypothesis, but it is far from definitive.

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TABLE 1.1 STUDIES OF PUBLIC REACTION TO SUPREME COURT OPINIONS

Type of study	Persuasion	Polarization	Backlash	No effect
Experiment	Mondak 1990			Baas and Thomas 1984
	Mondak 1992			
	Mondak 1994			
	Hoekstra 1995*			
	Clawson, Kegler, and Waltenburg 2001*			
	Clawson and Waltenburg 2003			
	Gibson, Caldeira, and Spence 2005*			
	Unger 2008*			
	Bartels and Mutz 2009*			
	Zink, Spriggs, and Scott 2009*			
	Bodderly and Yates 2014*			
	Nicholson and Hansford 2014*			
	Observational study	Hoekstra and Segal 1996*	Franklin and Kosaki 1989	
Clawson, Kegler, and Waltenburg 2003*		Johnson and Martin 1998*	Hanley 2008	Gash and Gonzales 2008
Hoekstra 2003*			Lerman 2008*	
Brickman and Peterson 2006*			Nadler, Diamond, and Patton 2008	Green and Jarvis 2008
Stoutenborough, Haider-Markel, and Allen 2006*				Hanson 2008
Hanley, Salamone, and Wright 2012				Le and Citrin 2008
Ura 2014*				Luks and Salamone 2008
Ginn, Searles, and Jones 2015*				Mayeri et al. 2008
				Mullin 2008
				Murakami 2008

\*Study found effect to be present only under certain conditions.

What, then, can explain this discrepancy? One possibility is in the nature of the experimental research design. In these studies, participants are generally given a stimulus that includes information about a Supreme Court decision (often one that is fabricated) and then asked their opinion. These studies tend to draw participants not from representative samples but from university student samples of convenience (Baas and Thomas 1984; Clawson, Kegler, and Waltenburg 2001, 2003; Hoekstra 1995; Mondak 1990, 1992, 1994; Unger 2008; Zink, Spriggs, and Scott 2009). The experimental design grants researchers significant latitude to isolate the causal relationships between variables. However internally valid these results may be, the situation under study is contrived: even the most realistic stimuli cannot mimic how the public actually consumes news about Supreme Court decisions (see Barabas and Jerit 2010). After all, the costs associated with seeking out information are absent, as the news is part of an experimental treatment fed to the participant by the researcher.

The observational studies, on the other hand, are less invasive. In these studies, researchers measured public opinion among populations who consumed (or did not consume) news about Supreme Court decisions as they normally would. Because research of this type does not occur in a controlled setting, the causal mechanism between the Court's action and public opinion is more elusive and requires a clever research design. For instance, Franklin and Kosaki (1989) were able to rely on a survey question that asked respondents if they had heard of the Court's decision in *Roe v. Wade* (1973); using this, the authors were able to show the presence of a structural change in public opinion among respondents who had heard of the ruling and the absence of such a change among those who had not.

Interestingly, a number of observational studies that did find a persuasion effect looked at very salient Supreme Court opinions pertaining to "culture war" issues (Brickman and Peterson 2006; Hanley 2008; Stoutenborough, Haider-Markel, and Allen 2006). That is, most members of the public were very likely to have received some information about the Court's opinion

simply to the volume of coverage it was given. In several other observational studies consistent with the legitimization hypothesis, the researchers looked at local public opinion in reaction to decisions that, while not nationally salient, were of great interest to specific local communities (Ginn, Searles, and Jones 2015; Hoekstra 2003; Hoekstra and Segal 1996). In other words, the decisions in these studies may have gone mostly unnoticed across the country, but the researchers examined public reaction in the specific communities where they were likely to have received attention.

These studies then share a common feature with the experimental studies: the population that is persuaded by the Court is inundated with information about the ruling. In experimental studies, this is by design: exposure to information acts as the experimental treatment. In observational studies, this occurs naturally. But in either case, sufficient exposure to information appears to be a key element in the Supreme Court's ability to persuade the public. While this is far from definitive evidence of the causal link between informational availability and legitimization, other research comparing observational and experimental approaches to studying Supreme Court legitimization is consistent with this possibility (Linos and Twist 2016).

## The Power of Information

One way or another, the Court's persuasive power is contingent on the information the public receives. After all, a person cannot be persuaded by a ruling of which that individual is totally ignorant. Further, it is hard to imagine that an invisible Court can wield much source credibility, and James Gibson and colleagues (1998) have shown that those who know more about the national high court regard it more favorably. Therefore, it is important to consider the news media's relationship to the Supreme Court.

Thinking about the relationship between the Court and the media raises a couple of questions. First, what decisions do the media consider newsworthy, and, conversely, which ones are not brought to the attention of the general public? Second, how

might the framing of that coverage affect the public's attitude? Put otherwise, it is necessary to consider what cases the media cover and how they cover them.

Since John Roberts began his tenure as chief justice, the Court has decided an average of 79.7 cases per term.<sup>2</sup> However, the news media report only a fraction of these. From the 2005 to 2013 terms, the *New York Times* covered just 53 percent of cases decided by the Court, the *Los Angeles Times* 41 percent, the *Washington Post* 38 percent, and the *Chicago Tribune* 29 percent (for more on this topic, see Chapter 3). Indeed, the Court itself does not make coverage easy for journalists. The Court does not announce ahead of time when it will hand down rulings and does not make copies of the opinions available before they are announced. The justices do not allow cameras in the courtroom, and, while they release audio recordings of arguments and opinion announcements, they do not broadcast the audio live. The Court does post its written opinions online the day they are announced but not immediately. Thus, the fastest way for journalists to get their hands on the Court's opinions is to retrieve hard copies, which are made available at the courthouse when the opinions are announced. Members of Congress perennially urge the Court to increase its transparency; however, these requests are frequently ignored by the justices, and Congress has yet to pass a law to force a reform (Mauro 2015). Clearly, journalists, faced with the pressure of offering a story as quickly as possible find themselves in an uphill battle when reporting on the archaically traditional Supreme Court.

Thus, a number of political scientists and communication scholars have investigated the patterns of news coverage of the Supreme Court. In other words, when do journalists find it necessary to overcome the hurdles placed in their way, and when do they decide the story simply is not worth the effort? Richard Davis (1994, 81–83) demonstrates that journalists feel an im-

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2. This is calculated using the 2015 Supreme Court Database, Release 01, at <http://supremecourtdatabase.org>. This reflects decisions made during the 2005 to 2014 terms.

mense amount of pressure to report decisions in little time and therefore have come up with deadline-friendly shortcuts, such as techniques for skimming decisions and formulas for writing about them. Still, reporters worry about making embarrassing mistakes, as the process leaves little room for error. Indeed, such errors can happen: initially, both CNN and Fox News, perhaps not reading the decision carefully enough, mistakenly reported that the Court had struck down the individual health care mandate in the 2012 decision of *National Federation of Independent Business v. Sebelius* (Stelter 2012).

Researchers have found that the media are more likely to cover Supreme Court cases that involve issues in certain policy areas, such as First Amendment rights (Bowles and Bromley 1992; Collins and Cooper 2015; Sill, Metzgar, and Rouse 2013; Slotnick and Segal 1998; Tarpley 1984), civil rights (Collins and Cooper 2015; Epstein and Segal 2000; O’Callaghan and Dukes 1992; Sill, Metzgar, and Rouse 2013; Slotnick and Segal 1998; Tarpley 1984), privacy (Collins and Cooper 2015; Sill, Metzgar, and Rouse 2013), and criminal procedure (Sill, Metzgar, and Rouse 2013; Slotnick and Segal 1998; Spill and Oxley 2003). Meanwhile, others have found that certain issues are unlikely to be covered, such as economic issues (Epstein and Segal 2000; O’Callaghan and Dukes 1992) and issues of judicial power (Collins and Cooper 2015).

Other characteristics of a case appear to be correlated with its likelihood of gaining the media’s attention, as well. For instance, the Supreme Court traditionally announces the opinions of its most high-profile cases in June, the last month of the Supreme Court’s term. Accordingly, scholars have noted that journalists are more attentive to the Court in June than at other times of the year (Franklin and Kosaki 1995; Slotnick and Segal 1998). Likewise, some have noted that certain media outlets, particularly the *New York Times*, may display their political biases by choosing to highlight liberal rulings over conservative ones (Johnson and Socker 2012; Sill, Metzgar, and Rouse 2013; Unah and Hancock 2006). Moreover, indicators of the legal importance of a case, such as the alteration of precedent (Collins and Cooper 2015;

Sill, Metzgar, and Rouse 2013), reversal of the lower court (Collins and Cooper 2015), and declaration of unconstitutionality (Collins and Cooper 2015; Sill, Metzgar, and Rouse 2013), as well as large numbers of *amici curiae* participating (Sill, Metzgar, and Rouse 2013; Slotnick and Segal 1998) also correlate with higher levels of media coverage. While some have found that division among the justices is associated with higher levels of media coverage (e.g., Collins and Cooper 2015; Sill, Metzgar, and Rouse 2013), others have found no such relationship between coverage and majority size (Johnson and Socker 2012). This topic is explored in further detail in Chapter 3.

Finally, the place of the case's origin appears to be of interest to reporters covering the Supreme Court. For instance, Valerie Hoekstra (2003) finds that local media are likely to cover "ordinary" Supreme Court cases that are not necessarily of national interest but originate in their geographic region. Further, Kaitlyn Sill and colleagues (2013) find that, all else being equal, the *New York Times* is more likely to report on cases that come out of New York State and the District of Columbia than on those that originate in other parts of the country. This indicates that even "national" news outlets may show some degree of regional bias.

After the choice to cover a Supreme Court decision is made, what information do journalists choose to include, and how do they frame that information? Rorie Spill and Zoe Oxley (2003) find that newspaper reporters are more likely to report details about the facts of the dispute, the history of the issue, the justice's reasoning, and the vote, while television reporters are apt to discuss the content of the decision and the ruling's political implications. Interestingly, Spill and Oxley say that none of these characteristics appear in a majority of news stories regardless of medium; in fact, they find all but one of these characteristics (discussion of the decision's content) present in fewer than 15 percent of news stories across media types.

This is consistent with critiques that news media coverage of the Court is subpar. For instance, Elliot Slotnick and Jennifer Segal (1998) find television news coverage of the Court often to

be incomplete, misleading, or inaccurate. Likewise, Ethan Katsh (1983) is unimpressed by the breadth of television coverage of the Supreme Court; noting that only about 20 percent of cases were covered from the mid- to late 1970s to the early 1980s, he quips, “There is . . . more taking place at the Court than meets the television eye.” Further, Lionel Sobel (1970) argues that insufficient reporting made it difficult for the Court to shake the negative characterizations by the Nixon administration. More recently, Joe Mathewson finds several flaws in Supreme Court coverage:

The media fall short in five respects: inaccuracy; failure to explain clearly the legal basis and reasoning of each decision; reporting decisions like the policy determinations of a legislative body; overemphasis on reaction and impact at the expense of the decision itself; and downplaying with inadequate space or time, or omitting altogether, newsworthy stories. (2011, 347)

That is, in many respects, the public is underinformed when it comes to matters of the Supreme Court. Although the media has changed much in recent years, these studies do raise concerns regarding the quality and detail of Supreme Court news coverage.

Among the choices that journalists make when devoting limited space to covering the Supreme Court is whether to emphasize the Court’s role as a legal or political institution. Tyler Johnson and Erica Socker (2012) find that the more laws the Court declares unconstitutional in a given term, the more likely journalists are to use political rather than legal language in characterizing their decisions that year. In other words, journalists take periods of judicial activism as signals of political, rather than jurisprudential, shifts. This is potentially problematic in light of Vanessa Baird and Amy Gangl’s (2006) finding that the public reacts more positively to media frames that highlight legal rules instead of political motivations.

Likewise, different media outlets may have different styles in conveying Supreme Court news. Christopher Johnston and

Brandon Bartels (2010) note that news outlets like radio and cable have more sensationalist reporting styles than do newspapers and network news. These reporting differences extend to Court coverage: the researchers find that this difference in presentation has an effect on consumers' attitudes toward the Supreme Court as well as toward state courts.

## The Court's Public Image and Judicial Behavior

Understanding the public's perception of the Court and its work is more than an exercise in civic knowledge and sophistication; its implications may have real consequences for the internal politics of the judicial branch. Walter Murphy describes this phenomenon: "If prestige is one of the major sources of judicial power, it must follow that public opinion is one of the major limitations on the authority of the courts" (1964, 19–20). That is, if the Hamiltonian argument that courts' power consists of "merely judgment," then how that judgment is received is likely to be part of a judge's decision-making calculus. Indeed, contemporary scholars of judicial behavior have continued to show that judges have an incentive to be mindful of public reaction (e.g., Epstein and Knight 1998).

Several scholars have found evidence that the Supreme Court's behavior may be constrained by public opinion (Casillas, Enns, and Wohlfarth 2011; Clark 2009; Enns and Wohlfarth 2013; Epstein and Martin 2010; Fleming and Wood 1997; Giles, Blackstone, and Vining 2008; Link 1995; McGuire and Stimson 2004; Mishler and Sheehan 1993, 1996). While some suggest that the connection between public opinion is strong (e.g., McGuire and Stimson 2004) others are more agnostic about the causal link between the Court and the public (e.g., Epstein and Martin 2010). Moreover, other studies have even suggested that the correlation between Court decisions and public attitudes is the indirect effect of the Court's composition (Norpoth and Segal 1994; Stimson, Mackuen, and Erikson 1995). Regardless, the notion that the Court shapes its behavior to please the public remains a viable theory.

Taken with the Court's potential to affect popular attitudes, the Court's cautious adherence to public opinion may be indicative of a self-preservation strategy. That is, the Court's ability to remain an authoritative opinion leader depends on its good standing with the public. Meanwhile, to maintain that good standing, the Court must not stray too far from public opinion. Thus, the bench is in the circular position of needing to follow the will of the people, on the whole, in order to lead the public on occasion. For this reason, some scholars have suggested that the Court may attempt to protect its public image through its behavior (e.g., Epstein and Knight 1998; Zink, Spriggs, and Scott 2009). In fact, James Zink and colleagues (2009) argue that consensual decision making factors into this calculation.

The justices' behavior outside the Court also shows that they have concern for their popular reception. Richard Davis argues that the justices are, and have been, "externally strategic" and use the media that "go public" as part of an effort to foster a positive image of the Court (2011, 187, 33). In fact, current and recently retired justices have taken to the media to defend the institution from critics attempting to undermine the Court's neutrality and credibility.

## Conclusion

This chapter demonstrates that the Court has, at the very least, the potential to affect public opinion. While observational studies show that this potential is not always realized, its prevalence in experimental work suggests that the Court's ability to affect popular attitudes may be closely tied to information exposure. That is, the likelihood of finding that the Court has a persuasion effect appears strongest when the researchers guarantee, through an experimental stimulus, that research subjects have adequate information about the Court's decisions. This is corroborated by Valerie Hoekstra's (2003) findings that the communities from which Supreme Court cases originate, where information about the cases is most widely available, are the most likely to be persuaded.

With information so critical to the legitimating effect of the Court, it is especially important to consider the role of the news media as an intermediary between the justices and the public. However, as this chapter demonstrates, there are serious limitations, and perhaps biases, to the media's portrayal of the Court. As journalists have adapted to the Court's traditionalism and reclusiveness, they are forced to rely on short cuts that may inaccurately reflect the whole of the Court's work.

Because these informational limitations restrict the quality and the narrative of Supreme Court coverage, the public may be left with a misperception of the Court's rulings. And because it appears from the extant literature that the Court *may* be able to affect public opinion, any missteps in the media's reporting of the justices' decisions may then filter into the public's attitudes toward those decisions and the policies at stake. Meanwhile, this is all happening against the backdrop of a Court that may feel quite protective of its image and may even alter its behavior as a defense mechanism. Chapter 2 explores how the rise of polarization on the Supreme Court has played into this dynamic.