Public Opinion
and
Freedom of Speech

White Paper for the John S. and James L. Knight Foundation

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July 14, 2006

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Overview

This white paper addresses the relationship between the United States Supreme Court's doctrines that secure freedom of speech and public opinion about that freedom. It is concerned with two important questions. First, to what extent does the law of freedom of speech respond to and influence long term changes in public opinion? Second, what best explains the discrepancy, suggested by sixty years of research, between individuals' support in the abstract for freedom of speech and their willingness to suppress particular categories of speech?[1]

In response to the first question, based largely on a survey of existing research, this study concludes that public opinion and the Supreme Court's protection of free speech are connected over the long run in significant ways. Public opinion's influence on the Court seems more substantial and well-supported than the Court's influence on public opinion. Although studies have had to rely on sparse and somewhat inconclusive evidence, they have almost unanimously concluded that public opinion and Supreme Court decisions do influence one another.

In response to the second question, the paper rejects both the question's premise—that there is a discrepancy between individuals' abstract and specific support for freedom of speech—and the usual proposed explanation—that the public is mistaken or dishonest when it professes abstract support for freedom of speech.[2] The premise rests almost exclusively on evidence from studies focusing on only one aspect of free speech doctrine: public tolerance for extremist or offensive speech. Unlike most previous studies, this paper considers a range of Supreme Court controversies, and concludes that the public supports freedom of speech in ways largely consonant with existing free speech doctrine. The paper also concludes that the public seems most to value speech that it understands to promote an informed citizenry and democratic self-governance.

Public opinion's influence on the Supreme Court has long been of great concern because many feared the public's perceived low regard for freedom of speech would undermine the Court's protection for speech. There is at least some basis for this fear. Public opinion does influence the Court's decisions and, while the public is not anti-speech in general, for certain types of speech (such as offensive speech or media speech) and perhaps during certain times, the public may be less speech-protective than the Court. As a result, public opinion may help undermine—or buttress—exiting speech protection for certain speech categories or during certain periods.

Given these conclusions, the paper proposes educational initiatives to strengthen public support for freedom of speech. The point of this educational program is to build on the public's existing commitments to free speech and show why protecting journalism and forms of dissident and unpopular speech serves the interests of ordinary citizens, and helps contribute to democracy and self-governance.

The paper has four main parts. The first part briefly discusses the research on public opinion and the Supreme Court. Although much of the data is inconclusive, the data nevertheless suggests that the Court responds to public opinion over the long run, primarily through the judicial appointments process. Studies also suggest that, conversely, the Court may affect public opinion in diverse ways. For most issues, the Court has little to no influence on popular opinion. For certain issues, however, the Court has an influence, which can be positive, negative, or merely polarizing. As a result, when the public and Court disagree on certain free-speech issues, these mechanisms of influence may help to reveal the future path of free-speech law.

The second part attempts to specify which doctrinal areas are most likely to produce agreements and disagreements between the public and the Supreme Court. It employs both existing studies and an original study, which appears in Appendix 2. This part concludes that the public appears far less willing than the Supreme Court to protect rights to engage in offensive speech or extremist speech, speech that is foisted on unwilling audiences, campaign finance, and certain media practices. The public is least protective of speech it regards as "dangerous" and most protective of speech it regards as political.

The third part analyzes why the public and Supreme Court agree and disagree on these areas of speech, and what this relationship reveals about their respective notions of freedom of speech. It concludes that the public and the Supreme Court are both devoted to the abstract concept of "freedom of speech," but that each defines protected "speech" differently, perhaps based on the perceived need for protecting speech. Where the public and the Supreme Court agree that something is protected speech, they also tend to agree on whether and how it can be regulated. The analysis suggests, first, that the public considers something "speech" when the activity appears to promote democratic discourse and the formation of an informed citizenry. Second, the public is solicitous of unwilling listeners, so it prefers discussion to protests and politeness to offensiveness. Third, the public is highly skeptical of free-speech claims made by media companies and powerful institutions, as opposed to those made by individuals. Fourth, the public – and often the survey questions themselves-- appears to confuse norms—such as social disapproval and self-control—and law, such as fines or imprisonment. The public, however, appears to prefer social norms over law to regulate speech. Finally, members of the public appear most likely to support the kinds of speech in which they are likely to engage.

In light of the third part's conclusions, the fourth part proposes educational strategies to expand the public's commitment to freedom of speech. The strategies attempt to expand existing commitments to freedom of expression. Members of the public already hold many speech-protective commitments. Educational programs, therefore, need not inculcate new values. They can place existing commitments on a firmer and more self-conscious basis. They can also help explain how those existing commitments require protecting speech in many situations where the public is currently reluctant to extend protection. Free speech advocates can use this basic approach to devise school curricula, create teaching materials, or engage in public relations campaigns. Moreover, because individuals are more likely to support free speech rights when they can imagine themselves actively engaged in free speech, free speech advocates should encourage students and the general public to exercise their free speech rights in practical settings, for example through using new and digital technologies. Students who are exposed to the work of journalism and self-expression may take away lessons about the importance of free speech that they will carry with them through the rest of their lives. By participating in free speech activities and becoming citizen-journalists or student journalists, individuals will become more invested in the need to protect a diverse range of speech, including dissenting speech, unpopular speech, the work of journalists and speech through diverse media.

Finally, the paper includes five extensive appendices presenting original research and a comprehensive review of existing research. Appendix 1, a literature review, summarizes the conclusions of much of the literature on the interaction between public opinion, the Supreme Court, and free speech doctrine. Much of this literature follows one of two methodological approaches. One method compares specific survey questions to specific Supreme Court decisions to find correlations. The other method compares the public's general "policy mood" to

the Court's general liberalism or conservatism (as measured by well known political science measures). Appendix 2 presents an original study following the first of these methods, thus presenting a comparison of survey items and all Supreme Court free speech cases from 1989 to 2005. The data presented in this study is central to this paper's conclusions on the discrepancy between the public's abstract and concrete commitments to speech. Appendix 3 presents an original study following the second method, and compares the public's policy mood with the Court's views on free speech issues. This analysis, which admittedly has flaws, finds little correlation between the policy mood and Court decisions. Appendix 4 presents an original study of the Supreme Court's influence on public opinion on the one free-speech controversy, flag burning, where polling items are available over a range of years. The data is sparse, and the result inconclusive. Appendix 5 lists cases, surveys, and sources used in the paper and its various appendices.

I. Connections Between Public Opinion and the Work of the Supreme Court

A. The Limitations of Research Data

This part discusses data from previous and original research, all of which is presented in far greater detail in the appendices. The data, although sparse, supports a few basic conclusions. Nevertheless, genuine problems remain for any attempt at measuring the interplay between public opinion and the Supreme Court's decisions. It is worth detailing those problems at the outset. Data problems permeate research on public opinion, Court decisions, and especially their possible influence on one another over time.

First, data measuring public opinion is sparse and often disappointing. As an initial matter, theorists debate whether there is a single coherent "public opinion," as opinions may be fragmented based on demographics, political engagement, or other factors.[3] Assuming "public

opinion" exists, it is often unclear how best to measure it. Public opinion surveys, the most common measure, may have design flaws and respondents may be dishonest or careless in taking surveys. Survey items specifically addressing free-speech issues may be flawed because the public appears poorly informed on such issues[4] and so its opinion may be ill-formed and changeable.[5] Moreover, survey items on speech issues are "irregularly conducted, limited in number, and rarely extended over time."[6] The items that do exist are often unrepresentative, addressing highly publicized, emotional cases.[7] Even those items are generally poorly phrased, unclear about the relevant constitutional or legal issues, and have other major limitations.[8] A common flaw is that many items could refer to legal sanction, social disapproval, or self-censorship; that is, they often ask whether certain conduct, like flag-burning, should be "allowed," but fail to specify which party would allow or disallow the speech.[9]

Second, data for the Supreme Court is also limited. The Court hands down only a small number of free-speech decisions each year, generally no more than ten. In addition, analyzing these decisions requires subjective judgments about how to categorize them or characterize their (often multiple) holdings and rationales.

Third, data on the complex interaction between the Supreme Court and public opinion is severely limited.[10] The Court is usually not explicit about public opinion's influence.[11] Surveys are not explicit either, and there are varying time lags between survey items and Court decisions.[12] Causation is extremely difficult to pinpoint, as research must control for innumerable other possible influences. Although recent research has helped lessen some of these data limitations, severe limitations remain, and further research could extend or refine this study.[13] All these limitations should be borne in mind as we discuss the conclusions that we can glean from the data.

B. Does Public Opinion Influence the Supreme Court?

Public opinion appears to influence Court decisions on free speech matters the same way it does on other matters. Most of the public would prefer that the Court consider public opinion a "great deal,"[14] but a plurality believes that public opinion in fact has "only a little" influence.[15] The general consensus of political scientists, however, is that, over the long run, public opinion does affect Supreme Court decisions. It does so primarily "indirectly," through presidential and congressional elections and the judicial appointments process, but has relatively little "direct" impact on sitting Justices. There is also a vigorous debate about whether a lag exists—perhaps up to seven years—between shifts in public opinion and changes in the direction of Supreme Court decisions.[16]

The empirical literature almost unanimously[17] concludes that public opinion influences on Supreme Court decisions,[18] although a recurring complaint is that the data is severely flawed.[19] In 1997, two analysts concluded that the existing research in the field has reached "consensus on two issues"—that the Court's decisions coincide with public opinion in a general way, and that the decisions do so primarily indirectly through the judicial appointments process.[20] Some research suggests the Court's decisions coincide with public opinion just as strongly as the political branches' actions coincide with public opinion.[21] Considerable research "over the years strongly supports" the hypothesis that appointments are the primary, though indirect, mechanism for public opinion's influence on the Supreme Court.[22] Beyond appointments, other significant indirect mechanisms include the Court's deference to the popularly elected Congress,[23] and its reliance on lower court opinions, which in turn may also have been influenced by public opinion.[24] According to some authors, there is some evidence of a very slight direct influence, which appears strongest for moderate or "swing" Justices.[25]

Specifically on free speech decisions, there is some data and thus empirical support for the public's influence. Appendix 1 discusses some of the studies, which generally focus on extremist or offensive speech, and rely on very limited data. Some of these studies suggest an influence despite the limited data set.[26] The study in Appendix 3 showed no correlation over time between the public's "mood" and First Amendment decisions.

Not only do empirical studies conclude that the Supreme Court is majoritarian, but political science accounts of constitutional change support that thesis. Political scientists, legal scholars and legal historians explain shifts in constitutional doctrine through mechanisms that realign the Court with the then-prevailing opinions of the governing national political coalition or the public as a whole.[27] These accounts offer two basic (sometimes overlapping) mechanisms to explain this tendency: Presidents appoint new judges and Justices, or existing Justices (particularly moderate, swing, or median Justices) respond to public sentiment and political pressures.

For example, in the period between 1937 and 1941, the Supreme Court significantly revised its jurisprudence regarding economic regulation and federal power—which it had previously used to strike down a host of labor regulations-- in the face of mounting presidential, congressional, and public pressure, and a series of elections that brought the Democrats' New Deal coalition into power. Franklin Roosevelt's appointments during this period solidified a new jurisprudence amenable to the President and Congress.[28] In 1954, when the Court decided its landmark decision in, *Brown v. Board of Education,*[29] most states in the Union had already abolished de jure school segregation, and the foreign policy imperatives of the Cold War demanded that the United States do something about Jim Crow, which was becoming an embarrassment in America's struggle with the Soviet Union. Chief Justice Warren consciously

crafted the *Brown* decision with public opinion in mind, ensuring the opinion was short (so that the lay public could read it), unanimous (to confer greater compliance, and ensure enforcement), and not directly insulting to Southern whites (to enhance legitimacy).[30] A few years later, in 1957-1958, following a series of decisions ruling in favor of the civil rights of communists (several based on the First Amendment), the Court faced tremendous public and congressional criticism,[31] including the very real threat of legislation that would strip its jurisdiction to hear certain constitutional cases.[32] The next year, the Supreme Court narrowed its previous holdings.[33] Indeed, the degree of pressure the Court faced during this period may have caused Justice Felix Frankfurter to shift from supporting free-speech rights to supporting government power, because according to Chief Justice Earl Warren, Frankfurter "couldn't take criticism"[34] and he was worried about what his future biographer would write.[35] The Court's shift also was due in part to new appointments by President Eisenhower—Charles Whittaker and Potter Stewart-- who were more favorable to government claims.[36] In 1961, however, John F. Kennedy took office, the Democrats made gains in Congress, and Kennedy and his successor, Lyndon B. Johnson, appointed four new Justices—Byron White, Arthur Goldberg, Abe Fortas and Thurgood Marshall. The Court moved sharply back to the liberal political values of the new ruling coalition.[37] After the Warren Court decided a series of controversial cases on criminal procedure and school busing, Richard Nixon and George Wallace ran against the Court on "law and order" platforms.[38] The Justices clearly felt the pressure—one Justice even gave an interview on CBS to address the public backlash and defend the Court's decisions.[39] After Nixon won the Presidency in 1968, he appointed four new Justices who limited the scope and direction of the Warren Court's criminal procedure decisions. The new Nixon appointees also made several key decisions limiting welfare and educational rights, and generally took a more

cautious approach to civil rights and civil liberties issues than the Warren Court had. These opinions, not surprisingly, reflected changing national public opinion in the 1970s.[40]

Statistical and historical evidence repeatedly confirm that public opinion affects Supreme Court decisions; nevertheless, the mechanisms of that influence are diverse. The political science and legal literature overwhelmingly agree that the major mechanism of influence is through the appointments process.[41] New appointments shift the political ideology of the median Justice or Justices who hold the balance of power in highly controversial and closely contested cases; this produces new swing Justices who are more conservative or liberal on particular issues than the previous swing Justice.[42] New appointees do not automatically become swing or median Justices—that depends on the existing configuration of Justices, the ideology of the new Justice and the ideology of the person replaced. For example, the retirement of Sandra Day O'Connor in 2005 and the appointment of Samuel Alito in 2006 means that the Court's new swing Justice is Anthony Kennedy, who is thought to be more conservative on affirmative action and Establishment Clause issues than O'Connor. Over time, new appointments keep the Court roughly in step with changing public opinion. Presidents appoint on average about two Justices during a four-year term, although that average has been getting smaller in recent years because Justices tend to remain on the bench much longer than they did in years past.[43] The President generally appoints Justices who agree with the President's general values, or who at the very least are unlikely to block major elements of the President's political agenda. However, because a President may be unable to predict constitutional controversies many years in advance, his appointments may agree on the most salient issues of the present, but disagree amongst themselves when new controversies arise, as the President did not vet them for consistency with his views on those controversies.[44]

The President's choices for the courts are tempered by the constitutional requirement that the Senate approve his nominees. This requirement further reinforces the effect of public opinion, because popularly elected Senators can influence the President's selection and threaten to vote down candidates they do not like. For example, Ronald Reagan was able to appoint his most conservative pick, Antonin Scalia, and elevate William Rehnquist, the most conservative sitting Associate Justice, to Chief Justice, in 1986 because the Senate was controlled by the Republicans. However, after the Democrats regained the Senate in the fall of that year, they successfully blocked the conservative jurist Robert Bork in 1987. With a new election less than a year away, Reagan then appointed the more moderate Anthony Kennedy.[45]

Public opinion affects the Supreme Court in other ways besides the appointments process; often these mechanisms also work through effects on median or swing Justices . First, members of the Supreme Court may share the same values and opinions as others in society, merely by being part of the same culture.[46] Second, the Court may share the same general policy goals as the political branches and the public (at a general or particular level), and render decisions that support these goals. Recent appointees in particular are more likely to consider themselves as part of the then-reigning political coalition. Third, Justices may be concerned about their own power and the power of the Court.[47] If Congress is sufficiently opposed to Court actions, it could attempt to take this power from the Justices, in subtle or overt ways.[48] Fourth, Justices may seek to advance their agendas and preferences through good relations with the public and other government institutions. This means that they may be particularly sensitive to questions of backlash and public discontent. Although Justices express their views about the law in their opinions, they rely on other institutions to carry out those views.[49] Not only must the Court rely on the political branches for enforcement and implementation, it must also rely on

lower court judges, who can often thwart what the Court wants through manipulating legal analysis, erecting procedural roadblocks, limiting remedies, or in various other surreptitious ways.[50] For the Court to succeed in its tasks, other institutions must feel the Court is legitimate; agreement with the dominant political coalition and public opinion helps confer legitimacy.[51] Fifth, the Justices may act strategically in their interactions with the other branches in an effort to maintain public support. The Court's power rests in large part on the public's high regard for the Court.[52] When Congress or the President attack the Court to undermine that essential source of authority,[53] Justices, like other government officials who come under attack, may appeal to the public to maintain their support.[54] Finally, every ruling coalition has diverse elements; to give only one example, the modern Republican party is a coalition of social and religious conservatives, fiscal conservatives, libertarians, moderate suburbanites, and rural voters.[55] In many cases the Justices may not so much advance the ruling coalition's aims as mediate between and decide issues that are disputed within the ruling coalition.[56] For example, in Grutter v. Bollinger, the Michigan affirmative action case, several Fortune 500 corporations and military officers supported the constitutionality of affirmative action programs, while other elements of the Republican coalition did not.[57] To the extent national public opinion supports one side over the other in these disputes, median Justices tend to side with national public opinion.

Although the Court, in the long run, tends to reflect national public opinion and the aims of the governing national political coalition, that does not mean that it reflects state and local opinion. [58] The Court tends to follow national public opinion over state and local opinion because the Court's institutional role is to impose national values, and the supremacy of national law, on the states, and because the appointment process—public opinion's main lever—is federal. The President and Senate, as a collective, respond to national, not state and local,

opinion. Indeed, much of the Court's work involves striking down state and local laws and imposing national values on regional and local majorities. The best known example is *Brown v. Board of Education*, which imposed the values of national majorities on a regional majority in the South.[59] Even the conservative constitutional revolution of the 1990s, which sought to advance states' rights, conformed to the sentiments of the Reagan and George H.W. Bush administrations, as well as the Republican-led Congress in the 1990s.[60]

C. Does the Supreme Court Influence Public Opinion?

Just as popular opinion affects judicial doctrine, the Supreme Court's decisions also affect public opinion. On some issues, the Court polarizes opinion, making those favoring and those opposing a position more extreme in their beliefs. On other issues, the Court's impact can be positive, negative, or insignificant, although the evidence of these effects is sparse.[61] Supreme Court decisions appear most strongly to influence public opinion about the Court itself[62]—that is, respondents change their opinion about the Court for the better or worse if the Court agrees with the respondents' existing position.[63]

Appendix 4 includes a study of whether the Court's flag-burning decisions, decided in 1989 and 1990, appear to have influenced public opinion. The study found that, despite the Court's decisions, the public did not come to agree that flag-burning should be protected. That said, the public appeared to see the issue as less salient or important as years passed.

II. Where the Court and Public Opinion Agree (and Disagree)

If public opinion and the Supreme Court influence one another, then understanding differences between Court decisions and public opinion might help us predict the likely direction of Court doctrine over time. For this reason, many people fear that if the public opposes free

speech strongly enough, the Court and its doctrine may waver in protecting free speech. Conversely, if the Court abandons protections of free speech, the public may come to believe that these protections are relatively unimportant. However, such influence also presents an opportunity: if the public supports freedom of speech strongly enough, the Court will be more likely to protect this core freedom.

There is a vast literature on correlations between public opinion and freedom of speech. As the literature review in Appendix 1 makes clear, almost all of this literature centers on only one subset of free-speech issues—the public's tolerance for offensive or extremist speech. Although this question is certainly quite important, it comprises only one part of free-speech doctrine. In fact, since 1989, no more than five percent of free-speech cases have involved this set of issues.[64]

Because the literature has focused almost exclusively on the issue of offensive or extremist speech, the literature has come to the same general conclusion for over half a century—the public professes to support free speech only in the abstract,[65] but wavers when confronted with concrete situations that involve protecting unpopular speech.[66] That is, the literature tends to conclude that the public "really" opposes freedom of speech, and then the authors try to determine why that is so.[67]

When one considers a wider range of free-speech questions beyond offensive and extremist speech, the data presents a different picture. Free-speech questions range across many issues, from campaign finance to media regulation, so the public's positions on offensive and extremist speech do not necessarily reflect the public's abstract commitment to "speech." Indeed, an abstract commitment to speech cannot always predict specific outcomes (either for the public or for the Court)[68] as speakers' interests often conflict, as do the interests of listeners and

speakers. For example, one media regulation challenged by cable companies affected competing speech interests including the interests of broadcasters, cable network operators, cable channel programmers, and television and cable viewers.[69]

The Court's free-speech doctrine is quite complicated. Unlike the public's notions of free speech, however, it is relatively transparent because it is presented in written opinions totaling thousands of pages. The Constitution requires the Supreme Court to apply an abstract principle of "freedom of speech" to particular cases.[70] To do so, it makes distinctions between what is protected "speech" and what is not, for example by excluding verbal fraud and perjury.[71] If a communication counts as "speech," the Court places that speech in a doctrinal category, such as indecent, commercial, political, or obscene speech.[72] The Court also considers the technological and economic circumstances of the speakers and listeners.[73] It looks at the nature and circumstances of the regulation that is challenged; for example, it may ask whether the regulation turns on the content or viewpoint of speech or rather on the time, place, or manner of the speech, without regard to content.[74] Different judicial tests apply based on the result of each of these inquiries. These judicial tests generally permit government to regulate speech if government's interest in the regulation is sufficiently important and if the fit between the regulation and that interest is sufficiently close. The importance of the interest and the required degree of fit vary based on the category of speech, the technology used, and the regulation's focus on content.

At a more theoretical level, a debate persists over the purpose of freedom of speech. Some scholars and Justices ground the freedom of speech on the promotion of democracy;[75] this principle has long been considered the Court's dominant basis for freedom of speech.[76] Other principles underlying freedom of speech include speech's capacity to foster truth and speech's relationship to individual autonomy.[77]

The lay public probably does not possess such a nuanced "doctrine" of freedom of speech, but it appears to have an underlying theory of the freedom that is roughly consistent with theories found in academic literature and case law. Its notion of freedom of speech is far less transparent than the Supreme Court's. Nevertheless, like the Court, the public considers free speech important,[78] and again, like the Court, the public appears to consider some expression not to be "speech" worthy of protection. It also appears to believe some speech deserves less protection than other speech, based on content and context. It appears to favor most the protection of political speech, perhaps based on the tendency of such speech to promote an informed citizenry and democratic discourse.

A 2004 study and the study in Appendix 1 help clarify how the public categorizes a range of free speech issues. In 2004, Julie Andsager and her co-authors used complex statistical tools to "to tap into [the] underlying constructs" of how the respondents (consciously or unconsciously) categorized speech situations.[79] Although their study had some limitations,[80] it remains helpful because, while Justices usually are explicit in how they categorize the speech at issue, individuals taking surveys usually are not. The authors found that the respondents classified questions about individual, non-media, speech into five categories: political, "morality-based," extremist, offensive, and dangerous speech.[81] Respondents classified questions about media-speech into four categories: harmful content, objectionable content, "routine journalism," and identification of crime victims or juveniles accused of crimes.[82] The authors ranked the public's willingness to protect speech by each category. "[B]y far the most highly supported form of individual expression" was political speech, such as speaking in favor of a candidate for office, disagreeing with the President, and discussing workplace rights.[83] Next, the public believed that "morality-based" speech, such as nude dancing or buying magazines featuring

nudity, should be protected only "sometimes" (as opposed to "always" or "never").[84] Extremist speech, including advocacy of Satanism or a right-wing dictatorship, received less protection; on average, and with little demographic variation, the public would protect such speech a little less than "sometimes."[85] Offensive speech, including using words offensive to a racial/ethnic group, or situations in which children swear at their parents, received similarly low levels of protection.[86] "Dangerous" speech—which might include making statements that could damage national security, passing confidential information to a foreign government, or yelling "fire" in a crowded theater— received by far the least support.[87]

Across the board, respondents were far less protective of media rights than individual rights. Even in response to abstract survey questions, the public supported freedom of the "press" less than freedom of "speech."[88] Moreover, the public would protect even its most favored media right only "some," not "all" of the time.[89] The most strongly supported category of media rights was the right to publish objectionable printed material— for example, the right to keep a book in a library despite objections, to sell magazines with nude pictures in them, and to run graphic photos of violent events.[90] The public supported what the authors called "routine journalism" even less, although relatively well-educated groups were most supportive.[91] The routine journalism category included controversial journalistic practices, such as reporting the sexual habits of public figures and reporting classified material, as well as errors inherent in journalism, such as reporting inaccurate information believed to be true. The public did not support journalistic "identification" practices, such as identifying rape victims and juveniles charged with crime.[92] Finally, the public strongly opposed "harmful" media speech, such as advertising illegal products, displaying false or misleading advertisements, or airing videos involving drug-use on television.[93] These answers resemble the public's attitudes about

"dangerous" individual speech. Based on this evidence, the authors even speculated that "most Americans do not believe the mass media act in the best interests of the citizenry."[94]

Largely agreeing with Andsager's conclusions, the study in Appendix 2 also helps reveal how the public categorizes speech, and which categories it most supports. The study matches existing survey items with Supreme Court free-speech decisions from 1989 to 2005. Based on the limited data, it appears the public agrees with the Court on a range of issues, although it disagrees on others. As Appendix 2 shows, the public and Court disagree on several issues. First, as one would expect from past research, the public and Supreme Court disagree on cases involving extremist or offensive speech; the public opposes protection for such speech, while the Court generally protects it. Second, the public has far less sympathy for the free speech claims of media companies. Third, the public would go further in limiting campaign money. It would limit campaign spending as well as campaign contributions, while the Court generally permits only limitations on contributions. Indeed, the public does not appear to consider campaign money even to be speech. Fourth, the public would also apparently more strongly oppose electoral regulations that could have the effect of entrenching the power of the two major parties and harming competing third parties. The public and Court also disagreed on other cases: the public opposed permitting criminals to profit from speech about their crimes (e.g., published memoirs); and it opposed forbidding health professionals from discussing abortion options when accepting government subsidies. Finally, as detailed in Appendix 2,[95] the public sometimes appears confused about social norms and law, yet it also prefers, where possible, that speech be regulated by norms rather than law.[96]

The public and Court agree, however, on a number of points. Both agree that legislatures may punish hate crimes, and both consider it acceptable to place certain restrictions on abortion

protesters, perhaps because the public considers these forms of speech to be threatening or dangerous. Both the public and the Supreme Court appear willing to protect sexual speech only if it is not available to children, through any medium, although the public appears less protective of violent sexual speech. Both agree that economic or structural regulation of the media are constitutional. Both the Court and the public agree that dangerous speech deserves very little protection.[97] And both are less likely to accept the speech claims of criminals or prisoners, and the associational claims of gays.

These areas of convergence and divergence line up with what Andsager and her co-authors found. The public is not protective of dangerous speech at all and it is generally unwilling to protect offensive or extremist speech. The public would protect sexual speech only where the speech is not imposed on unwilling listeners and unavailable to children. Finally, the public supports individual claims far more strongly than the claims of media companies.

General survey items also tend to agree with Andsager's finding that the public most supports freedom for political speech. The public strongly supports protection for criticism of political leaders. In a 2003 survey, 72% felt those criticizing President Bush's position on Iraq were "acting in appropriate way … through their right to free speech," while 20% felt it was unpatriotic.[98] On October 11 and 12, 2001, a month after the 9/11 terrorist attacks, a survey asked whether the government "should permit continued anti-war protests in this country under the free-speech guarantees of the Constitution" or "ban protests in order to support the US military operation in Afghanistan." Although this question rests on the questionable assumption that banning protests would support the military operation, and although the public is less disposed to protecting protests than discussion, 71% of respondents agreed government should permit the protests; only 23% would ban them.[99] As a result, it appears that many of the public's

free-speech notions agree with standard Supreme Court doctrine. It may not be the case, as long argued, that the public is extraordinarily speech restrictive and the Supreme Court must continually oppose and restrain public opinion on all fronts. More accurately, the Court would buck public opinion only on certain, targeted free speech issues.

III. Why the Public and Supreme Court Agree (and Disagree)

Several plausible explanations account for the public's agreements and disagreements with current free-speech doctrine. The public and the Supreme Court agree, in the abstract, that freedom of speech is important. It appears that they disagree about exactly which speech deserves most protection, suggesting disagreement on the principles underlying speech protection.

First, as noted above, the public particularly values speech freedom where that freedom encourages the exchange of information and ideas necessary for citizens to make political and personal decisions. The public supports political and informative speech more strongly than it does other kinds of speech. It does not consider offensive speech to be core protected speech, perhaps because it believes that offensive speech does not involve a serious exchange of ideas. Likewise, the public may believe sexual speech does little to promote an informed citizenry and roughly similar sentiments are not uncommon in First Amendment scholarship or in First Amendment jurisprudence.[100] Indeed, certain Justices do not consider matters such as nude dancing[101] or racial epithets[102] to be "speech," or at least they consider them to be very low-value speech.[103] Similarly, the Supreme Court seems to consider protecting political speech to be at the heart of the First Amendment guarantee.[104]

Although the public favors political discourse, it also accepts many regulations of campaign finance, even though campaign money supports political organization and speech.

Indeed, the public opposes constitutional protections for campaign expenditures and contributions as strongly as it opposes flag burning.[105] The public, however, may not intuitively think of money spent in campaigns as "speech," and therefore may believe that campaign finance regulation merely regulates economic distribution and corruption. In one survey, for example, in 1997, the public overwhelmingly claimed that "campaign spending and contributions" have "nothing to do with free speech" (74%).[106] The public may also consider campaign contributions and expenditures to subvert equal democratic discourse, skewing discourse towards the powerful. From 1994 to 2004, the public overwhelmingly believed that "big companies" have "too much" power (83% in 2004), and thought the same of political action committees that give money to candidates (81% in 2004).[107] Similarly, the public seems to believe that strong and independent third parties enhance democratic discourse, while they consider laws entrenching the two-party system by burdening the speech and associational rights of third parties to subvert democratic discourse.

Second, the public is highly solicitous of unwilling listeners. The public prefers discussion to protests, politeness to offensiveness, and would permit access to indecency only for willing, not offended, adults. The public expects speech to consist in "communication," an exchange among speakers and listeners, not merely "expression" of what the speaker feels like saying. This idea is apparent, for example, in the public's willingness to restrict offensive speech, abortion protestors, and indecent speech for the unwilling.

Third, the public is highly skeptical of free-speech claims made by media companies. There are several possible reasons for this skepticism. First, the public may believe that large media companies disserve society's interests in democratic discourse, or are more interested in drawing large audiences than in informing citizens.[108] Second, the public may have less respect

for speech motivated by corporate profits rather than political commitment. Third, the public may respect media free speech claims only insofar as those claims support individuals' interests in democracy. Fourth, the public may not regard media corporations as persons who deserve the same First Amendment rights as individuals. Fifth, the public may be concerned that that media companies serve their advertisers and/or powerful interests, rather than the public interest.[109] Sixth, the public may identify media speech claims with indecency and commercial advertising, which media companies defend under the First Amendment. Seventh, and finally, the public's preference for individual free speech claims may simply reflect the public's more general prejudice against big, powerful institutions—a prejudice that is perhaps exacerbated by the public's belief that such large institutions have the ability to skew democratic debates disproportionately and undermine democratic self-government. This belief could explain why the public has so strongly supported regulations that limit further media consolidation.[110]

Fourth, the public and the Supreme Court may appear to disagree about free speech issues in part is because the public, and the survey questions themselves, confuse norms and law. As a result, survey items may far overstate the public's willingness to censor speech. The items often do not specify if norms, law, or speakers themselves will censor the speech at issue. As Appendix 2 explains in more detail, it appears that the public prefers norms to law to regulate speech, and it fairly strongly opposes government regulation where norms would suffice.[111] Hence, although the public appears confused on the difference between laws and norms, the public may appear in survey questions more willing to use the law to censor speech than it really is.

Fifth, the Court and the public disagree in part because people tend to privilege speech in which they are likely to engage. The Justices are all lawyers, drawn from elite academic

institutions, often with experience or interest in political affairs. Coincidentally, the Justices are extremely protective of the speech of lawyers and judges.[112] They are also more protective than the public of elite institutions such as the major political parties.[113] Members of the public, by contrast, tend to favor speech in which they imagine themselves most likely to engage.[114] Most do not engage in media speech, as only few Americans own cable systems, broadcast stations, radio networks, etc. Most probably do not engage in what they consider extremist or offensive speech on a regular basis. As all those surveyed are over 18, most do not engage in underage reading or viewing of pornography. By contrast, most probably do discuss politics or current affairs with colleagues and friends, some may enjoy occasional pornography, and many may distrust elite institutions with which they are not involved. In addition, most individuals spend far more time as listeners in political debates than as speakers, both in person and mediated through technology, and therefore may be particularly solicitous of the interests of listeners and audiences.

IV. Educating the Public About the Values of Freedom of Speech

Based on the available research, an educational program designed to promote the values of freedom of speech could have a significant effect. Most of the public is poorly informed about free speech issues. As a result, support for freedom of speech may be tentative: support for free speech rights could waver in times of crisis or when interests like national security appear to outweigh speech interests. A better understanding of freedom of speech could help bolster and even expand the public's existing commitments to freedom of speech, which, in turn, could influence the Court's doctrines.

Even marginal improvements in public education might change public views substantially. Survey data suggests that the more educated individuals are, the more tolerant they

are of offensive and indecent speech,[115] and the more willing they are to protect routine journalistic practices.[116] In one 2004 survey, almost one in six Americans favoring a constitutional amendment to ban flag burning no longer favored the amendment upon being told that it would be the first change to the First Amendment in over 200 years.[117] In addition, in a 2000 survey, 12% who favored a constitutional amendment limiting election campaign spending no longer favored the amendment upon being told it, too, would be the first change.[118]

The public might even welcome increased education on speech rights. Americans believe that their educational system teaches these issues poorly. When asked from 2001 to 2004 how they would "rate the job that the American educational system does in teaching students about First Amendment freedoms," the public gave low ratings.[119] On average, 63.8% of Americans believe the education system only does a fair or poor job in teaching First Amendment issues.

Based on the public's apparent commitments, an educational program need not inculcate the value of free speech anew. Rather, it can build on the public's existing commitments to free speech, and explain how these commitments suggest either extending constitutional protection to more areas of speech, or increasing the level of protection in areas where the public only reluctantly supports protection. Such a program could deepen the public's commitment to the speech it already supports, and can expand its tolerance of other speech.

If this paper's conclusions about the public's commitment to free speech are accurate, then a successful educational program can address several points. The point of such a program would be to build on the public's existing commitments to free speech. An educational program could explain how much speech that appears to be nonpolitical actually has at least a marginal benefit for democracy. At the same time, the program could use historical examples to explain

why individuals should treat with skepticism government claims that certain speech, especially political speech, is "dangerous" and therefore unprotected. The program could offer examples of historical eras when the government deemed what we now regard as fairly standard political or policy-based speech to be "dangerous" and sought either to suppress it or punish its speakers. Even if truly dangerous speech should deserve less protection, the public could learn to be more suspicious of the government's flat assertion that the speech it wishes to criminalize, or otherwise censor, is in fact dangerous.

In addition, a successful educational campaign can focus on narrowing the differences between the public's and the Court's views of freedom of speech. The program should tie freedom of speech to democratic self-governance. Teachers often begin with a paradigmatic example of a "speaker" or "speech" being restricted. This speaker could be a street corner pamphleteer, picketer, flag burner, racist, pornographer, advertiser, politician, etc. Instead of beginning with difficult examples that have less public sympathy, such as pornography and flag burning, educational programs could begin with examples that involve political speech directed at willing listeners and therefore have clear connections to the promotion of democracy, self-governance, and the formation of public opinion. In this way it can demonstrate how protecting speech in these cases furthers democracy and self-governance. Then it could extend these lessons as appropriate to situations involving unwilling listeners. Similarly, a program should approach the issue of indecent speech through cases involving speech that has literary, artistic, political and scientific value, and cases involving indecent sexual speech offered to willing adults.

Many key examples can come from Supreme Court cases on speech and media rights. Many of these decisions involve political speech instead of offensive speech, and these cases

emphasize the rights of both speakers *and* listeners, and of both the powerful and the less powerful.[120] The program can then move to other media cases which also focus on political speech and the rights of individuals and media entities. Because the public should intuitively agree with most of these cases, it will be able to see the point of the Supreme Court's jurisprudence and its understanding of the purposes of freedom of speech. The educational program can then show how those purposes are furthered when courts extend freedom of speech to new cases where the public would not intuitively extend protection; it could then explain how extending free speech protection would further both democracy and the public interest.

Second, a well-designed education campaign could expand individuals' willingness to protect the speech of media companies and journalists. The study concludes, based on the public's well-documented distrust of the organized media, that the public is skeptical about whether or not the media actually serves the public's interests or democratic goals.[121] These attitudes are particularly worrisome and may, in the long run, undermine the press's ability to serve its democratic function. If the public no longer trusts the press to act as a reliable check on government, but rather sees it merely as another special interest that selfishly promotes its own values, American democracy will be both impoverished and endangered. Powerful public and private interests will be far more unconstrained and irresponsible if they believe that the press will not report their misbehavior, or, even if they do report it, that the public will not trust the reports.

A successful educational program should try to draw the connections between a vibrant press and democratic self-government more clearly. It should focus on those situations where media organizations best serve democracy: by exposing government overreaching, incompetence and corruption, by facilitating serious discussions about public issues, and by bringing important

abuses of public and private power to the public's attention. That is, the program should focus on media companies' contributions to news and public affairs more than their contributions to public entertainment and the spread of indecent or violent content. An educational campaign should explain how protecting free expression and freedom of information for news organizations actually promotes the democratic interests of the public as a whole and helps make American democracy stronger. Although these connections may be obvious to media companies and professional journalists, survey data suggests that they are not obvious to the general public, which may have come to see media companies and professional journalists as yet one more form of entrenched power or simply as rich and powerful purveyors of entertainment. One of the most effective ways to draw the connection between the press and a vibrant democracy is by informing individuals of instances where the press's action resulted in concrete improvements in the lives of citizens. This information could include instances of newspapers or other news outlets exposing local corruption, health hazards, frauds, or other social problems. In addition, the educational program can contrast these examples with others that show how societies suffer without a free press. The most famous example involves famine: no society with a robust system of free expression has ever suffered a famine because news of the problem spreads and government actors are compelled to take action.[122] If, either through public relations campaigns or educational curricula, members of the public become better informed about the structural role that the free press plays, they would better understand the intimate connection between a well-functioning free press and the public interest. After drawing the connections between the media and democracy, an educational program could then show how the democratic work of media and journalism goes well beyond traditional news programs and extends into the dissemination and

discussion of a wide range of opinions, including even some forms of entertainment that may have violent or indecent content.

Third, the educational program (and future surveys) should make clear the difference between laws and social norms. The program should acknowledge that free speech carries with it social responsibilities, but emphasize that those responsibilities are often social and are enforced by social norms rather than by civil and criminal law. In particular the public needs to focus on the fact that without political and legal rights to speech, individuals face fines or even imprisonment for speech, and that such actions are quite different from being criticized for speaking. If the public better understands the distinction between social disapproval and legal punishment, it appears far more likely to choose norms over law to regulate undesirable speech.

Finally, any educational program should be participatory—inviting participants to learn by doing. Individuals appear most invested in protection for the speech in which they themselves engage (or can imagine themselves engaging). As a result, an educational program or public relations initiative can encourage Americans to participate more frequently in speech and expression. A primary example would involve media speech or, more specifically, journalism. An educational program can encourage students or others to express their views and opinions through digital and other technologies. Many of these technologies—for example, weblogs and podcasts-- enable individuals who do not work for a media organization to broadcast their ideas and do things traditionally associated with the mass media. For example, the program could encourage individuals to maintain a weblog of their thoughts for a week or month or create a series of podcasts or video programs. Individuals would report on their lives and current events as student-journalists or as citizen-speakers. Of course, students could also employ older forms of media—they could draft stories on paper to circulate in class, or to submit

to local publications. Such reporting would help those involved in the program better to understand the connection between the purposes of the free speech guarantee—which includes democratic participation—and the protection of journalism and media speech. Conceivably, such a project could be national in scope; it might involve a nationwide "Student-Journalist Week", or a "Citizen-Journalist Week". The project could be tied to a national holiday such as Independence Day, Thanksgiving, or President's Day. A particularly effective teaching initiative in schools could support this participatory approach with extensive theoretical backing. During the period in which students participate in student journalism or political self-expression, their lessons could focus on the history of and values underlying freedom of speech.

At the very least, an educational initiative would improve public understanding of freedom of speech and its rationales. And, in the long run, improving public understanding of and appreciation for freedom of speech will have a positive influence on the Supreme Court's doctrines that protect that freedom.

NOTES

[1] Julie L. Andsager, *A Constant Tension: Public Support for Free Expression*, 38 Stan. J. Int'l L. 3 (2002). *See also* Hazel Erskine, *The Polls: Freedom of Speech*, 34 Pub. Opinion Q. 483 (1970) ("Americans believe in free speech in theory, but not always in practice.").

[2] For example, one report referred to Americans as "potential 'sunshine patriots,'" who are "quick to defect" from their abstract devotion to freedom of speech when considering specific situations. John Seigenthaler, *Forward* to Donna Demac, *State of the First Amendment*, at vii (1997). In that first "State of the First Amendment" report, released by the Freedom Forum in 1997, 93% of respondents claimed they would re-ratify the (abstract) language of the First Amendment as written. Donna Demac, *State of the First Amendment* 96 (1997) (hereinafter "SOFA 1997"), http://www.freedomforum.org/publications/first/sofa/1997/sofa_all.pdf. Yet, the more particular questions and existing research led Mr. Seigenthaler to conclude the public would defect.

[3] *See, e.g.*, JULIE L. ANDSAGER ET AL., FREE EXPRESSION AND FIVE DEMOCRATIC PUBLICS 6 (2004).

[4] Thomas R. Marshall, *Public Opinion and the Court* (book review of VALERIE J. HOEKSTRA, PUBLIC REACTION TO SUPREME COURT DECISIONS), 87 Judicature 256, 256 (2004) ("National media coverage may be slight for most Supreme Court decisions, and sometimes even nonexistent.").

[5] Valerie J. Hoekstra, *The Supreme Court and Local Public Opinion*, 94 Am. Pol. Sci. Rev. 89 (2000) (noting the public is poorly informed "of all but the most controversial and visible cases"). For example, almost 40% consistently cannot name a single right guaranteed by the First Amendment. *See, e.g.*, Survey by First Amendment Center and *American Journalism Review* (conducted by Center for Survey Research and Analysis, University of Connecticut), May 6-June 6, 2004, *in* First Amendment Center, *State of the First Amendment 2004*, at 23 (2004) (hereinafter "SOFA 2004"), http://www.firstamendmentcenter.org/PDF/SOFA2004.pdf. In 1999, over 60% wrongly claimed they lacked the right to burn a flag. Survey by First Amendment Center (conducted by Center for Survey Research and Analysis, University of Connecticut), Feb. 26-Mar. 24, 1999, *in* First Amendment Center, *State of the First Amendment 1999*, at 16 (1999) (hereinafter "SOFA 1999"), http://www.freedomforum.org/publications/first/sofa/1999/sofa1999report.pdf. In 2000, 61% had that wrong belief. Survey by First Amendment Center (conducted by Center for Survey Research and Analysis, University of Connecticut, April 13-April 26, 2000), *in* First Amendment Center, *State of the First Amendment 2000*, at 12 (2000) (hereinafter "SOFA 2000"), http://www.freedomforum.org/publications/first/sofa/2000/sofa2000.pdf. Similarly, in another survey, a majority of Americans claimed they support all of the Constitution, but that nobody should be permitted to criticize the Constitution (despite the First Amendment, which would guarantee the right to criticize it). United Press International, *Polled Americans Like Constitution, Not What It Says*, Chi. Trib., Sept. 13, 1987, *available at* 1987 WL 2984886 (discussing a University of Houston survey). Hoekstra argues, however, that parts of the public are, in fact, slightly more interested and knowledgeable than prior research had indicated, especially when the Supreme Court case involves a local matter. Hoekstra, *supra* note 5.

[6] Roy B. Flemming & B. Dan Wood, *The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods*, 41 Am. J. Pol. Sci. 468, 469 (1997).

[7] Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 St. Louis U. L.J. 569, 628 (2003) ("Public opinion can be ascertained with confidence on only a few issues, like abortion, prayer in public schools, and the death penalty.").

[8] Surveys may not track the actual Supreme Court controversy or decision. Hoekstra, *supra* note 5, at 90 (surveys often "do not adequately reflect the subtlety of the issues involved in the cases."). They often ask if the respondent is "for or against" a certain hypothetical law, Jennifer L. Lambe, *Dimensions of Censorship, Reconceptualizing Public Willingness To Censor*, 7 Comm. L. Pol'y 187, 197 (2002), not whether it is constitutional or unconstitutional, *cf.* Eldred v. Ashcroft, 537 U.S. 186 (2003) (the majority suggests the law in question is unwise yet constitutional). Also, questions also may not explain whether the regulation at issue is a prior restraint, a tax, or a

lawsuit after publication. *See, e.g.*, Lambe, *supra*, at 196. They may be unclear about the medium and audience of speech, *id.* at 191, though the medium and audience may matter doctrinally, s*ee, e.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978) (apparently turning on the pervasiveness of broadcast, and that children may be in the audience). Questions may not present alternative fora still open for the speaker, should he or she be forbidden from speaking in a particular place. Questions also often concern a generic class of speakers (such as advertisers, journalists, filmmakers, employees, parents), without noting the content or viewpoint expressed, and a generic class of listeners, without situating the listeners in a community. *See* ANDSAGER, *supra* note 3, at 67.

Survey questions also often provide dichotomies not helpful to understanding the public's opinion on free speech. Often the question does not contextualize the decision, and the two values listed may not be opposed. *See, e.g.*, Survey by ABC Nightline News (fieldwork by TNS Intersearch), Jan. 8-Jan. 12, 2003 ("If you had to pick, which of these would you say is more important: the right to a free press in this country OR the government's ability to keep military secrets in wartime?"), *available at* Polling Report, http://www.pollingreport.com/media.htm.

Survey answers may also reflect respondents' imaginations. Questions may ask if certain censorship is acceptable "always," under "certain circumstances," or "never." Lambe, *supra*, at 197. But the exact circumstances may be dispositive, both for the public and for the courts. In one survey, 67% claimed that the "federal government should be allowed to censor news stories before they appear in the national news media if the government feels national security might be endangered by the story." Survey by ABC News, December 8, 1983, *available at* http://www.ropercenter.uconn.edu/cgi-bin/hsrun.exe/roperweb/pom/pom.htx;start=ipollsearch?TopID=58. If respondents imagined facts similar to the *Pentagon Papers* case, New York Times Co. v. United States, 403 U.S. 713 (1971), they imagined the government acting under flimsy or dishonest national security pretenses to silence valuable information which embarrassed government officials. If they imagined, instead, facts similar to United States v. Progressive, 467 F.Supp. 990 (W.D. Wis. 1979) where a magazine wanted to publish instructions to make an atomic bomb, they imagined the government acting with more plausible national security concerns and not based on possible embarrassment to government officials. This question, like many others, also suffers from other ambiguities: does "censor" mean scrub a few names or words or forbid publication altogether?

Twenty-three years later, another question changed a few words which led to the opposite result. The question asked, "Which is more important to you: that the government be able to censor news stories it feels threaten national security or that the news media be able to report stories they feel are in the national interest?" Fifty-six percent felt the news media's interest was more important and 34% supported the government; but because the words are different, it is difficult to see if the public's opinion had actually changed. Survey by Pew Research Center (conducted by Princeton Survey Research Associates International), Feb. 1- Feb. 5, 2006, *available at* http://www.ropercenter.uconn.edu/cgi-bin/hsrun.exe/roperweb/pom/pom.htx;start=ipollsearch?TopID=58.

[9] *See, e.g.*, Lambe, *supra* note 8, at 196.

[10] William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making*, 58 J. Pol. 169, 198 (1996).

[11] THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 50 (1989).

[12] Hoekstra, *supra* note 5, at 90. *See also* Gregory A. Caldeira, *Courts and Public Opinion*, *in* THE AMERICAN COURTS: A CRITICAL ASSESSMENT 303, 309 (John B. Gates & Charles A. Johnson, eds. 1991) (noting the "wording of the items and the timing of the survey often leave much to be desired. … [S]ometimes the phrasing of an item did not adequately reflect the nuances of the Court's decisions; and the space between the date of the decision and taking of the poll varies wildly.").

[13] For public opinion data since 1999, the Freedom Forum has either on its own or through funding for the First Amendment Center, undertaken annual opinion surveys of free speech issues. In addition, Henry Stimson devised a measure of "public mood" that is highly-regarded and often used to reflect how "liberal" or "conservative" the public feels from year to year. Finally, yearly, advanced survey-analysis techniques permit researchers to tease out more information from the existing data. For Supreme Court data, Harold J. Spaeth has created a database of decisions that categorizes decisions by type of case (civil rights, First Amendment, etc.) and uses standard factors to measure whether an opinion is "liberal" or "conservative" (for example, voting against the rights of any free-speech

claimant is "conservative"). Recently, many studies about public opinion and the Supreme Court have compared the public's liberalism according to Stimson with the Court's liberalism according to Spaeth, and have drawn conclusions from those comparisons. *See* Appendix 1.

[14] In 2005, 50% of the public believed the "views of the majority of Americans should have" a great deal of influence on the Supreme Court's decisions, and another 29% believed the views should have "some" influence. Survey by Quinnipiac University Poll, May 18-May 23, 2005, *available at* Polling the Nations, http://poll.orspub.com/.

[15] Only 7% believed public opinion has a great deal of influence. Survey by Quinnipiac University Poll, May 18-May 23, 2005, *available at* Polling the Nations, http://poll.orspub.com/.

[16] *See* Appendix 1, at 9-12.

[17] For a summary of the empirical research demonstrating the Supreme Court is a majoritarian institution, see Terri Peretti, An Empirical Analysis of Alexander Bickel's The Least Dangerous Branch, in THE JUDICIARY AND AMERICAN DEMOCRACY, 123, 130-32 (Eds. Kenneth D. Ward & Cecilia R. Castillo, 2005).

[18] *See* Mishler & Sheehan, *supra* note 10, at 171 ("A few dissenting voices linger, but most accept that the Supreme Court is broadly responsive to public opinion."); *see also* MARSHALL, *supra* note 11, at 80.

[19] In 1991, one analyst appraised the research and concluded, "The truth is, we know virtually nothing systematically about the effect of public opinion on the Supreme Court." Caldeira, *supra* note 12, at 313. In 1993, two more analysts also found the research unconvincing and concluded, "We know of no empirical study that systematically demonstrates that public opinion has any influence on the decisions of the justices." Flemming & Wood, *supra* note 6, at 469 (quoting JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 240 (1993)).

[20] Flemming & Wood, *supra* note 6, at 468; Michael W. Link, *Tracking Public Mood in the Supreme Court: Cross-Time Analysis of Criminal Procedure and Civil Rights Cases*, 48 Pol. Res. Q. 61, 62 (1995) (discussing Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policymaker*, 6 J. Pub. L. 279 (1957)).

[21] Mishler & Sheehan, *supra* note 10, at 169.

[22] Flemming & Wood, *supra* note 6, at 468. *See also* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

[23] Marshall found that when Congress and public opinion agree on an issue, the Court agrees with them both in 81% of cases. When the polls and Congress disagree, the Court overlaps with *Congress*, not public opinion, 63% of the time, and therefore with public opinion a mere 37% of the time. MARSHALL, *supra* note 11, at 83-84. Unlike Congress and the president, however, state legislatures apparently have little or no mediating effect. *Id.* at 19-20.

[24] The Court generally agrees with Congress, but when it does strike down legislation it generally agrees with a lower court. For example, according to one commentator, since 1994, the Court has invoked freedom of press or speech "to set aside 13 federal laws, eight state laws, and four local laws. [I]n the vast majority of [these] instances … it affirmed the judgment of the lower court." Ronald K.L. Collins, *Recent Trends Go Against Free Speech*, First Amendment Center, Sept. 4, 2004, *at* http://www.firstamendmentcenter.org/analysis.aspx?id=13985#f3.

[25] Mishler & Sheehan, *supra* note 10, at 180.

[26] *See id.* at 3, 4-5, 14.

[27] *See* Keith E. Whittington, *Congress Before the Lochner Court*, 85 B.U. L. Rev. 821, 828 & nn. 37-46 (2005) (reviewing this literature).

[28] *See* Daniel A. Farber, Who Killed Lochner?, 90 Geo. L.J. 985 (2002) (reviewing G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000)).

[29] 347 U.S. 483 (1954).

[30] Mark V. Tushnet, *The Politics of Constitutional Law*, 79 Tex. L. Rev. 163, 175-177 (2000) (reviewing LUCAS A. POWE, THE WARREN COURT AND AMERICAN POLITICS (2000)).

[31] Neal Devins, *Should the Supreme Court Fear Congress?*, 90 Minn. L. Rev. 1337, 1343 (2006).

[32] *See* Tushnet, *supra* note 30, at 171, 182.

[33] C. HERMAN PRITCHETT, CONGRESS VERSUS THE SUPREME COURT: 1957-1960, at 12-13 (1961).

[34] Roger K. Newman, *The Warren Court and American Politics: An Impressionistic Appreciation*, 18 Const. Comment. 661, 677 (2001) (reviewing LUCAS A. POWE, THE WARREN COURT AND AMERICAN POLITICS (2000)) (quoting Drew Pearson's diary).

[35] *Id. See also* Devins, , *supra* note 31, at 1345; Tushnet, *supra* note 30, at 182-83 (questioning the reasons for Frankfurter's switch).

[36] PRITCHETT, *supra* note 33, at 12.

[37] Tushnet, *supra* note 30.

[38] *Id.* at 172

[39] Newman, *supra* note 34, at 678;

[40] *Id. See also* Madhavi M. McCall & Michael A. McCall, *Chief Justice William Rehnquist: His Law-and-Order Legacy and Impact on Criminal Justice*, 39 Akron L. Rev. 323 (2006).

[41] See Appendix I for discussions of the political science literature. *See also* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 Va. L. Rev. 1045, 1067(2001); Devins, *supra* note 31, at 1340 (and sourced cited therein).

[42] *See* Andrew D. Martin et al., *A Multidisciplinary Exploration: The Median Justice on the U.S. Supreme Court*, 83 N.C. L. Rev. 1275 (2005) (and sources cited therein).

[43] *See* Balkin & Levinson, *supra* note 41, at 1067 (noting that Justices serve, on average eighteen years).

[44] *See* Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change:From Partisan Entrenchment to the National Surveillance State*, Fordham L. Rev. (forthcoming 2006).

[45] *See* Balkin & Levinson, *supra* note 41 , at 1070.

[46] *See* Newman, *supra* note 34, at 673 (Chief Justice Hughes told Justice Douglas[:] "At the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections.") (quoting William O. Douglas, The Court Years 1939-1975: The Autobiography of William O. Douglas 8 (Random House, 1980)).

[47] Tushnet, *supra* note 30, at 186.

[48] *See* Devins, *supra* note 31.

[49] *See id.* at 1342.

[50] *See* Balkin & Levinson, *supra* note 44, at 11.

[51] Indeed, the Justices could minimize tension with Congress by employing judicial tests that permit the Justices to endorse the nobility of the government interest at stake (as "substantial" or "compelling"), but then to strike down the law based on the means employed. Newman, *supra* note 34, at 664 (discussing Powe's assessment of Justice Brennan's method).

[52] *See* Devins, *supra* note 31, at 1359.

[53] *See id.* at 1361-62.

[54] *See id.* at 1338, n.14 (noting "Chief Justice William Rehnquist spoke, in January 2005, of his 'hope that the Supreme Court and all of our courts will continue to command sufficient public respect to enable them to survive basic attacks on the[ir] judicial independence'") (quoting Chief Justice William H. Rehnquist, 2004 Year-End Report on the Federal Judiciary, 4, 8 (2005), http://www.supremecourtus.gov/publicinfo/yearend/2004year-endreport.pdf).

[55] *See* Balkin & Levinson, *supra* note 41, at 1073.

[56] *See* Whittington, *supra* note 27, at 827, 835 (discussing Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 Stud. Am. Pol. Dev. 35, 36 (1993)).

[57] *See* Grutter v. Bollinger, 539 US 306 (2003); *see also* Balkin & Levinson, *supra* note 44, at 18-19.

[58] *See e.g.*, Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, Vand. L. Rev. (forthcoming 2006). Available at SSRN: http://ssrn.com/abstract=897360. *See also* Whittington, *supra* note 27, at 821-23, 830-32.

[59] *See, e.g.*, Tushnet, *supra* note 30, at 168.

[60] Balkin & Levinson, *supra* note 41, at 1054-59, 1073; Devins, *supra* note 31, at 1358.

[61] Thomas R. Marshall, *Public Opinion and the Rehnquist Court*, *in* JUDICIAL POLITICS: READINGS FROM JUDICATURE 499, 504 (Elliot E. Slotnick, ed. 1992).

[62] For example, those who are more aware of and perhaps affected by a Court decision show a greater increase or decrease in support for the Court depending on their agreement or disagreement with the final decision than those who were uninterested in the result. *See* Hoekstra, *supra* note 5, at 96 (discussing those in the immediate community giving rise to a Supreme Court case versus those in surrounding areas).

[63] Marshall, *supra* note 61.

[64] See Appendix 2.

[65] At some level, discrepancies among questions cannot be explained merely based on how "abstract" a question is. Over 90% of the public consistently agrees that "[p]eople should be allowed to express unpopular opinions," Survey by First Amendment Center and *American Journalism Review* (conducted by Center for Survey Research and Analysis, University of Connecticut), June 3-June 15, 2003, *in* First Amendment Center, *State of the First Amendment 2003*, at 25 (2003), (hereinafter "SOFA 2003") http://www.firstamendmentcenter.org/PDF/SOFA.2003.pdf, while at the same time nearly a majority of the public "strongly" disagrees that people should be allowed to say things that even "might be offensive to racial groups," SOFA 2004, *supra* note 5, at 28. Both questions are abstract.

[66] *See, e.g.*, Cecile Gaziano, *Relationship between Public Opinion and Supreme Court Decisions: Was Mr. Dooley right?* (1978), *in* COMMUNICATION RESEARCHERS AND POLICY-MAKING 395 (Sandra Braman, ed. 2003) (and sources cited therein).

[67] One study argues that the public, however, does distinguish between support for a concept—freedom of speech—and disapproval of those who benefit from it—such as communists or the media, but only under certain circumstances. *See, e.g.*, DAVID A. YALOF & KENNETH DAUTRICH, THE FIRST AMENDMENT AND THE MEDIA IN THE COURT OF PUBLIC OPINION (2002).

[68] For example, the Supreme Court values freedom of speech, but it may value the integrity of elections more under certain circumstances. *See, e.g.*, Burson v. Freeman, 504 U.S. 191 (1992).

[69] Turner Broad. Sys. Inc. v. FCC, 520 U.S. 180, 226-27 (1997) (Breyer, J., concurring) (noting "important First Amendment interests" on both sides of the judicial issue); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (balancing First Amendment interests and declaring "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."); Bert Neuborne, *Conflicting Claims to First Amendment Rights*, 15 Touro L. Rev. 1559, 1559-60, 1575 (1999).

[70] It may not provide much comfort that the public and the Supreme Court both believe they are upholding freedom of speech, and that they merely define the speech guarantee slightly differently. Authors have argued that nearly all press systems, whether "libertarian, authoritarian, [or] totalitarian … claim to support free expression, although they define it differently." ANDSAGER, *supra* note 3, at 5.

[71] *See, e.g.*, Frederick Schauer, *The Boundaries of the First Amendment*, 117 Harv. L. Rev. 1765 (2004).

[72] *See, e.g.*, Reno v. ACLU, 521 U.S. 844 (1997); Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980); Miller v. California, 413 U.S. 15 (1973).

[73] *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 57 (1994) ("Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute."); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 662 (1994) ("[T]he physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home. … A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch."); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 389 (1969) ("It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.").

[74] *See, e.g.*, Turner Broad. Sys., Inc., 512 U.S. 662 .

[75] *See, e.g.*, CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971); William J. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

[76] *See, e.g.*, FCC v. League of Women Voters of California, 468 U.S. 364, 383 (1984) (noting "the Framers of the Bill of Rights were most anxious to protect [the category of] speech that is 'indispensable to the discovery and spread of political truth"') (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[77] *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 785-89 (2d ed. 1988). *See also* Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. Rev. 23 (2001); C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989).

[78] In 2003, 93% believed it was somewhat or very important; 78% believed it was very important. Survey by Pew Research Center, April 30-May 4, 2003, *available at* Polling the Nations, http://poll.orspub.com/.

[79] ANDSAGER, *supra* note 3, at 82.

[80] Although the authors claimed to have abundant evidence, in fact they had to rely on very little data. They relied on one survey. The survey's questions were flawed in showing the degree of support, and perhaps on reflecting whether support existed at all. Some questions involved concrete items, and these asked if respondents would support the right-in-question "all" the time, "some" of the time, or "none" of the time. These options do not quite measure the strength of one's support for free speech; the most speech protective person may imagine at least one instance where certain speech, like the broadcasting of indecent acts, should not be protected, and therefore not protect it "all" the time. These include protecting confidential sources, false advertising, or broadcasting sexually explicit material. The authors, however, conclude that "those members of the public who fall within the *protect sometimes* group cannot always be relied on as defenders of free expression." ANDSAGER, *supra* note 3, at 69.

[81] *Id.* at 84-85.

[82] *Id.* at 104-05.

[83] *Id.* at 82.

[84] *Id.* at 89.

[85] *Id.* at 89-91.

[86] *Id.* at 91-92.

[87] *Id.* at 93. Interestingly, the most educated demographics supported regulating dangerous speech more than less educated demographics.

[88] *Id.* at 74.

[89] *Id.* at 102.

[90] *Id.* at 100.

[91] *Id.* at 110.

[92] *Id.*

[93] *Id.* at 104-05, 110.

[94] *Id.* at 107.

[95] Appendix 2, at 22.

[96] Because of the powerful effect of norms, though people are "legally free to praise rape, child molestation, or other crimes," they usually do not. Eugene Volokh, *Deterring Speech: When is it "McCarthyism"? When is it Proper?*, 93 Cal. L. Rev. 1413, 1414-15 (2005).

[97] *Cf.* ANDSAGER, *supra* note 3, at 96. The authors concluded that offensiveness and danger are equivalent: "obscene gestures," "slander," and "espionage" are "all about the same to the American people." *Id.* at 81. A less radical reading of the limited evidence is that the public merely finds neither obscenity nor espionage to be protected by the First Amendment—as it finds neither hot-dog eating nor murder protected by the same amendment—or that it finds obscenity to deserve only minimal protection.

[98] Survey by Fox Broadcasting Company/Opinion Dynamics Poll, Feb. 25-26, 2003, *available at* Polling the Nations, http://poll.orspub.com/.

[99] Survey by Kansas City Star/Times, Dec. 1991, *available at* Polling the Nations, http://poll.orspub.com/.

[100] See sources cited in *supra* note 76. *See also* Jack M. Balkin, *Digital Speech and Democratic Culture*, 79 NYU L. Rev. 1 (2004); OWEN M. FISS, LIBERALISM DIVIDED (1996); LEE C. BOLLINGER, THE TOLERANT SOCIETY (1986).

[101] *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (Scalia dissenting).

[102] *See, e.g.*, Virginia v. Black, 538 U.S. 343 (2003) (Thomas dissenting) (classifying certain racist actions as threats, not speech).

[103] In 2003, 95% of Americans agreed, 74% strongly, that Americans should be allowed to "express unpopular opinions." SOFA 2003, *supra* note 65, at 25. Meanwhile, 63% disagreed (49% strongly) that people should be "allowed" (whatever that means—government? norms? self-control?) to offend racial groups in public. *Id.* at 26.

[104] See sources cited in *supra* note 76.

[105] See Appendix 2, at 38.

[106] Survey by NBC News, Wall Street Journal (conducted by Hart and Teeter Research Companies), July 26-July 28, 1997, *available at* The iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut. http://www.ropercenter.uconn.edu/ipoll.html.

[107] Survey by Harris Poll, Feb. 9-Feb. 16, 2004, *in* Harris Poll, *#21 Large Majorities of Americans Continue to Think that Big Companies, PACs, Lobbyists, and News Media Have Too Much Power and Influence on Government, Harris Interactive*, Mar. 19, 2004, http://www.harrisinteractive.com/harris_poll/index.asp?PID=450.

[108] *See* Survey by Radio and Television News Directors Foundation (conducted by Advantage Research and Ball State University Center for Business Research), 2003, *in* Radio and Television News Directors Foundation, *2003*

Local Television News Study of News Directors and the American Public (2003) (hereinafter "RTNDF 2003"), http://www.rtnda.org/ethics/2003survey.pdf. Surveys of the general public and news directors show that "[t]he general public thinks almost everyone improperly influences the media," including elected officials, big business, advertisers, the federal government, interest groups, television station owners, as does the desire to make a profit, to report a story first, and to increase ratings. *Id.* at 29-31. News directors agree that the desire to increase ratings, make a profit, and be the first to report stories all improperly influence news. *Id.*

[109] *See* i*d.* at 32 ("The general public overwhelmingly thinks that local television chases sensational stories to attract an audience."). *See also id.* at 33 (showing the public overwhelmingly believe that television news shows cover sensational stories and those with "promotable pictures" even where the "news value of those stories may be minimal").

[110] *See, e.g.*, Ben Scott, *The Politics and Policy of Media Ownership*, 53 Am. U. L. Rev. 645 (2004).

[111] *See* Appendix 2, at 22-25.

[112] *See* Appendix 2, at 50-51

[113] *See, e.g.*, id. at 41.

[114] *See, e.g.*, ANDSAGER, *supra* note 3, at 251.

[115] *See* Erskine, *supra* note 1, at 483.

[116] *See* ANDSAGER, *supra* note 3, at 107-10.

[117] *See* SOFA 2004, *supra* note 5, at 31.

[118] *See* SOFA 2000, *supra* note 5, at 16-17.

[119] *See* SOFA 2004, *supra* note 5, at 33.

[120] *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); FCC v. League of Women Voters of California, 468 U.S. 364 (1984).

[121] Appendix 2, at 45-50.

[122] Amartya Sen, *What's the Point of Press Freedom?*, World Association of Newspapers, May 3, 2004, *available at* http://www.wan-press.org/article.php3?id_article=3881.