CORRELATIONS BETWEEN THE U.S. SUPREME COURT AND PUBLIC OPINION ON THE ISSUES OF ABORTION AND THE DEATH PENALTY

A Thesis
Presented
to the Faculty of
California State University, Chico

In Partial Fulfillment
of the Requirements for the Degree
Master of Arts
in
Political Science

by
Slande Erole
Fall 2010
CORRELATIONS BETWEEN THE U.S. SUPREME COURT AND PUBLIC OPINION ON THE ISSUES OF ABORTION AND THE DEATH PENALTY

A Thesis

by

Slande Erole

Fall 2010

APPROVED BY THE DEAN OF GRADUATE STUDIES AND VICE PROVOST FOR RESEARCH:

_________________________________
Katie Milo, Ed.D.

APPROVED BY THE GRADUATE ADVISORY COMMITTEE:

Matthew O. Thomas, Ph.D. Mahalley D. Allen, Ph.D., Chair
Graduate Coordinator

_________________________________
Charles C. Turner, Ph.D.

_________________________________
Matthew O. Thomas, Ph.D.
ACKNOWLEDGMENTS

I would like to take this opportunity to thank the two people who have supported me since the beginning of my academic career at two years old, Leobert and Yvela Erole. Was it not for them, I sincerely doubt that I would be in the position that I am today. They supported me both financially and emotionally and for that I am eternally grateful. Second, I would like to thank my committee members for their support. I want to sincerely express my gratitude for my committee Chair, Mahalley D. Allen, for all the advice and direction that she has given me throughout the entirety of this project. She is a rock star and I simply could not have done this without her help. Lastly, I want to thank all those who have inspired, encouraged, pushed, and believed in me. Thank you for your faith.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Acknowledgments</th>
<th>iii</th>
</tr>
</thead>
<tbody>
<tr>
<td>List of Tables</td>
<td>vii</td>
</tr>
<tr>
<td>List of Figures</td>
<td>ix</td>
</tr>
<tr>
<td>Abstract</td>
<td>x</td>
</tr>
</tbody>
</table>

## CHAPTER

### I. Introduction

1. Introduction .............................................................................................. 1

### II. The Supreme Court’s Role As a Policymaker

2. The Supreme Court as an Agent of Social Change .................................... 7
3. The Supreme Court as a Legal and Political Institution ....................... 11
4. Constraints on the Supreme Court’s Ability to Make Policy ................ 13

### III. Morality Policy

5. Defining Morality Policy ........................................................................... 17
6. The Legislation of Morality Policy ....................................................... 19
7. The Adoption of Morality Policy ............................................................. 22
8. Conclusion ................................................................................................. 27

### IV. Judicial Decision Making: Are Supreme Court Decisions Affected by Public Opinion?

10. The Legal Model ......................................................................................... 30
11. The Attitudinal Model .............................................................................. 34
12. Strategic Model .......................................................................................... 37
13. Public Opinion and the Supreme Court .................................................. 40
14. Effect of the Supreme Court on Public Opinion ..................................... 44
15. Conclusion ................................................................................................. 50
<table>
<thead>
<tr>
<th>CHAPTER</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>V.</td>
<td></td>
</tr>
<tr>
<td>Examining the Morality Cases of the Death Penalty</td>
<td>52</td>
</tr>
<tr>
<td>Furman v. Georgia, June 1972</td>
<td>56</td>
</tr>
<tr>
<td>Gregg v. Georgia, July 1976</td>
<td>58</td>
</tr>
<tr>
<td>Woodson v. North Carolina, July 1976</td>
<td>60</td>
</tr>
<tr>
<td>McCleskey v. Kemp, April 1987</td>
<td>62</td>
</tr>
<tr>
<td>Atkins v. Virginia, June 2002</td>
<td>65</td>
</tr>
<tr>
<td>Roper v. Simmons, March 2005</td>
<td>67</td>
</tr>
<tr>
<td>Conclusion</td>
<td>68</td>
</tr>
<tr>
<td>VI.</td>
<td></td>
</tr>
<tr>
<td>Supreme Court Cases Involving the Morality Policy of Abortion</td>
<td>70</td>
</tr>
<tr>
<td>Roe v. Wade, January 1973</td>
<td>73</td>
</tr>
<tr>
<td>Planned Parenthood of Southeastern Pennsylvania v. Casey, June 1992</td>
<td>74</td>
</tr>
<tr>
<td>Stenberg v. Carhart, June 2000</td>
<td>77</td>
</tr>
<tr>
<td>Gonzales v. Carhart, April 2007</td>
<td>79</td>
</tr>
<tr>
<td>Conclusion</td>
<td>81</td>
</tr>
<tr>
<td>VII.</td>
<td></td>
</tr>
<tr>
<td>Correlation Between Supreme Court Decisions and Public Opinion on Issues of the Death Penalty</td>
<td>82</td>
</tr>
<tr>
<td>Furman v. Georgia, June 1972</td>
<td>85</td>
</tr>
<tr>
<td>Gregg v. Georgia, July 1976</td>
<td>87</td>
</tr>
<tr>
<td>Woodson v. North Carolina, July 1976</td>
<td>90</td>
</tr>
<tr>
<td>McCleskey v. Kemp, April 1987</td>
<td>93</td>
</tr>
<tr>
<td>Atkins v. Virginia, June 2002</td>
<td>96</td>
</tr>
<tr>
<td>Roper v. Simmons, March 2005</td>
<td>98</td>
</tr>
<tr>
<td>Conclusion</td>
<td>100</td>
</tr>
<tr>
<td>VIII.</td>
<td></td>
</tr>
<tr>
<td>Correlation Between Supreme Court Decisions and Public Opinion on the Issue of Abortion</td>
<td>102</td>
</tr>
<tr>
<td>Roe v. Wade, January 1973</td>
<td>104</td>
</tr>
<tr>
<td>Planned Parenthood of Southeastern Pennsylvania v. Casey, June 1992</td>
<td>106</td>
</tr>
<tr>
<td>Stenberg v. Carhart, June 2000</td>
<td>110</td>
</tr>
<tr>
<td>Gonzales v. Carhart, April 2007</td>
<td>113</td>
</tr>
<tr>
<td>Conclusion</td>
<td>115</td>
</tr>
<tr>
<td>IX.</td>
<td></td>
</tr>
<tr>
<td>Conclusion</td>
<td>117</td>
</tr>
</tbody>
</table>
CHAPTER

References .................................................................................................................. 126
# LIST OF TABLES

<table>
<thead>
<tr>
<th>TABLE</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Public Opinion Data Regarding the Death Penalty in the Years of 1971 and 1972</td>
<td>86</td>
</tr>
<tr>
<td>2. Public Opinion Data Regarding the Death Penalty in the Years of 1975 and 1977</td>
<td>88</td>
</tr>
<tr>
<td>3. Public Opinion Data Regarding Mandatory Death Penalty</td>
<td>92</td>
</tr>
<tr>
<td>6. Public Opinion Data Regarding Capital Punishment for the Mentally Retarded</td>
<td>97</td>
</tr>
<tr>
<td>8. Public Opinion Data Regarding Abortion in the Years of 1969 and 1974</td>
<td>105</td>
</tr>
<tr>
<td>10. Public Opinion Data Regarding Abortion and the 24-Hour Notice</td>
<td>108</td>
</tr>
<tr>
<td>11. Public Opinion Data Regarding Abortion and Parental Consent for Minors</td>
<td>108</td>
</tr>
<tr>
<td>13. Public Opinion Data Regarding Partial-Birth Abortion in the Year 2000</td>
<td>111</td>
</tr>
</tbody>
</table>
LIST OF FIGURES

FIGURE                          PAGE
1. Public Opinion Data Regarding the Death Penalty in the Years of 1971 and 1972 86
2. Public Opinion Data Regarding the Death Penalty in the Years of 1975 and 1977 88
3. Public Opinion Data Regarding Mandatory Death Penalty 92
4. Public Opinion Data Regarding Discrimination and the Death Penalty Based on Questions Illustrated in Tables 4 and 5 95
5. Public Opinion Data Regarding Capital Punishment for the Mentally Retarded 97
7. Public Opinion Data Regarding Abortion in the Years of 1969 and 1974 105
8. Public Opinion Data Regarding Stricter Regulations of Abortion 109
ABSTRACT

CORRELATIONS BETWEEN THE U.S. SUPREME COURT AND PUBLIC OPINION ON THE ISSUES OF ABORTION AND THE DEATH PENALTY

by

Slande Erole

Master of Arts in Political Science

California State University, Chico

Fall 2010

In this study, I examine correlations between the United States Supreme Court and public opinion. Throughout this thesis, I collect and analyze public opinion data regarding U.S. Supreme Court cases regarding the death penalty and abortion, which I then enter into frequency distribution tables and graphs in order to determine the relationship between public opinion and the Supreme Court’s decisions. Many different scholars note that the Supreme Court must pay special attention to public opinion if it wants to maintain its legitimacy and also because the Court cannot fully control the policy outcomes of its decisions. Other scholars have also explained that the Supreme Court is indirectly influenced by public opinion through the selection and nomination process. Though the American public may not be able to directly control the actions of
the Supreme Court, it can influence the actions of members of Congress, who in turn can exert pressure on the Court. Ultimately, the research I conduct in this thesis shows a correlation between Supreme Court decisions and public opinion. In almost every case, public opinion regarding the particular questions asked in the cases match with the resulting decision handed down by the Court. Though the Court may protect minority rights in some cases, it is still a majoritarian branch of government in that it does pay attention to public opinion, something which it must do in order to secure its legitimacy and set enduring policies.
CHAPTER I

INTRODUCTION

The Supreme Court of the United States was structured in such a way by the Founders that it is one of the most insulated of the three branches of government. Theoretically, the Supreme Court should not be influenced by any one branch of government or by the people. The Founders enabled the Court with the power to interpret laws and structured the office in such a way that it would be free from undue influences. While legislators are elected by the people, and the President indirectly so, the Supreme Court justices are not chosen by ballot but rather are appointed by the President and then confirmed by the Senate. Despite being so far removed from the public, is the Supreme Court influenced by public opinion? Is there a correlation between public opinion and Supreme Court decisions?

There is an intense, though limited, argument among scholars over the relationship between the Supreme Court and public opinion. Through this thesis, I will strive to formulate an answer to the questions mentioned above. There are many reasons why it is advisable to understand Supreme Court decision making. One reason is that the Supreme Court renders decisions that affect, quite significantly, the lives of all those living in the United States. Justices on the Supreme Court are able to affect social policy through the decisions they render on cases. They have the ability to declare acts of Congress to be unconstitutional, and yet are rarely held accountable for their decisions.
The fact that the Supreme Court may be affected by public opinion does not necessarily mean that the justices actively seek out to discover public attitudes towards a particular case; rather, it merely implies that the Supreme Court is sensitive to the sentiments of the majority and renders its rulings accordingly.

To really gain perspective on the debate as to whether the Supreme Court is affected by public opinion, one should first determine an answer to the question: does it matter if the Supreme Court is influenced by public opinion? Why should there be any concern regarding this issue? It matters a great deal if the Supreme Court is influenced by public opinion. The Supreme Court is generally regarded as a powerful and unelected institution and, therefore, as the most undemocratic branch of government. The Supreme Court is not generally held accountable for its decisions and because of that lack of accountability, it becomes extremely imperative for scholars to understand how the Court arrives at its decisions. Also, the legitimacy of the Court depends on it being able to decide cases based on neutral principles of the law. The Court makes decisions that affect everyday life for many. That is one reason why I am interested in studying the Supreme Court and want to delve behind the reasoning of judicial decision making.

This thesis will strive to answer various interrelated questions regarding the Supreme Court. I first address the issue of the Supreme Court’s role as a policymaker. Is the Supreme Court a policy maker? Various scholars argue that policymakers are more responsive to the public in cases involving morality policy. In order to demonstrate correlation between Supreme Court decisions on issues of morality policy and public opinion, I will examine the Supreme Court’s role as a policymaker in the areas of the death penalty and abortion. Scholars would have little reason to study the Court if it did
not have an influence in setting the direction of policy in the United States; therefore the question of whether the Supreme Court is able to set policy in the United States through the decisions it renders must be investigated.

In this thesis, I will also explore the nature of morality policy. What is morality policy? What is the difference between a morality policy and a non-morality policy? This question will be fully answered in Chapter III. There is a distinct relationship that exists between morality policy, the general public, and the Supreme Court. The reason why I am interested in exploring morality policy as opposed to other types of policy is because the public pays particular attention to decisions made by the Supreme Court regarding morality policy. The public is more aware of these decisions and so is more likely to try to influence decision makers regarding morality policies.

Though there are many who agree that the Court is an effective producer of social change and policymaker, others still are hesitant to declare that the Court acts as policymaker.

Additionally, I will focus on public opinion and the Supreme Court. How does public opinion affect Supreme Court decisions? Various theories explore the relationship between public opinion and the Supreme Court. Public opinion can be said to be an external constraint that the Court must take into account if it is to strategically render decisions. Neo-Institutionalism which contributes to the Strategic Model of Supreme Court decision-making, provides a direct link between public opinion and the Supreme Court (Clayton and Gillman 1999). This theory puts into perspective the relationship between judicial decision making and public opinion. I will focus not only on why the Supreme Court needs to be responsive to public opinion but also look at how it is responsive. I will also focus on the effects of the Supreme Court on public opinion. Does
the Supreme Court also influence public opinion? Or is it only public opinion that influences the Supreme Court?

Next, I gather and evaluate data from death penalty cases in the search of a correlation between the death penalty and Supreme Court decisions. How does public opinion regarding the morality of the death penalty affect Supreme Court decisions? In trying to answer this question, I analyze six cases: Furman v. Georgia, Gregg v. Georgia, Woodson v. North Carolina, Roper v. Simmons, McClesky v. Kemp, and Atkins v. Virginia. These cases are some of the most salient cases concerning the death penalty. They cover a broad range of death penalty issues, such as whether juveniles or the mentally challenged should be sentenced to die. I test public opinion taken before and after the ruling of these cases through frequency distributions in order to see whether it correlated with the decisions of the Supreme Court. Was the Court influenced by public opinion when it decided cases involving the death penalty, a morality policy issue? Is there a correlation between public opinion and the Supreme Court as shown by the death penalty cases? The use of capital punishment has been debated for years in the United States and it continues to be a hotly contested topic. It is an intricate part of the American political system and will most likely remain so in the immediate future.

I also seek to discover a correlation between the Supreme Court and public opinion regarding the morality policy of abortion. How does public opinion regarding the morality of abortion affect Supreme Court decisions? I analyze four cases: Roe v. Wade, Planned Parenthood v. Casey, Steinberg v. Carhart, and Gonzales v. Carhart. I collect public opinion data and compare it with Supreme Court decisions on these four abortion policy cases; once again, I use frequency distributions to look at this correlation. The
movement to legalize abortion began in the 1960s and took hold in American politics. Abortion policy was largely ignored in the early decades of the country, and it was not until the nineteenth century that the government began to regulate the practice (Rose 2007). I will address not only the cases involving abortion policy but also the history of abortion regulation in the United States.

I conclude this thesis with a review of my major findings concerning the effects of public opinion regarding the morality of the death penalty and abortion on Supreme Court decisions. Did the data regarding public opinion on both the death penalty and abortion show a relationship between Supreme Court decisions and public opinion? What was the result? Furthermore, what are the implications of the results? What areas of future research should be targeted in order for a clear relationship to emerge? Ultimately, I will assess the concept of whether public opinion on morality issues affects Supreme Court decision-making.
CHAPTER II

THE SUPREME COURT’S ROLE AS A POLICYMaker

Various scholars argue that policymakers are more responsive to the public in cases involving morality policy (Mooney and Lee 1995; Mooney 2000; Patton 2007; Mooney and Schuldt 2008). As the purpose of this thesis is to demonstrate a correlation between the Supreme Court and public opinion, in order to show that such a relationship does in fact exist in cases of morality policy, it must also be confirmed that the Supreme Court is a policymaker. Scholars would have no reason to study the Court if it did not have an influence in setting the direction of policy in the United States, therefore the question of whether the Supreme Court is able to set policy in the United States through the decisions it renders must be investigated. The literature provided from various scholars notes that the Supreme Court can in fact affect national policy (Dahl 1957; Casper 1976; Baum 2001) Though there are many who agree that the Court is an effective producer of social change and a policymaker, others still are hesitant to declare that the Court acts as policymaker. Those who challenge the Supreme Court’s ability to affect policy choose instead to believe that the Court can only have an impact if in concert with the other branches of government. The following section will present evidence that supports the Supreme Court’s role as a policymaker.
The Supreme Court as an Agent of Social Change

The Supreme Court is foremost a legal institution, the highest court in the United States judicial system. Though the Court is often thought of as being a “nonpolitical” office, its role as the third branch of government in the United States defines it as a political institution (Baum 2001). Lawrence Baum notes that the Supreme Court is able to set policy through its legal interpretations of the Constitution. The mere existence of a Constitution makes it possible for the Supreme Court to set policy because it offers a foundation for individuals to challenge the actions of the other two branches of government (Baum 2001). Through its use of judicial review, which the Court claimed for itself earlier on in its existence, the Supreme Court is able to engage in judicial activism, using its decisions to set policy that result in significant changes in American life (Baum 2001).

Like Congress and the Executive Branch, the Supreme Court also has an agenda, which is represented by the number of cases it chooses to hear in certain policy areas. But for the Court to have an impact or shape public policy in certain areas, it has to address multiple cases in that area, something that can be difficult because the Court is able to hear only a limited number of cases each term (Baum 2001). The Court makes important decisions on major issues that affect the general public. These decisions are often also salient enough to make the public want to influence the decisions of the Court (Baum 2001). As a result, appointments to the Supreme Court have been increasingly contentious political battles between Congress and the Executive Branch (Baum 2001).
One critic who refutes the idea of the Supreme Court as a catalyst for social change is Gerald Rosenberg. He maintains that the Supreme Court is not an agent of social change and, in effect, not a policymaker. In his book, *The Hollow Hope*, he states that the Court has little influence in the arena of social change. By using the policy issues of civil rights, women’s rights and the environment, Rosenberg argues that using the judicial system to create social reform is generally ineffective, unless certain conditions are met. Rosenberg arrives at his conclusions by comparing (and then rejecting) the two current views of the judicial system: the dynamic view and the constrained view of the Court. The dynamic view asserts that the Supreme Court is an effective producer of social change and that in some cases it can be more effective than other governmental institutions (Rosenberg 1991). Conversely, the constrained view maintains that the Court is not an effective producer of significant social change for a number of reasons: lack of judicial independence, lack of powers of implementation, and the limited nature of constitutional rights (Rosenberg 1991). Leaning towards the constrained view of the court, Rosenberg creates his own view of the judicial system by stating that the courts may have some impact on social reform under four conditions: if other actors provide incentives to those complying with court orders, if costs are imposed towards those who are not complying with judicial decisions, if the economic market provides incentives for obeying court decisions, and by providing a cover for those who are willing to act towards implementing court decisions (Rosenberg 1991). Rosenberg focuses heavily on the civil rights area to test his theory, and one of the cases he uses to illustrate his points from that movement is *Brown v. Board of Education*. Using the case, Rosenberg argues that the Court is weak and ineffectual. Rosenberg demonstrates that only after action was
taken by Congress and the President ten years later was the Court’s decision finally implemented. He conveys the fact that because the Supreme Court has no implementation powers or the power to impose financial consequences on those who choose not to follow its decisions, it has very little effect unless aided and supported by the other branches of government (Rosenberg 1991).

Other scholars disagree with Rosenberg’s conclusion and argue that it is inaccurate of him to conclude that because the Court did not bring about immediate significant effectual change, then it had absolutely no impact on social reform (Dahl 1957; Casper 1976; Baum 2001). By handing down the decisions that it did, though it may have taken long for the changes to be implemented, the Court did set a precedent. The decision of the Supreme Court in Brown v. Board of Education set in motion at least an awareness of the problems facing African Americans and that there was a need for change. The Court’s decision sent a message that at least one part of the government was ready to act towards social reform. And it enabled Congress to pass anti-discriminatory legislation, such as the Civil Rights Act of 1964. Without the previous decisions of the Supreme Court towards ending discrimination, Congress may not have had a basis for passing the anti-discriminatory laws that it did. If the Court had not decided against the “separate but equal” doctrine, would Congress or the Executive Branch have acted at all?

It is impossible for Rosenberg to prove that there was not some type of correlation between the Supreme Court’s decisions and social reform. Ultimately, it can be said that in concert with the other branches of government, political support, economic incentives, mass media, and public opinion, the Supreme Court is able to produce change. Though the changes may not be immediate or dramatic, they do exist. It is very hard to determine
the direction that abortion rights, civil rights, or criminal rights would have taken had the
Supreme Court not taken action as a policymaker. For example, Jonathan Casper argues
that the Court has a particular importance in placing issues on the agenda of the other
branches of government and that the Court can provide legitimacy to certain issues, as
well as serve to mobilize individuals towards those issues (Casper 1976).

Scholar Thomas R. Marshall tested the limits of the Supreme Court as a
policymaker and provided four models to explain why some Supreme Court rulings
prevail and others do not. The first model, the Issues Model, predicts that the success of
the Supreme Court’s rulings is tied to the expertise of the Court in certain areas. For
example, decisions rendered by the Supreme Court on civil liberties are more likely to be
enduring than those on economic policies because the Court has more experience in that
arena. The Decision-Making Model predicts that the pattern of decision-making in the
Court affects its ability to make lasting decisions, one meaning being that decisions
handed down unanimously by the Court have more impact. The Public Opinion Model
suggests that rulings that reflect the opinions of the mass public, or those on which the
public is inattentive, will prevail more often than those that do not (Marshall 1989b). The
fourth model provided by Marshall, the Over-Time Model, suggests that Supreme Court
rulings are eroded by the passage of time, which brings new justices to the bench and
changing public opinion (Marshall 1989b). The results procured by Marshall show that
Supreme Court rulings prevail on the basis provided by the four models. “The modern
Court’s ability to hand down enduring decisions is very closely linked to the Court’s
unanimity, the ruling’s ideology, and to the distribution and attentiveness of mass public
opinion” (Marshall 1989b, 503). Marshall recognizes the Court’s ability to impact policy and set enduring policy.

The Supreme Court as a Legal and Political Institution

One influential scholar involved in the discussion of the Supreme Court as a national policymaker is Robert Dahl. In his article titled “Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker,” Dahl (1957) categorizes the Supreme Court as both a political and legal institution. The U.S. Supreme Court was established by Article III of the U.S. Constitution, which states that “the judicial Power of the United States, shall be vested in one supreme Court” (U.S. Constitution, art. 3, sec. 1). Article III of the U.S. Constitution established both the authority and legality of the Supreme Court. The Supreme Court became a political institution through the case of Marbury v. Madison (1803). In this case, the Court established the principle of judicial review, which gives it the ability to declare laws unconstitutional. The power of judicial review enables the Court to set policy and to essentially become an integral part of the American political system. The Court being recognized as possessing lawmaking abilities by many scholars means that it can no longer be simply categorized as a legal institution (Kurland 1969). According to Dahl, the Supreme Court sets policy by going outside “established criteria found in precedent, statutes, and constitution” (Dahl 1957, 279-280). Dahl also defines policy as being a selection of the most preferable alternative among uncertain alternatives (Dahl 1957). Oftentimes the Court is called upon to make decisions that involve alternatives about which there is “severe disagreement in society, where the words of the Constitution are general, vague, and ambiguous, where precedents may be
found in both sides, and where experts differ in the predicting the consequences of the various alternatives” (Dahl 1957, 280). The Court is pegged as a policymaker because of the fact that it can be called upon to settle questions that were not provided for in the Constitution by the Framers, in precedents, and in statutes, and involve controversial alternatives in public policy.

Rather than stating that the decisions of the Court directly correlate with public opinion, Dahl determines that the policy views of the Court are often in alignment with those of Congress and the President, the dominant law-making majorities. He credits the appointment process with ensuring that the political leanings of the Court are the same as that of the President and Congress (Casper 1976). Through his theory of a “national alliance,” Dahl rejects the claim that the Court is a countermajoritarian institution. He refutes the thesis of the Supreme Court as a champion of minority rights; rather he classifies the Court as a member of a national coalition along with the other branches of government (Dahl 1957).

Dahl reasons that the Court rarely overturns federal legislation because presidents usually nominate justices who share their policy views, and Congress usually confirms nominees whose views are consistent with those of the political norm (Epstein, Knight, and Martin 2001). The results of Dahl’s research show that even when the Supreme Court does strike down federal legislation, it tends to occur more than four years after the passage of the law, when congressional majorities that passed the legislation are no longer in power (Dahl 1957). Dahl also holds that the Court is unable to solely affect national policy. Instead, it is able to make policy because of its membership in the national alliance, which it rarely opposes. The power of the Court stems from its
legitimacy as an interpreter of the Constitution, something which the Court is hesitant to
risk by opposing Congress and the President (Dahl 1957).

Constraints on the Supreme Court’s Ability
to Make Policy

Lee Epstein, Jack Knight, and Andrew Martin argue that the power of the
Court as a national policymaker stems not from the Court being part of the national
alliance presented by Robert Dahl, but rather from the institutional constraints placed
upon the Court (Epstein, Knight, and Martin 2001). These scholars argue that the Court
must take into account the likely actions of the other branches of government if it wishes
to have an impact on national policy. In effect, the Supreme Court is described as being a
strategic actor that must pay attention to external actions of other actors. Epstein, Knight,
and Martin categorize Dahl’s argument as being in line with the view of the Attitudinal
Model (discussed more thoroughly below), which positions the Court as being a seeker of
short-term legal policy (2001). They maintain that the Supreme Court cannot simply be
concerned with ideological preferences; it must instead pay attention to the other
institutions and any possible future actions these institutions might take to prevent Court
decisions from being enduring policy. Epstein and her colleagues describe the Supreme
Court in terms of the checks and balances provided for in the Constitution. The other
branches of government have the power to check the actions of the Court through
legislation that can overturn Court decisions, therefore the Court is rarely too far removed
from the preferences of Congress and the President. Epstein, Knight, and Martin rejected
Dahl’s nomination and confirmation theory for their own strategic choice explanation of
Supreme Court behavior (2001).
Epstein, Knight, and Martin (2001) also propose that the Supreme Court must be especially sensitive to the preferences of other actors in cases of constitutional disputes. Contrary to arguments that the Court need not take into account the preferences of Congress because of the difficulty that exists in overturning a constitutional interpretation of the Court, these authors argue that the Court should indeed pay attention to the preferences of other actors in cases of constitutional interpretation because failure to do so may result in extreme costs for the Court in terms of its legitimacy, credibility, and reputation (Epstein, Knight, and Martin 2001). Though actions are rarely taken against the Supreme Court, Congress does have a number of weapons in its arsenal that if used could be detrimental to the Supreme Court. For example, Congress can use the confirmation process to select certain types of justices, it can propose constitutional amendments, it can alter the jurisdiction of the Court, and it has power over the Court’s budget, among other possibilities (Epstein, Knight, and Martin 2001). All of these weapons could erode the legitimacy of the Court and its power as a policymaker. Ultimately, these three scholars determine that the Supreme Court is not just a policymaker but rather a strategic national policymaker. They argue that the Supreme Court needs to consider possible future actions of the other branches of government if it wants the decisions it renders to be enduring national policy.

Bradley Canon discusses the role of the Supreme Court as a policymaker in what he described as “politico-moral” disputes (in other words, morality policy which will be discussed further in Chapter III). He suggests that there have been some intense battles over moral issues in the United States. These battles bring forth questions of natural law or abstract moral justice that serve to produce partisan realignment (Canon
Canon described the politico-moral disputes as being a zero-sum game, where there can only be one winner and no compromise is possible (Canon 1992). Because of the hard uncompromising stances that can occur in these types of disputes, legislators are hesitant to align themselves with one side in fear of alienating the other and, so according to Canon, they are more than willing to let these issues be decided by the Supreme Court. Once the Supreme Court makes a decision that affects public policy, it must explain its reasoning in terms of precedent or logic. Furthermore, it must strive to persuade the public towards its decision through what Canon termed as cheerleading. Canon theorizes that in order for the decisions of the Court to prevail, it must strive to persuade opponents to accept its reasoning (Canon 1992). “Through cheerleading, the Court has the potential to influence the development of policy more broadly than it can through its direct policymaking” (Canon 1992, 641). Canon was also one in a range of scholars that charged the Supreme Court with the inability to solely affect policy. He maintained that the Court must persuade other “political institutions to make particular policies that the Court itself cannot make” (Canon 1992, 641). According to Canon, the Court also has the ability to bring morality policy issues to the forefront of the national agenda.

The literature provided from various scholars notes that the Supreme Court can in fact affect national policy. While some state that the Supreme Court can act as a primary national policymaker, others maintain that the Court can only have an impact if in concert with the other branches of government. Now the focus can be turned towards a discussion of morality policy and the role that the Supreme Court plays in that type of policy. One of the reasons that morality policy is examined, rather than, say, economic policy, is because of the distinct relationship that exists between the public and morality
policy. As will be explained in more depth in the paragraphs below, morality policy is particularly salient to the general public. Decisions made by the Supreme Court regarding morality policies will in general be noticed more by the public than if the Court were to render a decision regarding economic policy. It is for that reason that the Supreme Court must be particularly attentive to public opinion in order to protect its legitimacy.
CHAPTER III

MORALITY POLICY

Defining Morality Policy

Recent elections show that voters are increasingly basing their decisions on moral values (Mooney and Schuldt 2008). Basic principles are determining political behavior more and more. There is a distinct relationship that exists between morality policy, the general public, and the Supreme Court. The public pays particular attention to decisions made by the Supreme Court regarding morality policy, a trend that will be discussed in this chapter. This chapter will also analyze the characteristics of morality policy, the debate regarding the legislation of morality policy, and the adoption of morality policy.

Morality policies often seek to regulate social norms and generate strong moral responses as well as conflict over basic moral values (Mooney and Lee 1995). “Morality policies are neither tactical nor strategic…they are authoritative statements about what a polity holds to be fundamentally right or wrong” (Mooney 2000, 173). This type of policy serves as an expression of societal values and makes clear statements regarding those values. Morality policies are debated based on principles focused on personal morality and behavior (Mooney 2000). Sometimes referred to as social regulatory policies, morality policies are characterized by debate over core values typically grounded in religious beliefs (Patton 2004). Some examples of morality policies
include abortion, capital punishment, pornography, end of life decisions, and gay rights. There are three main characteristics of morality policy: it is generally salient, simple, and can produce wide citizen participation (Mooney and Schuldt 2008). Scholars Mooney and Lee distinguish morality policy issues as being fairly simple and giving citizens a better chance to communicate their desires to their policymakers. “The high public salience and technical simplicity of morality policy provide for perhaps ideal conditions for democratic responsiveness by policy makers” (Mooney and Lee 2000, 225).

Sin and redistributive policies are two different ways that morality policies are categorized. Those that are characterized as sin policies, such as prostitution or recreational drug use, have no significant opposition, while those that are characterized as redistributive policies, such as the death penalty and abortion, have at “least two legitimate, substantial, and recognized positions on the issue” (Mooney and Lee 2000, 225). Policymakers have the ability to reflect their constituents’ wishes in cases of morality policy because those policies require little of the technical knowledge that can inhibit citizen participation and engagement. Policymakers are more responsive to their constituent values on morality policy than on non-morality policies (Mooney and Lee 2000). Morality policy forces officials to respond and prevents them from doing so in a manner that is inconsistent with the demands of their constituents because these issues can clearly differentiate them from opponents. Legislators adopt moral policies not because of socio-economic factors such as state wealth or urbanization but rather because of factors related to the distribution of citizens’ values (Patton 2007). The federal structure of the United States allows elected officials in different areas of the country to respond to their constituents by setting policy that is aligned with the preferences of those
constituents (Mooney 2000). As such, legislators are able to reflect the regional values and variation in the adoption of morality policy (Mooney 2000). But when the federal government intervenes to set morality policy, the debates regarding that policy become extremely intense and divisive.

Going further from merely defining morality policy, how can it be differentiated from other types of policy? Morality policies can be recognized based on the way the issues involved are framed. Rather than the substance of the policy, the perception of those involved in the debate determines whether a type of policy can be classified as morality policy (Mooney and Schuldt 2008). That is, if an issue is portrayed as one of morality and moral arguments are used when discussing it, then that issue can be classified as a morality policy.

A policy is classified on this dimension through an assessment of people’s beliefs and attitudes about it, rather than by, for example, an analysis of related legislation, the policy tools it employs, or the part of society it affects. (Mooney and Schuldt 2008, 201)

A morality policy is only so defined if it is framed in terms of morals and values. Changing the way an issue is framed shifts public opinion and elevates the priority of that issue to the public (Lewis 2006). Emphasizing moral values in an issue is what makes it easier and simpler for the public to understand. Those framing the issue, however, must be credible as well as persistent (Lewis 2006).

The Legislation of Morality Policy

There is wide debate regarding what is categorized as “the legislation of morality” or “morality policy.” From a very early period, legislators have tried to create laws designed to protect communities from immorality. Among the earliest of scholars to
reject laws based on views of morality was John Stuart Mill. He proposed the principle that came to be known as “freedom of harmless action.” This principle maintains that power can be exercised over individuals against their will only to prevent the harm of others (Mill 2003). Mill thought that

the principle required liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. (2003, 83)

According to Mill, barriers against legal moralism or coercive enforcements of communal ideals of decency must be erected because “liberty is violated when people are forced to prevent harm which they have not caused” (Grey 1983, 26). According to Grey (1983), scholar Ronald Dworkin argues that many of the difficult and controversial legal issues that come before the Court are issues of normative moral philosophy. The argument brought on by Mill centers around the idea that the majority in a society is able to force its moral judgments onto the minority through policy. Mill argues that because of differences among individuals, what is good for one may not necessarily be good for everyone (Greenawalt 1995). For Mill, individuals should not be restricted by society and should be allowed to conduct their lives as they see fit, as long as they are not harming others and even if their actions lead to self-harm.

The debate over the legislating of morality was revived in the United States by drafters of the Model Penal Code in 1955 (Grey 1983). This committee recommended that it was inappropriate for the government to regulate or control behavior that pertained to the morality of the actor (Grey 1983). Also, in England, the Wolfenden Committee argued that individuals should have freedom of choice in matters of private morality and
that the law existed to the preservation of public order, to protect individuals against injury, and not to regulate immorality (Grey 1983). The authors of both the Wolfenden Committee report and the Model Penal Code argued against the legal enforcement of morality, setting the stage for further discussion by those who support the notion of legislating morality and who believe that the government should not play a role in setting morality policy.

While there are many who support Mill’s principle, others argue that moral legislation is really an open-ended matter of policy that can do more good than harm (Grey 1983). Critics of Mill’s principle insist that it is necessary for the health of society for there to be a firm adherence to a binding moral code (Grey 1983). Lord Patrick Devlin, a critic of Mill, countered with his own observation stating that it is the duty of society to enforce positive morality through law or policy (Sartorius 1972). Lord Devlin believed that morality is as necessary in a society as a stable government and that it must be enforced in order to prevent societal collapse (Sartorius 1972). This is called the “disintegration thesis,” the belief that morality serves as a bond that forms a coherent society (Kekes 2000). Devlin also argued for the “conservation thesis,” believing in the power of the majority. According to Devlin, the fact that a majority of individuals in a society believed a certain kind of act was immoral meant that policy could be enacted to criminalize that act (Sartorius 1972). One of the problems noted by critics of the disintegration thesis is that though there may be disagreements in societies regarding moral changes, these disagreements may not necessarily lead to the collapse of the society (Kekes 2000). Furthermore, Devlin refrained from clarifying which moral changes would lead to the disintegration of a community (Kekes 2000).
As a result of the power of judicial review that the Supreme Court seized for itself, the Court has a tremendous effect on the policymaking environment of the United States (Patton 2007). Because of the constitutional issues raised by morality policies, they are likely to be challenged in the Supreme Court, the highest level in the federal judicial system (Patton 2007). The debate over morality policy has moved from being focused on legislative acts to the Supreme Court arena. Over the past decades, the Supreme Court has heard over fifty cases involving morality policies. Ruling in cases involving legislative morality, the Supreme Court often invokes the idea of a right to privacy. For example, in the case of *Griswold v. Connecticut*, Justice Douglas of the U.S. Supreme Court states that specific and various guarantees in the Bill of Rights have *penumbras* that create certain zones of privacy. The Supreme Court is very actively involved in determining cases of morality policy, though the question of whether or not morality policy should be legislated still remains highly debated (Greenawalt 1995).

The Adoption of Morality Policy

In the past several years, political scientists have often empirically examined the adoption of morality policy. One study led by Christopher Mooney and Richard Schuldt tests the basic characteristics of morality policy by using a survey of morality policy scholars and Illinois residents. They test the assumption that morality policy is highly salient, technically simple, uncompromising, and generates conflict over basic values (Mooney and Schuldt 2008). The authors find that policies that are categorized by scholars as being “morality policy,” such as abortion regulation and gay rights, generate greater conflict over basic values than those that are not categorized as such. They also
conclude that these same policies are less likely to be amenable to compromise (Mooney and Schuldt 2008). An interesting aspect of their findings is that morality policy may not be as salient as scholars argue. For example, their results indicate that gay marriage, which can be categorized as morality policy, is not especially important or salient to the respondents of their survey. One explanation given by the authors to explain this phenomenon is that what was defined as broad public salience only applies among political elites (Mooney and Schuldt 2008). This suggests that the public is motivated to take action on morality policy by political elites rather than simply on its own initiative. This argument also correlates with that of Morris Fiorina. In his book *The Culture War? The Myth of a Polarized America*, Fiorina claims that Americans are not as polarized in their thinking as they are made out to be by the media; rather it is the political elites, media pundits and politicians who are deeply divided and split over national issues (Fiorina 2005).

Scholars Mooney and Lee conducted other studies in which they asked the question of whether morality policies that affirm a clear majority’s values have different politics than those that are more contentious (Mooney and Lee 2000). Using death penalty cases from 1956 to 1982, they discover that “state to state variation on contentious morality policy is driven by specific mass public opinion” (Mooney and Lee 2000, 224). Mooney and Lee expected to find different patterns in the politics of consensus versus those of contentious morality policy. Elected officials have greater incentives and little risk to act in situations where the consensus is against values reflected in the current policy (Mooney and Lee 2000). But when the values are more contentious, elected officials are expected to act more slowly towards reforming the
policy (Mooney and Lee 2000). These scholars chose the area of capital punishment to study because it provides examples of both contentious and consensus morality policy, as well as an example of a policy area that changed dramatically over a short period of time (Mooney and Lee 2000).

Mooney and Lee (2000) argue that the link between public values and public policy is quite strong when considering morality policy rather than non-morality policy. Non-morality policies are often technical and difficult to understand, therefore generating little interest among the public. As a result of the lack of public interest, legislators have little understanding of what their constituents require them to do and so depend on intermediaries, such as interest groups (Mooney and Lee 2000). While these intermediaries may influence policy-makers disproportionately in non-morality issues, citizen ideology has a much stronger influence on the adoption of morality policy (Mooney and Lee 2000). On contentious issues, public opinion will be taken into account more so than the general ideology of office holders. Consensus issues enable officials to have more of an impact on the timing and extent of the policy. As opposed to other policies, morality policies are not generally influenced by economic, social, or political structures (Mooney and Lee 1995). Through their study, Mooney and Lee discover that in the contentious period before the 1972 Furman v. Georgia decision, public support is the only discernible influence on the abolition of the death penalty, while activists’ ideology had more influence on re-instating capital punishment in the consensus period after the Furman v. Georgia decision. Mooney and Lee’s research suggest differences in officials’ responses to public values and opinions depending on the distribution of those values (Mooney and Lee 2000). The greater consensus there is involving an issue, the more
leeway that officials have to respond to public opinion. When public opinion regarding a policy is contentious, public officials have to closely follow the wishes of their constituents.

Moving away from the death penalty and focusing on the morality policy of abortion, Mooney and Lee next explore the distinctiveness of the politics of morality policy adoption (Mooney and Lee 1995). Morality issues concern debates that typically evoke uncompromising responses, whereas non-morality policies invoke economic interests that invite compromise more easily (Mooney and Lee 1995). Debates involving morality policies are more prone to be uncompromising, ideological, and polarized.

Using three dimensions of regulation reform (diffusion, reinvention, and determination) to analyze the patterns of adoption in abortion regulation in the United States prior to the 1973 *Roe v. Wade* Supreme Court decision, Mooney and Lee analyze whether policy affected politics. Policy diffusion is the pattern by which organizations adopt certain regulations across time and space (Mooney and Lee 1995). The uncompromising nature of morality policy may keep it from ever being adopted by some states, therefore preventing it from the normal diffusion pattern, which assumes that all states will eventually adopt a certain policy over time. Determinants of adoption are factors that increase or decrease the likelihood of a state adopting a policy, such as public opinion and ideology. The authors find that “adoption of morality policy is affected by the demands for it, the resources available to its proponents and opponents, and the constraints on it” (Mooney and Lee 1995, 622). Ultimately, the authors discover that the politics of abortion deregulation are the same as that of economically based policies in terms of the
process involved. The differences were in the specific demand, resource, and constraint variables that lead a state to reform or to refrain from reform (Mooney and Lee 1995).

Mooney and Lee have also investigated changes that occur in morality policy as it diffuses. By developing and testing three reinvention hypotheses, they explore whether later adopters of morality policy are able to learn and adapt their policies by learning from earlier adopters. Policies often evolve as they diffuse over time. The pattern of how policies are reinvented can have enormous impact on their quality and effectiveness (Mooney and Lee 1999). Mooney and Lee hold that morality policy may have unique patterns of diffusion and reinvention due to its simplicity and high public salience (Mooney and Lee 1999). They hypothesize that the pattern of morality policy is that the least morally contentious aspects of the issue are dealt with and the moral conflict is not put forth until much later (Mooney and Lee 1999). The reinvention of policy has a significant impact on the content of a state’s policy. A state that adopts a policy earlier will have a different form of the policy than those that later adopt the policy. Yet, reinvention of morality policy may be different because of its characteristics. In morality policy, the arguments involve fundamental values and are less focused on technicalities (Mooney and Lee 1999). The previous experience of earlier adopters may be irrelevant in the adoption of morality policies because the elected officials are more concerned with the values and opinions of their constituents rather than the experiences of early adopters (Mooney and Lee 1999). By once again focusing on the death penalty, the authors examine the long-term evolution of capital punishment among the states, as well as focus on the basic moral debate. Mooney and Lee conclude that state level death penalty policy shows that morality policy evolution is incremental and unidirectional in some aspects;
later adopters can have more moderate policies than earlier adopters, and there can also be no pattern of systematic learning, as in the post-\textit{Furman v. Georgia} death penalty case. These authors advise that groups advocating morality policy must do so in small, incremental steps without raising the basic moral issues (Mooney and Lee 1999). They conclude that “morality policy reinvention differs with the context of public values” (Mooney and Lee 1999, 90). Policymakers only need to look to the values of their constituents when adopting morality policy and not react to the policies of other states (Mooney and Lee 1999).

Conclusion

Morality policy is described as being particularly divisive and uncompromising. The Supreme Court has been active in rendering decisions in the area of morality policy, particularly the death penalty and abortion. The U.S. Supreme Court is often looked upon as being the decisive factor in these types of morally contentious issues. Morality policy generates considerably more attention from the public because of its technical simplicity and conflict over fundamental beliefs. In cases of morality policy, citizen participation and engagement is high, with members of the public being more likely to signal their preferences to policymakers. Through the work provided by scholars involved in the study of the Supreme Court, it is shown that the Court is considered to be a policymaker, armed with the ability to influence the direction of policy in the United States. Though it has been shown that the Supreme Court is in fact a policymaker, does it pay attention to the preferences of the public? Is it responsive to public opinion? In the next chapter, I will explore the literature regarding the Supreme Court and public
opinion. Is the Supreme Court affected by public opinion? Does it take public opinion into consideration when rendering its decisions on cases, especially in cases of morality policy?
CHAPTER IV

JUDICIAL DECISION MAKING: ARE SUPREME COURT DECISIONS AFFECTED BY PUBLIC OPINION?

There are various theories surrounding the decision-making process that occurs in the United States Supreme Court, all striving to explain why the nine justices of the Court behave as they do. One of the customs of the Court is its propensity towards secrecy, which further enhances its lack of transparency. Although researchers may guess or glean some information regarding the Court through journals provided by some of the justices who served on the bench, there can never really be any concrete evidence as to why justices behave any definite way (That is, unless they choose to tell us). Political scientists have identified a number of different models that focus on judicial decision-making. The Attitudinal, Legal, and Strategic Models all seek to explain decision-making in the Supreme Court and why justices act as they do, although no one model is able to completely elucidate individuals regarding the behavior of justices.

In this chapter, I will review the literature involving public opinion and the Supreme Court, as well as the broad theories noted by scholars regarding judicial decision-making. All of the models mentioned above, especially the Strategic Model, serve as a basis for many scholars in the connection that is made between public opinion
and the Supreme Court. Although it is extremely difficult to discern causation between public opinion and Supreme Court decisions, various scholars have tried to do just that through these models. The Strategic Model is the one most important to this project because it is through the understanding of the Strategic Model that a connection can be made between Supreme Court decisions and public opinion.

The Legal Model

One of the first models presented by scholars is the Legal Model. This theory posits that the decision-making of the Supreme Court is guided solely by the facts of cases. This model suggests that justices should make their decisions by following what is known as the “plain meaning of the law.” It maintains that the Supreme Court should strive to discern the original intent of legislators as well as that of the Framers when ruling on a case (Spaeth and Segal 2002).

Precedent is also invoked in the legal model, with scholars believing that the Supreme Court should take precedents into account when making decisions (Spaeth and Segal 2002).

The Legal Model supposes that justices primarily use the text of the Constitution as the basis for making decisions on issues concerning constitutional cases, and the text of federal statutes to make decisions on cases concerning statutory interpretation.

According to the Legal Model, “ideologies, party affiliations, personalities, and social backgrounds of justices are simply irrelevant to the process of judicial decision making” (Scheb and Lyons 2001, 182). Furthermore, justices would not be affected by
public opinion or interest groups, merely the legal analysis of the law. The public (and justices as well in their speeches) has embraced the Legal Model, which tends to view the Court as a legal institution rather than a political one (Scheb and Lyons 2001). This model has also contributed to the legitimacy of the Court in the past, with the public being more willing to accept decisions coming from the Supreme Court because of the view that the Court is nonpolitical.

The Legal Model is really a set of criteria (precedent, plain textual meaning, and Framers’ intent) to be followed by the Supreme Court. Though scholars Scheb and Lyons have discovered that the public would like original intent and precedent to have the greatest impact on Court decisions, they also found that the public supports the idea of having Court decisions be based on public opinion and feel that the will of the majority should have more impact as well (Spaeth and Segal 1999). The belief that precedent or *stare decisis* should be impactful in Supreme Court decisions is an important aspect of the Legal Model.

Adherence to precedent is important in establishing confidence in the Court. In order for the Court to maintain its legitimacy, it must follow precedent and other such institutional norms. The Supreme Court is hesitant to overrule precedent because it serves the goal of portraying the predictably, stability, impartiality, and fairness of the Court (Spriggs and Hansford 2001). Spaeth and Segal write that in order for there to be faith in the Supreme Court and its administration of justice, following precedent must be the rule rather than the exception (Spaeth and Segal 1999). Spaeth and Segal examine the influence of precedent in one of their many studies involving the Supreme Court. They hold that in order for precedent to be proven to have an impact on judicial decision
making, it would mean that justices who have disagreed with a precedent would alter their beliefs in subsequent cases and uphold that precedent (Spaeth and Segal 1999). By developing a scale that measures the degrees of adherence to precedent for dissenting justices, Spaeth and Segal discover that precedent did not play a large role in Supreme Court decisions. Although justices can occasionally show preference for precedent out of respect for the authority of that precedent, they are shown to remain largely unaffected by *stare decisis* (Spaeth and Segal 1999).

Scholars Spriggs and Hansford show that the Supreme Court will generally apply precedent in their opinions in order to maximize the likelihood that their opinions will be effective (Spriggs and Hansford 2002). These same authors also show that the Supreme Court is more likely to ignore precedent when there has been an ideological shift in the Court since the ruling of that precedent (Spriggs and Hansford 2001). Both teams of writers, Spaeth and Segal and Spriggs and Hansford, posit that the justices of the Supreme Court are motivated by their own policy preferences and so choose to incorporate and interpret precedent when it meshes with their ideologies. Ultimately, the Legal Model’s theory that justices use precedent, among other criteria, as a way to rule is shown to be ineffectual in predicting judicial decision making. Though justices do not entirely ignore precedent, they also are not stringently held to incorporate it into their decisions.

There are many additional problems that are inherent to the Legal Model. One of the model’s components is that justices follow the “plain meaning of the law.” The law also does not always contain clarity. In fact, in most cases the law is ambiguous. Some federal statutes or constitutional provisions have no plain meaning, and “even a provision
that may seem to have a plain meaning can be susceptible to multiple interpretations” (Baum 2001, 140). Furthermore, one cannot always ascertain the true meaning of some provisions because different words may have different meanings to different people. One person may certainly view the law in a different perspective than someone else. Also, the Legal Model does not take into account that the English language itself is full of uncertainty and is not always precise. The English language evolves over time, with one word meaning something entirely different than it did in previous years (Baum 2001).

Additionally, it is unreasonable to charge the Court to follow legislative and the Framers’ original intent when making decisions. Congress contains more than 500 members, and all of the members of Congress can possess different intentions. “When congress adopts a statute, its members sometimes offer different interpretations of language in the statute, trying in this way to influence the courts” (Baum 2001, 141). How is the Supreme Court supposed to ascertain the intentions of such a large government body? This also holds true for the argument concerning the Framers’ intent. There were quite a few individuals involved in the Constitutional convention, so it would be erroneous to presume that all of them had the exact same intentions. Additionally, the Framers lived in a time when women did not have the right to vote and slavery was still allowed. If the Supreme Court in modern times still followed the original intent of Congress and the Framers, a lot of civil rights and freedom enjoyed by individuals today would not exist. Some justices view intent as illegitimate, believing that it is the law that should be interpreted, not the intentions of legislators, which may be suspect (Baum 2001).
Though there are many problems attached to the Legal Model, it cannot be completely discounted. It is hard to imagine that Supreme Court justices do not take the law or precedent into account when making decisions on a case. The Supreme Court has to justify its decisions on the basis of legality and cannot entirely discount the law (Baum 2001). The Legal Model rejects the argument that public opinion is part of the judicial decision-making process. Public opinion is given absolutely no role in this model, with proponents instead choosing to believe that justices make decisions based on precedent, plain textual meaning, and Framers’ intent.

The Attitudinal Model

The second model often used to explain judicial decision making is the Attitudinal Model. This model centers on around the idea that justices review cases and make decisions based not just primarily on the facts of the case but also based on their own ideological perspectives (Spaeth and Segal 2002). As mentioned before, no matter how much individuals may want to believe that the law is black and white, the law is in fact full of uncertainties and vagueness. Some scholars believe that because so much of the law can be left up to interpretation, justices have to ability to frame positions according to their ideological views. The judicial selection and confirmation process is often used to justify the belief that the Supreme Court renders decisions based on ideology. Justices of the Supreme Court are appointed by the president and confirmed by the Senate. Because of the selection process of the justices, one can assume that a president and the majority coalition in Congress will be careful to choose candidates that closely align with their ideology. Spaeth and Segal write that 87% of the 147 studied
justices nominated to the bench have shared the same ideology as that of the president’s party (Segal and Spaeth 2002). A president will wish to nominate a justice who possesses the same views because he wants to sway the balance towards his views and influence decisions from the bench (Segal and Spaeth 2002).

Though it may be hard for individuals to grasp, given the power enjoyed by the Supreme Court and the prestige that the office enjoys, one must take into account that the nine justices that sit on the Court are human beings with opinions, personalities, and ideologies. If societal norms, attitudes, and values are changing, one cannot expect the justices to remain immune to these influences. Just as a majority of the public has an opinion about the issues and discussions taking place in society, so too must the justices of the Supreme Court. They have their own opinions and though they may try to be completely unbiased when deciding on a case, it would not be surprising if their decisions are actually influenced in part by their personal ideological views. Justices bring particular set of beliefs and attitudes to the Court because of their backgrounds and experiences (Baum 2001). Scholar Lawrence Baum believes that justices’ policy preferences provide “the best explanation for differences in the positions that the nine justices take in the same cases, because no other factor varies so much from one justice to another” (Baum 2001, 145).

Research done regarding the Attitudinal Model asserts that justices actively make decisions to realize outcomes that are close to their policy preferences. One team of scholars, Segal and Spaeth (2002), further the notion that justices make decisions based on whether they are liberal or conservatives and not based solely on the law. Another reason why scholars believe that justices are able to base decisions on their ideological
attitudes and values is the idea that they have the ultimate say in all cases and that they are rarely overruled. As a result of the degree of freedom possessed by justices of the Supreme Court, they may even be more likely to rule along their ideological preferences than members of Congress or administrative agencies (Baum 2001). The only times that the Supreme Court can be challenged by the other branches of the federal government or the states is either through changes to the law by Congress (which is hard to do) or a Constitutional amendment (which is even harder to realize). Furthermore, justices have lifetime tenure with good behavior, so they cannot be chastised or punished for the decisions that they make. Although justices can be impeached as a result of unethical behavior, it has rarely happened in the history of the Supreme Court.

Using cases concerning unreasonable searches and seizures, Segal and Spaeth strive to test the Attitudinal Model. These scholars study the attitude of justices by correlating the voting records of justices with editorials of newspapers that centered on the nomination of justices and the confirmation process. Ultimately, the authors conclude that the behavior of justices could be predicted in at least 70% of cases (Segal and Spaeth 2002). Authors Caldeira and Wright also research ideological motivations of the Court. They further the belief that the Supreme Court justices pursue their ideological preferences by deciding cases that have a maximum impact on political, social, or economic policies (Caldeira and Wright 1990).

Conversely, Clayton and Gillman use privacy and religion cases to refute the Attitudinal Model and prove that justices do not make decisions based solely on ideological preferences (Clayton and Gillman 1999). In the case of Planned Parenthood of South East Pennsylvania v. Casey, the Supreme Court failed to overturn the doctrine of
Roe v. Wade and so did not follow the wishes of the Reagan and Bush administrations who appointed conservative members to the Court (Clayton and Gillman 1999). It can be said that the Supreme Court at that time did not succumb to political partisan pressure and the justices were influenced by their ideological views.

Though it is certainly true that ideologies can sometimes come into question when justices render decisions, they also do take into account the facts of the case and the legal text. Scholars also assume that the preferences of justices are fixed, that they are stable and unchangeable. In fact, justices’ ideologies can change over time, from more moderate justices moving from one end of the spectrum to another, or even more radical changes. Furthermore, the Attitudinal Model presumes that individual attitudes are the primary determinants of behavior for the justices (Mishler and Sheehan 1996). Unlike the Strategic Model, the Attitudinal Model does not consider public opinion as a factor of judicial decision-making. The Attitudinal Model considers that ideological factors play a stronger role in the process of judicial decision-making than public opinion.

Strategic Model

This model is broken down to include two interrelated theories: Rational Choice and Neo-institutionalism. Neo-institutionalism includes both internal and external constraints on the Supreme Court. Scholars of the Strategic Model argue that justices make decisions that will maximize their desired outcomes and that institutions provide incentives that are important in structuring the strategic behavior of political actors (Boucher and Segal 1995). Institutions are defined as structures that affect the decision making of the Court (Maltzman, Spriggs, and Wahlbeck 2000). These structures can be a
variety of things, such as formal or informal rules that shape the actions of actors who are trying to pursue their goals (Spaeth and Segal 2002).

Early theory on Rational Choice assumed that individual actors in the Court would choose alternatives that closely align them with groups (Brace and Hall 1990). Actors find alignments that maximize their success and form strong coalitions over a long period of time (Brace and Hall 1990). “Rules provide the context in which strategic behavior is possible by providing information about expected behavior and by signaling sanctions for noncompliance” (Maltzman, Spriggs, and Wahlbeck 2000, 14). This model assumes that the Supreme Court will try to push its agenda as close to an ideal point as possible without getting overturned by Congress or the states (Clayton and Gillman 1999). For the Court, finding equilibrium is a main goal. The Rational Choice Model assumes that justices will bargain or retreat in the face of a challenge. It also predicts that a justice will adopt insincere positions in order to avoid conflicts of those who are in power and are able to overturn decisions made by the Court (Spaeth and Segal 2002).

The Neo-Institutionalism approach offers the explanation that justices act as a result of internal or external constraints. Internal constraints on the Court are often the traditions of the Court. For example, it includes those actions that are associated with granting certiorari, opinion assignments, promoting harmony amongst the justices, or holding together a solid majority. The external constraints on the Court include the checks and balances system, meaning the relationship between the Supreme Court and other political actors, such as Congress or the Executive branch. Public opinion is also an external constraint as defined by the Neo-Institutionalism Model. Justices can sometimes be motivated to think beyond ideology or the legality of their decisions in deciding
whether they need to take steps to influence an outcome or to mitigate the ability of others to influence the Court.

Weaknesses of the Strategic Model include the fact that it does not take into account that justices may not necessarily always make decisions that are in their own best interests. The very structure of the institution itself can encourage members to make decisions that are not in their best interests. For example, justices may decide to forgo their position in a case to vote with the majority in order to ensure support from other justices in another case. The Strategic Model is not well designed to help with the perception of whether justices acquire distinctive preferences, goals, or conceptions of duty through their understanding of the role of the Supreme Court in the political system. It also assumes that Supreme Court justices view themselves as stewards of institutional missions and that this view generates motivations of duty and professional responsibility. Critics of the model note that the Strategic Model suggests that a justice is aware of an actor’s political positions on issues (i.e., Congress, and so can strategically base his or her decisions with that in mind). In fact, Supreme Court justices may not be aware of positions taken by Congress, which may be many because that branch of government is made up of 535 members. The model also mentions that the Supreme Court makes strategic decisions in order to prevent counteractions from Congress. What it does not take into account is the extreme difficulty that exists in overturning Supreme Court decisions. As a result of that difficulty, many scholars agree that the Supreme Court really does not have to worry about the actions of other actors when making its decisions. Furthermore, the Court can frame decisions in certain ways that prevent other actors from taking negative actions towards the Supreme Court. One of the things that the Strategic
Model fails to bring into light is the sorts of considerations that lead a particular justice to take a particular course of action and the extent that those actions are a result of institutional factors (Spaeth & Segal 2002).

For the most part, the Strategic Model can help scholars gain perspective as to how certain situations might lead justices to act in ways that might seem inconsistent with their positions or ideologies. Scholars Boucher and Segal use justices’ votes on certiorari to test the theory that justices vote strategically. They find strong evidence that justices strategically consider probable outcomes when they wish to affirm cases (Boucher and Segal 1995). Justices are more likely to consider the actions of other justices and the response of the other branches of government when voting to affirm cases (Boucher and Segal 1995).

Public Opinion and the Supreme Court

According to the Neo-Institutionalism Model of Supreme Court decision-making, public opinion is an external constraint that influences the Supreme Court. It is an external factor that the Court must take into account if it is to strategically render decisions. Superficially, there is little reason to believe that justices are influenced by public opinion. They have lifetime tenure (based on good behavior), no political constituencies that they must answer to or appease, and they also decide which issues are to be addressed before the Court. In fact, many view the Supreme Court as counter-majoritarian, that is, it is able to declare a legislative act unconstitutional. And by doing so, it is rejecting the will of the people (Barnum 1985). Contrarily, some scholars argue
that the Court does not often render counter-majoritarian rulings, even though it has the power to do so. Oftentimes, the Court’s agenda tends to reflect society’s agenda as well.

The modern Court’s pronounced tendency to reflect American opinion results from a combination of factors—chiefly, judicial deference to federal law and policies, the Court’s deference to popular opinion during crisis times, and the greater stability of those Court rulings that reflect prevailing public opinion. (Marshall 1989a, ix)

There are many ways to establish how the Court might be influenced by public opinion, either directly or indirectly. It can be assumed that public opinion might influence Supreme Court decisions indirectly because “elections determine the composition of Congress and the White House, whose members in turn select the justices” (Mcguire and Stimson 2004, 1020). The public elects into office officials who reflect their views and they in turn choose to appoint and confirm to the Court justices who are aligned with their beliefs, something that may change (or remain constant) decades or so later. As Mishler and Sheehan conclude from their studies, changes in the parties of the President and Congress significantly influence changes in the Court’s ideological composition. They also find evidence that points to a relationship between Supreme Court decisions and public opinion, a relationship that exists without the presence of the ideological composition of the Court (Mishler and Sheehan 1993).

In their review of the article titled “Popular Influence on Supreme Court Decisions,” political scientists Norpoth and Segal posit that the influence public opinion exercises on the Court occurs indirectly, through the choice of justices by the presidents chosen by the people (Norpoth and Segal 1994). Mishler and Sheehan respond by stating that the Supreme Court is responsive to public opinion because it is careful not to jeopardize the Court’s authority by departing from the majoritarian views for too long.
These scholars are not saying that justices change their views based on public opinion polls, but rather that they modify their decisions on important issues in response to long-term and fundamental changes in public opinion (Norpoth and Segal 1994). Scholar Thomas Marshall has also done extensive work concerning the Supreme Court, and he has found that the Supreme Court is a majoritarian institution and that it is responsive to both public opinion and other policymaking institutions (Marshall 1989a; Mishler and Sheehan 1993).

It is important for the Court to be responsive to public opinion if it in turn wants legislative support. The Supreme Court must calculate the extent to which legislators and presidents will support their rulings, as they do not have the power to enforce their decisions. As remarked by Alexander Hamilton in Federalist Paper # 78, the Supreme Court “has no influence over either the sword or the purse” (Mishler and Sheehan 1993, 89). The legislature can also take certain steps to chastise the Supreme Court if prodded by the public. Congress is in charge of the budget and so can reduce the Supreme Court’s funding. Congress can also realign the Court’s appellate jurisdiction, which it has the ability to control as shown through the 1789 Judiciary Act and other succeeding acts. Though the American public may not be able to directly control the actions of the Supreme Court, they can influence Congress, who in turn can exert pressure on the Court. Ultimately, although the members of the public may not be able to directly influence the actions of the Supreme Court, by exerting pressure on Congress, one can say that they in fact affect the decisions of the Court.

Mishler and Sheehan (1993), focus on the effect of public opinion on the Court. They test whether Court decisions shift as a result of changes in membership or as
a response to public moods. Analyzing the work of Robert Dahl, Mishler and Sheehan write that the Supreme Court is in fact a part of the dominant national alliance and for the most part supports the major national policies of that alliance. Mishler and Sheehan also note that justices are aware of trends in ideology and that at least some justices may adjust their decisions to accommodate these trends (Mishler and Sheehan 1993).

Using pooled time series cross-section analysis, Roy B. Flemming and B. Dan Wood discover through their individual level study that Supreme Court justices respond directly to changing public moods, with the justices being more responsive regarding salient issues. “We show that the individual justices follow shifts in public mood; the liberalism of justices’ voting decisions varies with movements in the policy mood of Americans” (Flemming and Wood 1997, 493). They note that justices respond quickly to shifts in public mood with no time lag as indicated by other scholars. One of the reasons offered by Flemming and Wood for the responsiveness of individual justices to public opinion is exposure. They hypothesize that because justices are often exposed to public mood through newspapers, travel, speeches, and interest groups involved in litigation in the Court, they are more apt to be responsive to public opinion. Also, justices’ awareness of public opinion enables them to respond to those moods because they are concerned about policy outcomes that they cannot fully control. This lack of control leads them to pay attention to what the public wants in order to avoid challenges from the other branches of government who are held accountable by the general public. “Substantial swings in public mood nevertheless prompt voting changes at the margins of the justices’ voting preferences” (Flemming and Wood 1997, 494). This research also coincides with
the Strategic Model. Flemming and Wood determine that justices will vote strategically in the hope of gaining public support and keeping the Court from losing influence.

There have also been signals from the justices themselves that point to consideration of public opinion by the Supreme Court. For example, in the case of *Furman v. Georgia* (1972), Supreme Court Justice Brennan issued a concurring opinion in which he proclaimed that meaning must be drawn from “the standards of decency that mark the progress of a maturing society” (*Furman v. Georgia* 1972, 270). The connotation that one can extract from Justice Brennan’s argument is that public opinion should be considered by the Supreme Court in some cases. Moreover, in the case of *Miller v. California* (1973), the Supreme Court created the Miller test to determine whether some speech or expression could be labeled as obscenity. One part of the test is to determine “whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest” (*Miller v. California* 1973, 489). The statement that standards from the community should be applied is a statement from the Supreme Court acknowledging the consultation of public opinion, or at least the influence of public opinion in cases brought before the bench.

**Effect of the Supreme Court on Public Opinion**

When analyzing the influence of public opinion on the Supreme Court, it is also important to explore the dynamic of the Supreme Court’s role as a “schoolmaster,” whether it influences the public’s opinion with the decisions it renders. Can it be said that the Supreme Court affects public opinion? Many scholars focus on whether public opinion is shaped by the Supreme Court and the extent of that influence. Two such
scholars are political scientists Franklin and Kosaki, who ask this question regarding the influence of the Supreme Court on popular opinion in one of their articles. One theory discussed in their article is the Positive Response Model. This model explains that the Court serves as an instructor to the population. It works to educate the public as to what public opinion should be on cases ruled upon by the Court. Using the case of Roe v. Wade, the authors also develop a theory of public response. The Supreme Court needs to garner public support for its decisions because the Court possesses little real enforcement power. And so, if the public supports the Supreme Court’s decisions, they could then pressure the other branches of government to enforce those decisions. If the other branches of government do not support the Supreme Court’s decision, they might be slow to enforce the decisions, as was the case with desegregation, or ignore them entirely, as in the case of school prayer (Franklin and Kosaki 1989). The Supreme Court needs the other branches of government to carry out its judicial policies.

Through their research, Franklin and Kosaki conclude that the Court does in fact influence public opinion. Although, rather than drastically changing public opinion, Court decisions serve to solidify and justify public opinion. Supreme Court decisions tend to increase polarization of groups or individuals on an issue although they did not necessarily change people’s opinions (Franklin and Kosaki 1989). If people were supportive of an issue, after the Court rendered its decision, they became even more supportive. In a sense, the Court legitimatized their opinions. One criticism that can be applied to this study is that it did not take into account political socialization as a reason why individuals support the Court. Political socialization can be one reason why individuals support the Supreme Court, especially if the decision rendered follows their
policy preferences. Also, it could be that individuals are already polarized on an issue and 
the Supreme Court’s decision is merely the catalyst that makes them become more vocal 
about either their support or opposition. Individuals could have already been moving 
towards polarization and it may not necessarily be as a result of a Supreme Court 
decision.

Scholars Johnson and Martin take this issue even further by testing the effects 
of the Supreme Court on public opinion regarding salient issues. Using abortion and 
death penalty cases, they present the Conditional Response Hypothesis. These scholars 
explain that because of the view of the Court as being a legitimate institution, it is, to 
some extent, able to influence public opinion (Johnson and Martin 1998). They 
hypothesize that once a person’s opinion is made about a decision, it is unlikely to change 
following further rulings on the same subject. The authors find that public opinion was 
set once the Supreme Court ruled in the *Roe v. Wade* decision, with the subsequent case 
of *Webster v. Reproductive Health Services* having little effect on public opinion. The 
same was true with cases involving the death penalty. Once a decision had been made, 
the effects of subsequent decisions were either minute or nonexistent. Johnson and 
Andrew conclude that the effect of the Supreme Court on public opinion is conditional. 
Initial rulings will have an effect on public opinion but following opinions on the same 
issue will have marginal effects (Johnson and Martin 1998).

Caldeira and Gibson examine the levels and sources of public support and 
explain the root for both diffuse and specific support for the Supreme Court. They 
thorize that the Supreme Court requires high levels of support to withstand instances 
when the Court must goes against the beliefs of the general public (Caldeira and Gibson
Diffuse support is described as being enduring favorable attitudes and good will towards the Court. Those who have diffuse support for the Court are able to accept or tolerate decisions that they may not favor. According to Caldeira and Gibson, diffuse support has greater durability than specific support. Specific support is described as “a set of attitudes toward an institution based upon the fulfillment of demands for particular policies or actions” (Caldeira and Gibson 1992, 3). In order to test the reason why people have support for the Court, these scholars used a variety of variables. Partisanship and political ideology, trust and satisfaction with one’s life, political values, and multivariate analysis of the mass public are all used to determine support origins for the Court (Caldeira and Gibson 1992).

These two scholars hypothesize that there is a connection between support for the Court and an individual’s political ideology because the work done by the Court tends to bear a relationship to partisanship. The authors conclude that policy preferences had minor implications for diffuse support for the Court. They also find no substantial relationship between trust and satisfaction and support for the Court. One of their findings is that those who value democracy are more likely to show support for the Supreme Court, with education having some direct effect on the level of support. Caldeira and Gibson also test the level of support for the Court among opinion leaders. Opinion leaders act as gatekeepers for the general public. They are more informed regarding political issues, better educated, and pay attention to politics. The results show that support for the Court depends upon the policy preferences of these individuals. In the case of opinion leaders, support for the Court ultimately depends on whether or not the decisions are aligned with their policy preferences. Changes in support among opinion
leaders are not as likely to occur. They have a much more stable and integrated belief system than the mass public (Caldeira & Gibson 1992). Ultimately, the authors discover that the mass public possesses more diffuse support for the Court, while opinion leaders provide specific support.

Authors Grosskopf and Mondak also delve into research regarding the reasoning behind public support for the Court. By focusing on two cases, *Webster v. Reproductive Health Services* and *Texas v. Johnson*, they test whether attitudes regarding specific Supreme Court decisions influence specific levels of confidence in the Court and the effect of a negative bias on confidence in the Court. The authors conclude that agreement with the Supreme Court’s rulings did have an effect on the public’s perceptions of the Court. Support for the Supreme Court is a form of social capital, which can increase or decrease as a result of Supreme Court decisions. A popular Court can maintain public support or even increase support for its unpopular judicial actions, but runs the risk of diminishing its long term public support (Grosskopf and Mondak 1998). Of course, the Supreme Court would prefer that its actions or decisions did not affect public support for itself but evidence runs contrary to that preference. The Court expends political capital every time it renders an unpopular decision. The Supreme Court is able to maintain support after unpopular decisions because of the reservoir of goodwill towards itself that it maintains, but even then, it is not immune to public backlash against controversial decisions. One of the arguments offered by these scholars is that Supreme Court justices are aware of their political limitations and are wary of depleting the “reservoir of goodwill” and so carefully choose controversial cases (Grosskopf and Mondak 1998).
Grosskopf and Mondak also examine the effects of negative bias on public support for the Supreme Court. Negative bias is the tendency of individuals to weigh negative information more heavily than positive information. Research done in the field of marketing and psychology shows that negative information tends to get noticed more so than positive information. It is also fairly apparent that the same hold true in politics. The mass public is more likely to notice negative information and scandals than any positive news. Upon testing the two cases mentioned earlier, the authors find that a disagreement with one or both of the decisions substantially reduces confidence in the Court, while agreement with both decisions only marginally improves the level of confidence in the Court. These findings are consistent with the view that negative views far outweigh the effects of the positive (Grosskopf and Mondak 1998).

The scholars conclude that specific decisions do impact public confidence in the Court. An individual who disagrees with a Supreme Court decision will have decreased support for the Court after that decision has been rendered. Public support for the Court is also more likely to decrease with highly salient and unpopular decisions (Grosskopf and Mondak 1998). Essentially, this study provides critical insight into why individuals support the Supreme Court. Though it shows a decrease in support for the Court as a result of negative bias as well as a result of specific Supreme Court decisions, the authors also did find that public support rebounded in the long term. Positive perceptions of the Supreme Court are enduring. After coverage of a Supreme Court decision recedes, confidence and support for this institution once again increase. In a way, this study shows that support for the Court is durable and long lasting. Most people
have a positive view of the Court as an institution, and that view is able to sustain support for the Supreme Court (Grosskopf and Mondak 1998).

Conclusion

The fact that the Supreme Court may be affected by public opinion does not necessarily mean that it actively seeks out to discover public attitudes towards a particular case; rather, it merely implies that the Supreme Court is sensitive to the sentiments of the majority and renders its rulings accordingly. To really gain perspective on the debate as to whether the Supreme Court is affected by public opinion, one should first determine an answer to the question: does it matter if the Supreme Court is influenced by public opinion? Why should there be any concern regarding this issue? It matters a great deal if the Supreme Court is influenced by public opinion. The Supreme Court is generally regarded as a powerful and unelected institution and, therefore, as the most undemocratic branch of government. The Supreme Court is not generally held accountable for its decisions and because of that lack of accountability, it becomes extremely imperative for scholars to understand how the Court arrives at its decisions. Also, the legitimacy of the Court depends on it being able to decide cases based on neutral principles of the law. The Court makes decisions that can greatly affect everyday life for Americans so scholars are definitely concerned with the judicial decision making process.

There are various theories regarding why people support the Supreme Court, whether the Supreme Court shapes public opinion, and whether public opinion influences the Supreme Court. All of these theories bring up more questions than they answer, and
more work still needs to be done in this field. This is why I have decided to analyze cases of morality to look at the extent of public influence on the Supreme Court. Because cases of morality are more salient to the public, it seems reasonable to assume that they would be the ones in which the Court would pay the most attention to public opinion. As has been discussed throughout these pages, there are many scholars who believe that public opinion can affect Supreme Court decisions, particularly Kevin McGuire and James Stimson, who stated in one of their articles: “we believe that a system of popular representation is alive and well in the Supreme Court” (McGuire and Stimson 2004, 1033). In the next two chapters, I will discuss the cases that will be used to test the theory of correlation between Supreme Court decisions and public opinion, as well as the history behind two categories of morality policy: abortion and the death penalty.
CHAPTER V

EXAMINING THE MORALITY CASES
OF THE DEATH PENALTY

The use of capital punishment has been debated for years in the United States, and it continues to be a hotly contested topic. It is an intricate part of the American political system and will most likely remain so in the immediate future. There are many who favor it as ideal for deterring criminals while others criticize it for being unconstitutional based on the Eighth Amendment’s prohibition of cruel and unusual punishment. Proponents of the death penalty believe that it serves a fundamental purpose in society. The death penalty is viewed as a deterrent that keep individuals from committing certain criminal acts by preventing criminals from being released into society. Supporters also believe that it maintains order in society and protects it to a certain extent. Opponents of capital punishment often use the Eighth Amendment to argue that the death penalty is unacceptable and unconstitutional. The Eighth Amendment states that “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted” (U.S. Constitution, art. 3, sec. 1). Those who oppose the death penalty cite this amendment as one reason why the death penalty should not be allowed in the United States, believing it to be a form of cruel and unusual punishment. Besides pointing to the U.S. Constitution as one reason why the death penalty should not be practiced, critics of capital punishment also point out that it is used disproportionately
against people of color and the poor. They argue that because the use of the death penalty is so disproportionate, it violates the rights of individuals who face execution.

The death penalty has been part of American criminal law since the colonial era of the United States. Reforms and calls to eradicate the death penalty have been active since the late 1700s (Epstein and Kobylka 1992). Though there were various reform movements, the states largely failed to abolish capital punishment, mainly because through the 1950s Americans widely supported the death penalty (Epstein and Kobylka 1992). Legislators did not face very much pressure from their constituents to abolish the death penalty. In fact, “if anything, the citizenry attempted to persuade representatives to reinstate or retain it” (Epstein and Kobylka 1992, 39). Of the states that did abolish capital punishment, most reinstated it in the 1950s. In the 1950s, only six states did not have a death penalty in their criminal procedures (Epstein and Kobylka 1992).

Although support for the death penalty has been largely positive in the United States, it has vacillated throughout the years. Support for the procedure decreased from the 1950s to only 47% in 1966 and increased again in the 1980s to where at least 75% of individuals approved of the death penalty (Radelet and Borg 2000, 44). In 1994, 80% of the population supported the death penalty. A gradual decrease in support for capital punishment has only been shown to occur recently, beginning in the late 1990s (Radelet and Borg 2000). The issue of reforming the death penalty did not really emerge until the 1960s, with the legal community taking an interest in the discussion (Epstein and Kobylka 1992). Opponents of the death penalty began to question the constitutionality of the death penalty and suggested that it be challenged based on the Eighth Amendment (Epstein and Kobylka 1992).
Before the 1960s, the Supreme Court hesitated to approach the subject of the
constitutionality of the death penalty. The Supreme Court decided cases on issues apart
from constitutionality, such as modes of execution. For example, in 1878 in the case of
Wilkerson v. Utah, the Supreme Court decided that the use of public execution was a
constitutional and acceptable method of punishment (Wilkerson v. Utah 1878). In the late
1950s, the Court started to take a different approach to the Eighth Amendment, which
Chief Justice Earl Warren demonstrated in his opinion written for the case Trop v. Dulles.
Justice Warren stated that the United States could not strip individuals of their citizenship
and that to do so would constitute cruel and unusual punishment. He wrote that the scope
of the Eighth Amendment is dynamic and evolving, with no clarity provided by the
Founders. He also suggested that the Court use public opinion as a marker to decide what
consisted cruel and unusual punishment as specified in the Eighth Amendment (Epstein
and Kobylka 1992). “The Amendment must draw its meaning from the evolving
standards of decency that mark the progress of a maturing society” (Trop v. Dulles 1958,
101). He believed that as long as the death penalty was seen to be an acceptable form of
punishment and was widely accepted, it could not be said to be unconstitutional (Burt
1987). Only when the mass public started to reject capital punishment could it be said to
be objectionable.

A dissent written by Justice Arthur Goldberg based on a denial of certiorari in
a 1963 case suggested that the Supreme Court should begin to reconsider the question of
the constitutionality of the death penalty. Justice Goldberg proposed that the death
penalty be reviewed by the Supreme Court because society now viewed the death penalty
as barbaric and inhumane (Epstein and Kobylka 1992). Goldberg was yet another
member of the Supreme Court who believed that public opinion should be taken into account in the case of the death penalty and, in fact, signaled that it should be abolished. Justice Goldberg argued that the Supreme Court should consider cases where the punishment of death would be disproportionate to the crime committed (Burt 1987). Justice Golberg’s opinion had the effect of inviting litigators to appeal cases to the Court that challenged the constitutionality of the death penalty to the Supreme Court. One of the first cases to reach the Supreme Court that challenged the death penalty based on the Eighth Amendment was the case of Boykin v. Alabama. This case involved a defendant being sentenced to death for committing a robbery (Boykin v. Alabama 1969). Although the case was raised on the grounds of the Eighth Amendment, this issue went unaddressed by the Court as it voted to strike down the death sentence on the issue that the defendant’s guilty plea had been involuntary (Epstein and Kobylka 1992).

The Eighth and Fourteenth Amendments are used most often in arguments by those who both support and oppose the death penalty. Because of the vagueness and ambiguity of these amendments, justices do have flexibility in how they interpret them. Also, justices on the Court have specifically stated that, at least in regards to the death penalty, the public view should serve as a signal to the Supreme Court (Trop v. Dulles 1958).

Like the issue of abortion that I will discuss in the next chapter, this thesis will focus on a small number of cases concerning the death penalty: Furman v. Georgia, Gregg v. Georgia, Woodson v. North Carolina, McCleskey v. Kemp, Atkins v. Virginia, and Roper v. Simmons. Furman v. Georgia (1972) was the Court’s first decisive foray into the realm of deciding whether the death penalty was unconstitutional.
Nine separate opinions, preceded by a *per curiam* opinion, were handed down by the Supreme Court in the case of *Furman v. Georgia*. The case involved a man who was convicted of murder and sentenced to death. Decided along with two others, the case strived to answer the question of the death penalty’s constitutionality, whether carrying out the death penalty in cases of rape and murder violated the Eighth Amendment’s cruel and unusual punishment clause (*Furman v. Georgia* 1972). The Court also considered whether death sentences imposed under discretionary statutes in which the jury was not presented with instructions on sentencing were constitutional (Liebman 2007). The Court’s *per curiam* opinion held that the death penalty did constitute cruel and unusual punishment and violated the Constitution (*Furman v. Georgia* 1972).

Justices William Brennan and Thurgood Marshall were the only justices among the majority who argued that the implementation of the death penalty under any circumstances would violate the Eighth Amendment (Liebman 2007; Pagniucci et al. 1973). Both justices remarked that a punishment should be considered to be “cruel and unusual” if it “violated the dignity of man” (*Furman v. Georgia* 1972). Justice Brennan provided four tests to be used in determining whether the death penalty violated human dignity. If the punishment “is so severe as to be degrading to human dignity, it is arbitrarily inflicted, it offends contemporary society, and it is excessive,” then it is not constitutional (Pagniucci et al. 1973, 281). On the other hand, Justice Marshall determined that capital punishment is unacceptable to modern society as well as being excessive. Both of these justices illustrated in their concurrences that public opinion should be used to determine acceptable forms of punishment. That is, the death penalty would be deemed...
in violation of the Eighth Amendment if a majority of the public thought that it was a cruel and unusual punishment (Pagniucci et al. 1973).

Justice Byron White agreed with the Court’s *per curiam* ruling and pointed out that the death penalty did not have great deterrent or redistributive effects. Justice Potter Stewart, along with Justice White, indicated that the death penalty in this case was unconstitutional because there were lesser penalties authorized by legislatures for the same capital offenses (*Furman v. Georgia* 1972). They also believed that because the death penalty was rarely imposed, it was considered to be excessive by the public. Justice William Douglas based his opinion on the fact that the death penalty was used in a discriminatory fashion and that the death penalty violated the Eighth Amendment. He believed that the death penalty was imposed disproportionately, particularly against African Americans (Pagniucci et al. 1973).

Justices who dissented in the case argued that the death penalty is a matter that should be left up to the states and legislators to decide, not one for judicial involvement. They disagreed that the death penalty is excessive and concluded that the Eighth Amendment did not provide a way to judge whether a punishment is excessive (Epstein and Kobylka 1992). The ruling in *Furman v. Georgia* suggested that the Supreme Court was concerned with the discretion given to juries and judges in determining death sentences. The Court did not want juries to be able to selectively apply the death sentence. The Court prohibited states from using their current capital punishment procedures because they believed them to be arbitrary and capricious (Epstein and Kobylka 1992).
In response to the decision in *Furman v. Georgia*, most states ratified their capital punishment statutes, with some making the death penalty mandatory for certain crimes and others seeking to guide juries in their decisions to apply the death penalty (Liebman 2007). The decision in *Furman v. Georgia* propelled the issue of capital punishment into prominence, bringing it to the front page of the political agenda at the time (Epstein and Kobylka 1992). The decision brought forth quite a backlash from the states, with them quickly taking action to ratify their capital punishment systems.

*Gregg v. Georgia*, July 1976

The next significant death penalty case examined by the Court was that of *Gregg v. Georgia*, which again posed the question of whether the death penalty was in violation of the Eighth and Fourteenth Amendments and constituted cruel and unusual punishment. In a bifurcated procedure, the defendant in this case was found to be guilty of murder as well as robbery and sentenced to death by the jury who was provided with instructions about when aggravated circumstances should be applied in death penalty cases (*Gregg v. Georgia* 1976). Bifurcated procedures allows for a trial to be divided into two parts. One procedure determines the guilt of a defendant and the other determines the sentencing. The Supreme Court held that bifurcated proceedings did not violate the Eighth and Fourteenth Amendments in all circumstances (*Gregg v. Georgia* 1976). The concurring justices argued that bifurcated proceedings allowed careful sentencing.

In the plurality opinion of the Court, Justice Potter Stewart noted that the death penalty has long been an accepted form of punishment in the United States and was accepted by the Framers. He noted that the language of the Fifth Amendment supported
the death penalty by saying that a person’s life could only be deprived with due process of the law. The Fifth Amendment states that “nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb…nor be deprived of life, liberty, or property without due process of law” (U.S. Constitution, art. 3, sec. 1). The Fourteenth Amendment also states that “no state shall deprive any person of life, liberty, or property, without due process of law” (U.S. Constitution, art. 3, sec. 1). Justice Stewart disagreed with the notion that American society regarded the death penalty as an unacceptable form of punishment and instead wrote that society viewed capital punishment as a criminal sanction that is necessary for society to function (Bedau 1982). Justice Stewart also remarked that an indication that society has come to accept capital punishment as appropriate is the response that occurred from state legislatures after the Furman v. Georgia ruling was handed down. As a response to that ruling, “the legislatures of at least 35 states have enacted new statutes that provide for the death penalty” (Gregg v. Georgia 1976). Given that legislators act as the representatives of their constituents and on their behalf, the Court assumed that American society was not yet ready to abolish capital punishment. The plurality opinion emphasized that even though juries were not employing capital punishment frequently, it did not mean that they rejected the death penalty, merely that it was reserved for the most extreme of cases. Justice Stewart also argued that the death penalty served as a form of deterrence and retribution. It deters individuals from committing similar crimes or the same crimes again and also prevents individuals from taking the law into their own hands, averting chaos in a society (Bedau 1982).
In his dissent in the case, Justice Brennan maintained that the death penalty was unconstitutional under all circumstances. He argued that the Court’s focus should be on deciding whether the death penalty itself is unconstitutional, not just the procedures that determine whether an individual should face capital punishment (Gregg v. Georgia 1976). Justice Marshall also dissented in this case, writing that the death penalty was unconstitutional under the Eighth and Fourteenth Amendments, and he acknowledged that the opinion of society should be taken into account, albeit only informed opinions (Gregg v. Georgia 1976). Justice Marshall thought that the states’ legislative response to the Furman v. Georgia decision was inconclusive proof that the majority supported the death penalty, unless that majority was informed. He observed that the public did not possess the required information needed to make a substantial judgment on capital punishment. Justice Marshall further cited a poll taken that pointed out that American society was largely unaware of the death penalty. He believed that were individuals to be provided with information regarding capital punishment, they would repudiate the death penalty, finding it to be unacceptable and shocking (Gregg v. Georgia 1976).

Woodson v. North Carolina, July 1976

Like most of the cases regarding the death penalty that came before, the 1976 case of Woodson v. North Carolina also focused on a specific question. The question asked was whether the mandatory death penalty law of North Carolina violated the Eighth and Fourteenth Amendments. After Furman v. Georgia, North Carolina changed its law, which provided juries with discretion in sentencing, to require that the death penalty be mandatory in cases of first degree murder (Woodson v. North Carolina 1976).
The Supreme Court ruled that mandatory death penalties were unconstitutional and in violation of the Eighth and Fourteenth Amendments. In its opinion, the Court pointed to the fact that the public had rejected mandatory rulings with the practice being viewed as unduly harsh (*Woodson v. North Carolina* 1976). Justice Stewart, once again writing the plurality opinion of the Court, noted that the history of the United States has been to allow in some cases of murder for the offender to be punished by imprisonment rather than death. Once more, the Court noted that “evolving social values” have rejected mandatory death sentences, and that the North Carolina statute had departed from contemporary standards (*Woodson v. North Carolina* 1976). The Court’s opinion also mentioned that juries were not provided with adequate procedures and instructions to make the decision to implement the death penalty. By making sentencing mandatory, the statute did not really resolve any of the issues regarding jury discretion prompted by *Furman v. Georgia*; it merely pushed them aside. According to the opinion, juries, while not given unrestrained discretion, should still maintain some flexibility because if they are not given that freedom, they may choose to free certain defendants facing mandatory death sentences rather than consign them to die, regardless of their guilt (Kennedy 1988). Public opinion polls showed that the majority of individuals favor that the death penalty be administered on a discretionary rather than mandatory basis (Kennedy 1988).

Furthermore, the Court noted that the North Carolina statute did not take into account the record of individuals before subjecting them to the death penalty (*Woodson v. North Carolina* 1976).

In his dissent, Justice White mentioned that because the death penalty is so seldom used, the North Carolina statute making it mandatory in crimes of first degree
murder was not in violation of the Eighth Amendment. Justice William Rehnquist also dissented, rejecting the plurality opinion’s view that the character and record of an individual should be taken into account when applying capital punishment. He noted that the Constitution did not provide for individualized sentencing and states should, therefore, not have to take into account the personality or character of an individual when undertaking sentencing procedures (*Woodson v. North Carolina* 1976). He believed that allowing the death penalty would undoubtedly encourage fair trials and an accurate fact finding process because the punishment is so irreversible (*Woodson v. North Carolina* 1976). The dissenters maintained that the death penalty, administered in any way, was not in violation of the Eighth Amendment.

Throughout these three former cases, a trend among the Supreme Court can be observed. Justices on both sides of the issue agreed that the death penalty is a question of morality and that standards of contemporary society should be used in making decisions regarding capital punishment, with Justice Marshall modifying that statement to state that only the informed opinion of the public should set precedent. Nevertheless, the Supreme Court has signaled that public opinion should set policy in some cases. Some justices have also mentioned that the death penalty is not an issue that should be settled in the Court but rather by the legislatures and, indirectly, the people.


Unlike previous cases that discussed mandatory sentencing, *McCleskey v. Kemp* (1987) involved race discrimination in the employment of the death penalty. It concerned a black defendant who was convicted of killing a white police officer in
Georgia and then was given the death penalty (McCleskey v. Kemp 1987). The case asked
the question of whether a statistical study, known as the Baldus Study, indicating racial
discrimination in the administration of capital punishment in the Georgia system meant
that the death penalty violated the Eighth and Fourteenth Amendments (McCleskey v.
Kemp 1987). The Baldus study supplied the Court with proof that a disparity existed in
the manner that the death penalty was administered based on both a victim’s and a
defendant’s race (McCleskey v. Kemp 1987). The study was based on more than 2,000
murder cases that occurred in the 1970’s in Georgia (McCleskey v. Kemp 1987). It
showed that defendants who killed whites were more likely to be put to death than those
who killed blacks. Also, the race of the defendant played a role in whether capital
punishment would be imposed.

The Supreme Court rejected the notion that disparity in the death penalty
made its use unconstitutional. Justice Lewis F. Powell delivered the opinion of the Court
in which he stated that the defendant failed to prove discrimination in his own case. In
order for the Court to find that there was a violation of the Fourteenth Amendment’s
Equal Protection Clause, a defendant would have to establish that he received the death
penalty only because of his race or that of his victim. The defendant in this case failed to
provide specific evidence that showed he was discriminated against in his own trial and
instead relied on the broad findings of the Baldus study (McCleskey v. Kemp 1987). The
Court acknowledged that it would be unwise to rely on statistical studies given the
substantial discretion present in capital sentencing (Lee and Bhagwat 1998). It also
suggested that statistical evidence, no matter how powerful, cannot prove causation in a
particular case (McCleskey v. Kemp 1987). Scholars criticized the Court by stating that
discretion in capital sentencing did not necessarily mean that the decisions made were not
guided by certain factors or were random (Lee and Bhagwat 1998). According to critics,
the Court held the McCleskey case to unusually higher standards and interpreted the
Baldus study as providing merely a correlation and not causation in the administration of
the death penalty.

Justice Powell also noted that the argument provided by the Baldus study is
one that should be presented to legislatures because their members are elected by the
people and are required to respond to the moral values of their constituents (Kennedy
1988). Furthermore, Justice Powell suggested that were the Court to accept the challenge
provided by the case, it would invite similar challenges to capital punishment under the
Equal Protection Clause by all disadvantaged groups (Kennedy 1988). The Supreme
Court did not accept historical evidence that showed that prior to the Civil War, Georgia
enacted laws that were racially discriminatory. The Court noted that the racial history and
disparity in Georgia did not itself make the death penalty unconstitutional. Although the
Court did notice the “continuity of formal and informal racial discrimination in Georgia’s
criminal justice system from the slavery era to the present moment,” the Supreme Court
did not agree that it made the death penalty unconstitutional (Kenneth 1988, 1412).

The legal community was shocked at the conclusion the Court arrived at in the
case of McCleskey v. Kemp, likening it to other cases such as Plessy v. Ferguson and
Korematsu v. United States (Kennedy 1988). Many scholars believed that the Supreme
Court wrongfully ignored racial discrimination in the administration of capital
punishment in this case (Kennedy 1988). This failure by the Court served to legitimate
the conduct of officials in Georgia and highlighted the wrongs in the Baldus study as
being nonjusticiable (Kenneth 1988). Critics argued that the Court “endorsed a system of separate-but-unequal, where statistically, African-Americans convicted of murdering whites received the death sentence at a frighteningly higher rate than whites convicted of murdering whites” (Graines and Wyatt 2000, 2).

\textit{Atkins v. Virginia}, June 2002

In the next significant case addressing the issue of the death penalty, the Court looked at whether the death penalty should be administered to the mentally retarded. The case, \textit{Atkins v. Virginia}, involved Daryl Atkins, who had been convicted of armed robbery, abduction, and murder (\textit{Atkins v. Virginia} 2002). During his trial, a psychologist testified that the defendant was mentally retarded. The Virginia Supreme Court rejected the claim that Atkins should not be sentenced to death because he was mentally retarded. The Supreme Court remanded the ruling and held that executions of the mentally retarded did constitute cruel and unusual punishment and, thus, violated the Eighth Amendment (\textit{Atkins v. Virginia} 2002). The Court mentioned that public reaction to the execution of a mentally retarded individual had prompted a number of states to conclude that the death penalty was not a suitable form of punishment for those who are mentally retarded. According to the Court, the consistent direction of states to prohibit the execution of the mentally retarded has proven that the contemporary standards of modern society have changed to find this type of punishment excessive (\textit{Atkins v. Virginia} 2002). The Court said that “a claim that punishment is excessive is judged not by the standards that prevailed in 1685…but rather by those that currently prevail” (\textit{Atkins v. Virginia} 2002, 311).
The opinion of the Court, as delivered by Justice John Paul Stevens, noted that because mentally retarded individuals are limited in areas of reasoning, they are unable to act with the same level of moral responsibility as those who are not mentally retarded (Atkins v. Virginia 2002). Furthermore, the fairness of trials can be called into question as a result of their disabilities. Mentally retarded defendants are not able to give meaningful assistance to their counsels or be effective witnesses in their own cases. The Court left it up to the states to define the criteria to be used in ascertaining which individuals are or are not mentally retarded. They did not clearly define the class of individuals who would be protected from capital punishment under the Eighth Amendment and so left room for inequities to develop from state to state.

In his dissent, Chief Justice Rehnquist noted that the actions of legislators are insufficient proof of the evolving standards of contemporary society. The dissent also pointed out that the Court should not take in blind faith polls that are brought to its attention because various sampling techniques can be used to arrive at a desired conclusion. Justice Antonin Scalia rejected the idea that there was a national consensus rejecting the execution of the mentally retarded because only 18 states possessed legislation that prohibited capital punishment of the mentally retarded (Atkins v. Virginia 2002). He noted that in some cases, juries do impose capital punishment on the mentally retarded for extreme crimes, something which illustrated society’s acceptance. He also argued that the majority opinion of the Court failed to highlight the fact that the death penalty could serve as deterrence, preventing defendants from committing the same crime again, and that it is not just a retributive punishment (Atkins v. Virginia 2002).
Roper v. Simmons, March 2005

The next significant death penalty case also demonstrates the Court’s ability to set substantive policy in the area of capital punishment. *Roper v. Simmons* (2005) involved a boy who committed a crime at the age of seventeen and was sentenced to death in the state of Missouri after he turned 18. Simmons challenged his sentence, stating that the standards of decency in the United States had changed and that it was no longer acceptable for a defendant to be executed for a crime committed while under the age of eighteen (Myers 2006). The Court’s ruling in this case was based on the previous one, *Atkins v. Virginia*. It compared minors to mentally retarded persons, arguing that like mentally retarded persons, minors lacked full mental culpability and, therefore, could not be held fully responsible for their actions (Myers 2006). Using state laws that had been passed regarding the execution of minors, the Court found that national consensus on the subject had changed and that to impose the death penalty on minors violated the Eighth and Fourteenth Amendments. This decision overturned an earlier decision, *Stanford v. Kentucky* (1989), where the Court held that executing minors ages 16 and 17 was not a violation of the Eighth Amendment. The majority opinion held that its decision in *Roper* was based on the evolution of society’s standards on capital punishment (Myers 2006). Like *Atkins v. Virginia*, the Court pointed out that a relatively low number of states allowed the execution of minors and of those that did permit it, it was done so infrequently. The Court mentioned that because juveniles possessed a lack of maturity and an underdeveloped sense of responsibility, were more vulnerable to peer pressure, and did not have well developed characters, they cannot be compared with adults (*Roper v. Simmons* 2005). Moreover, the possibility still existed for juveniles to be reformed
because they are still underdeveloped. The majority opinion also mentioned that the United States was one of the few countries who sanctioned capital punishment of minors. The Court drew the line at 18 years old for the death penalty as it is the age that society determined adulthood by giving them the right to marry or vote (*Roper v. Simmons* 2005).

Justice Sandra Day O’Connor dissented by rejecting that national consensus existed that prohibited capital punishment for juveniles. She also rejected the idea that juveniles cannot be held morally responsible for their actions, stating that while it is true that some juveniles may be immature and underdeveloped, not all can be said to possess those same characteristics and so are ineligible for the death penalty (Myers 2006). Justice Scalia also disagreed that a national consensus existed because less than 50 states had shown a preference for abolishing capital punishment for minors. Justice Scalia argued that because in previous court decisions minors were held to be mature enough to make moral decisions, using the example that the Court allowed minors to obtain an abortion without parental consent, they could be held to those same standards regarding capital punishment (Myers 2006).

**Conclusion**

Public opinion has often played a role in the issue of the death penalty, with both opponents and proponents using public opinion polls to justify their beliefs and the Supreme Court extending its reach through its decisions (Vidmar and Ellsworth 1974). The Court, while citing public opinions polls in some of its majority opinions, has mostly chosen to use legislative actions to judge public opinion. By assuming that legislators act
to satisfy constituent preferences, the Court has judged the standards of society through statutes and legislative actions. In addition, some justices have argued that the Court should take into account informed opinion.

The death penalty is a sensitive issue for many individuals, one that forces them to examine fundamentally core beliefs. Because the issue requires individuals to focus on their values, it is one that is relatively simple and less technical than others. As with the issue of abortion, I selected these cases for my thesis because they are the most significant and salient cases concerning the death penalty. Furthermore, they cover a broad range of death penalty issues, such as whether juveniles or the mentally challenged should be sentenced to die. They do not only focus on whether the Supreme Court has ruled that capital punishment should be unconstitutional. I examine public opinion taken before and after the ruling of these cases in order to see whether it impacted the decision of the Supreme Court. Was the Court influenced by public opinion when it decided cases involving the death penalty, a morality policy issue? Is there a correlation between public opinion and the Supreme Court as shown by the death penalty cases?

The Supreme Court has made significant policy changes in the case of the death penalty. Furthermore, the Court has signaled its willingness to do so by inviting litigators to bring cases to the Court’s attention. The strongest area where the Court has suggested that it is following public opinion, or that at least public opinion should dictate change, is that of capital punishment. By constantly reinforcing the idea that “evolving standards of decency” should be used when interpreting the Constitution, the Court is alerting scholars to the fact that it is possible for Supreme Court decisions to correlate with public opinion.
CHAPTER VI

SUPREME COURT CASES INVOLVING
THE MORALITY POLICY OF
ABORTION

The issue of abortion has invited a tremendous amount of controversy in American society. Abortion policy was largely ignored in the early decades of the country, and it was not until the nineteenth century that the government began to regulate the practice (Rose 2007). The process of abortion in the nineteenth century was virtually a private matter. Pregnant women were often cared for by midwives and so the decision to end a pregnancy remained firmly in the hands of women (Rose 2007). When the practice of abortion was questioned by physicians who became concerned about declining fertility rates, and magazines began to advertise abortion as a means to control fertility, abortion gained more public exposure. As a result of that exposure, legislators also took notice of abortion and sought to regulate the practice (Rose 2007).

The movement to legalize abortion began in the 1960s and took hold in American politics. Many wanted to legalize or reform abortion laws as a result of concerns over possible health consequences of illegal abortion (Rossi and Sitaraman 1988). Medical experts and reformers in both the legal and public health fields wanted to remove abortion from state penal codes because they were concerned for maternal health. They wanted to establish hospital committees that would be able to grant or deny access
to legal abortion (Rossi and Sitaraman 1988). Opposing feminists organizations such as the National Organization of Women (NOW) wanted women to have the power to obtain an abortion regardless of the reasoning and did not want physicians to have the power to either grant or deny the request for an abortion (Rossi and Sitaraman 1988). The states were responsible for setting abortion policy before the Supreme Court intervened in 1973. The states had discretion to regulate the extent a woman could terminate a pregnancy and even retained quite a lot of significant authority after the 1973 *Roe v. Wade* decision. Since that 1973 decision, the Supreme Court has rendered more than 25 opinions on the subject (Patton 2007).

The issue of abortion is one that is highly controversial. Like most morality policy issues, it is characterized by the fundamental conflicts it generates among the public over core values and beliefs (Arceneaux 2002). Because the debate regarding abortion is framed around fundamental values, it is rather easy for the mass public to participate in the debate, unlike other more technical issues. “Abortion is a classic easy issue, about which citizens can easily form opinions without great technical knowledge” (Jelen and Wilcox 2003, 489). As a result of the fact that abortion is considered to be an easy issue for the American public to understand, the issue of abortion has become highly salient as well, producing quite an interest among the masses.

In a National Election Survey taken in 2000, 98% of respondents voiced an opinion about abortion (Jelen and Wilcox 2003). Abortion policy is one of the few issues that has the power to influence individuals to take extraordinary actions and to influence their political behavior. It is also an increasingly polarizing issue, “having even been at least partially responsible for realigning the bases of support in the major political
parties” (Arceneaux 2002, 374). Public opinion towards the issue varies depending on the reason why women are having an abortion. Polls taken in the 1960s and early 1970s have posed the question of abortion in many different ways. There are six questions that were asked regarding when it is acceptable for women to obtain an abortion. The question asked responders to categorize when women should be allowed to have abortions: 1) if their life is in danger, 2) there is a strong chance of serious defects in the baby, (3) the woman became pregnant as a result of rape or incest, 4) the woman cannot afford the child, 5) the woman does not wish to marry the father of the child, or 6) the woman is married and do not want to have any more children (*Roe v. Wade* 1973). All of these different categories provided different levels of support for abortion. For example, more individuals supported abortion if the life of the woman was in danger or if there was a serious chance of defects in the baby (Rose 2007).

Scholars Jennifer Strickler and Nicholas L. Danigelis found that despite the controversy generated by the abortion debate, public attitudes towards the issue have remained relatively stable. Using data from the General Social Survey, these scholars were able to determine that in both 1977 and in 1996, the percentage of those who believed that a married woman should be able to have an abortion should she no longer want children remained the same, at 45% (Strickler and Danigelis 2002). The stability in public opinion regarding abortion is explained by the authors as perhaps being caused by “counterbalancing shifts in views” (Strickler and Danigelis 2002, 188). That is, social movements supporting both anti-abortion Christian conservatives and pro-abortion forces have clashed, forcing public opinion to remain the same rather than advancing one way or the other. The movement toward abortion reform succeeded in producing more lenient
laws in many states and eventually resulted in promulgating the *Roe v. Wade* Supreme Court decision on January 22, 1973 (Rose 2007).

*Roe v. Wade*, January 1973

*Roe v. Wade* presented the consolidated case of three separate appellants. One of the cases involved a young woman challenging the constitutionality of Texas criminal abortion laws (*Roe v. Wade* 1973). These laws made it illegal for a woman to obtain an abortion unless it was determined by a physician that it would save her life. On appeal, the Supreme Court ruled that state criminal laws that made it illegal for a woman to obtain an abortion unless it was to save the life of the woman, and without regards to other factors, such as the stage of the pregnancy, violated the Due Process Clause of the Fourteenth Amendment (*Roe v. Wade* 1973). The Court also ruled that it would be left to the judgment of a woman’s physician to determine whether to abort before the end of the first trimester. Only after the first trimester could the states regulate abortion procedures, taking into account the health of the woman (*Roe v. Wade* 1973).

The Supreme Court’s decision in this case focused not only on whether a woman had a constitutional right to an abortion but also on the invoked right to privacy. The Court found that the Ninth and Fourteenth Amendments created a penumbra that implied a right to personal privacy. The Court created a framework with which to protect a woman’s right to an abortion. During the first trimester is when the woman’s right to abort is strongest. The states may regulate abortion during the second trimester to protect the health of the woman. And during the third trimester, the states may prohibit abortion in order to protect whatever interest it may have in the potential life of the fetus with
respect to allowing procedures to protect the health of the woman (*Roe v. Wade* 1973). The Court also determined fetus constitutional rights to be absent because a fetus is not a person but “potential life” (*Roe v. Wade* 1973).

Following the 1973 decision made in *Roe v. Wade*, right to life organizations became extremely active and prominent in American politics (Rossi and Sitaraman 1988). The landmark decision furthered heated on-going debate between anti-abortionists and those who believe that women have the right to an abortion. Opponents of abortion viewed the decision as not only an extension of the judicial power exercised by the Supreme Court, but also as proof of the erosion of moral values. That belief set into motion a powerful movement that sought to reverse the legalization of abortion (Rose 2007). The 1973 decision served as a catalyst that not only propelled the issue of abortion within the center of American politics but also enabled it to become even more polarized. Anti-abortion organizations increasingly called for reversal of *Roe v. Wade*, while the opposition called on the Supreme Court to hold firm. Anti-abortion groups were quite effective in pressuring both local officials and Congress (Blake 1977). *Roe v. Wade* was able to set the stage for several subsequent significant cases.

*Planned Parenthood of Southeastern Pennsylvania v. Casey*, June 1992

The 1992 case of *Planned Parenthood of Southeastern Pennsylvania v. Casey* represents yet another influential Supreme Court ruling regarding the morality policy of abortion. *Planned Parenthood of Southeastern Pennsylvania v. Casey* involved provisions in the Pennsylvania Abortion Control Act of 1982. The Act proclaimed that a woman seeking an abortion must give her consent prior to the procedure and must be
provided with information regarding abortion and then must wait 24 hours before the
also required that a minor must obtain the consent of a parent or a judge in order to obtain
Furthermore, it required that a married woman sign a statement indicating that she had
notified her husband of her decision to have an abortion, although this notification
statement would be excused in the case of an emergency (Planned Parenthood of

The Supreme Court found that all the provisions provided in the Abortion Act,
except the husband notification statement, were constitutional. The Court perceived the
husband notification provision of the Act as an undue burden on a woman’s
constitutional right to choose to terminate an abortion (Planned Parenthood of
Southeastern Pennsylvania v. Casey 1992). It was thought that in cases of domestic
abuse, a woman fearing for her safety would hesitate to procure an abortion if she had to

In the majority opinion of the Court, the justices chose to carefully reaffirm
Roe v. Wade while at the same time limiting the constitutional protections of women
(Whitman 2002). The majority opinion contained discussion of the reproductive rights of
women and potential risks should these rights not be retained (Whitman 2002). While this
case reaffirmed the central holding of Roe v. Wade that women have a right to an
abortion prior to fetus viability, it rejected the trimester framework. The Court also
developed a new standard designed to determine the validity of laws restricting abortion.
It stated that states could regulate abortion only as long as that regulation did not impose
an undue burden on a woman’s right to terminate her pregnancy (Whitman 2002). An undue burden is described by the Court as being one that “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus” (Planned Parenthood of Southeastern Pennsylvania v. Casey 1992, 853). The undue burden test was one that diverged from the previous standard used by the Court in Roe v. Wade. The previous test required the states to show a compelling interest in the pregnancy of women. Though the Court still maintained that states have a compelling interest in a fetus throughout the course of a pregnancy, the states now have to show that they are not creating an undue burden on a woman wanting to terminate a pregnancy with their abortion regulations (Planned Parenthood of Southeastern Pennsylvania v. Casey 1992).

As a result of the Court’s new undue burden test, the Court found that while some of the provisions in the Pennsylvania Abortion Control Act were burdensome, they did not constitute a substantial obstacle to a woman’s right to abortion (Whitman 2002). Critics argue that while replacing the compelling interest test with that of the new standard, the justices failed “to provide a systematic methodology by which to apply” the undue burden standard (Metzger 1994, 2027). As a result of that lack of methodology, the force of the Court’s standard was weakened and also produced a discrepancy in the way state abortion regulations were examined, something which led to decreased access of abortions to women (Metzger 1994).

The decision in Planned Parenthood of Southeastern Pennsylvania v. Casey gave states more leeway in regulating abortion and counseling pregnant women about alternatives to abortion (Robertson 1992). The Supreme Court allowed that the states
could set up regulations that are hostile to those seeking an abortion, as long as the regulations did not place substantial restrictions on access to abortion. States are also permitted to clearly express a preference for childbirth and “to seek to actively persuade a pregnant woman to carry to term” (Metzger 1994, 2032). To some, this decision was considered to be a setback in the freedoms allotted in the Roe v. Wade decision. It severely limited access to abortion and weakened the fundamental right provided for in Roe v. Wade.

Stenberg v. Carhart, June 2000

The issue of abortion once again came to the Court through the case Stenberg v. Carhart (2000). This case involved a Nebraska law that prohibited partial-birth abortion and did not take into account the viability of the fetus. Any violation of the law was deemed to be a felony and doctors performing partial-birth abortion were at risk of losing their license to practice medicine (Stenberg v. Carhart 2000). The suit was brought by respondent Carhart, a physician who performed abortions. His suit claimed that the Nebraska statute was unconstitutional. The United States Supreme Court found that the Nebraska Law was in violation of the federal Constitution (Stenberg v. Carhart 2000).

Primarily two abortion methods, dilation and evacuation (D&E) and dilation and extraction (D&X), were discussed in the case. Partial-birth abortion is associated with the D&X method, which is also considered to be the safer of the two methods in regards to the health of the woman. Although previous cases concluded that states could promote their preference for childbirth, they could not endanger a woman’s health when regulating abortion. The Supreme Court found that the Nebraska law could indeed
endanger women’s health by preventing them from seeking what is considered to be the safer and superior method of abortion, dilation and extraction (Heffeman 2001). The Court also held that the Nebraska law created an undue burden on a woman’s decision to terminate a pregnancy because it banned the most commonly used second trimester abortion procedure (Stenberg v. Carhart 2000). Moreover, the Supreme Court found the law to be unconstitutional because it did not include a provision that would provide an exception to the ban in order to preserve the life of the woman (Stenberg v. Carhart 2000). The Court also found the statute unduly vague, with the possibility that it could ban physicians from performing the dilation and evacuation method of abortion, not just the dilation and extraction method (Stenberg v. Carhart 2000).

In a concurring opinion, Justice John Paul Stevens stated that states do not have a legitimate interest in requiring physicians to follow certain methods of abortion (Berkowitz 2001). Justice Ruth Ginsburg also sided with the majority opinion though she issued a concurring opinion, which stated that the Nebraska statute merely served as a way for the state to further weaken the ruling of Roe v. Wade, as well as that of the modified Planned Parenthood of Southeastern Pennsylvania v. Casey (Berkowitz 2001). Justice Antonin Scalia dissented with the decision and stated that the issue involved in the case was one of value judgment. He reproached the Court for involving itself in politics and believed that the people, rather than the Court, should be making decisions on the issue of abortion. Justice Anthony Kennedy also presented a dissent in which he claimed that “the state of Nebraska had a right to recognize a moral difference between the two procedures” (Berkowitz 2001, 365). Justice Kennedy’s dissent evoked morality in the case involving abortion. He was willing to rule a certain way based not only on whether
the act was constitutional but also because of the idea that states can have a compelling moral interest in determining the lawfulness of an abortion procedure (Berkowitz 2001). The narrow ruling in the case of *Stenberg v. Carhart* meant that an avenue remained open for those exuding efforts to outlaw partial-birth abortion. Justice Sandra Day O’Connor signaled in her concurring opinion that she would be willing to uphold a law that was not vague, prevented only D&X abortion procedures, as well as provided an exception to preserve the life and health of the woman.

*Gonzales v. Carhart*, April 2007

In direct response to the Court’s decision in *Stenberg v. Carhart* (2000), Congress passed the Partial-Birth Abortion Ban Act of 2003. The Partial-Birth Abortion Act criminalized partial-birth procedures (Gee 2007). While the Act did not regulate abortion procedures used in the first trimester, it did so for those used in the second trimester and later stages of pregnancy. It prohibited doctors from performing partial-birth procedures that were not necessary to save the life of a woman. In the case of *Gonzales v. Carhart* (2007), the Supreme Court held that the Partial-Birth Abortion Act was not vague and did not place an undue burden on a woman’s right to abortion (*Gonzales v. Carhart* 2007)

The Court found that a health exception was unnecessary in order for the Act to be constitutional because of the medical uncertainty that the prohibition would create any significant health risks at all or that the procedure would be necessary in some cases (*Gonzales v. Carhart* 2007). The Court also noted that because there were alternatives that could be used instead of the procedure prohibited, the Partial-Birth Abortion Ban Act
did not create an undue burden to a woman seeking to terminate her pregnancy. The justices dissenting in this case argued that the act should have provided an exception as necessary to preserve the health of the woman that was prescribed in the case of *Stenberg v. Carhart*. They also noted that in some cases, the procedure being banned was the safest procedure (*Gonzales v. Carhart* 2007). Furthermore, they stated that a different standard should have been established between previability and postviability. Because the term fetus was the one used in the language of the act, it did not account for viability, something that is used to determine a state’s interest in regulating abortion (*Gonzales v. Carhart* 2007). Several scholars noticed that the decision in *Gonzales v. Carhart* meant that some physicians would hesitate to perform even legal intact D&E procedures for fear of criminal charges (Kessler 2007). Others also commented that the Court was encroaching into the practice of medicine, preventing physicians from exercising their best judgments to perform procedures that they deem best for their patients (Kessler 2007).

The ruling in *Gonzales v. Carhart* is believed by many to have severely limited a woman’s right to choose an abortion, in addition to eroding the principle findings of *Roe v. Wade*. It also failed to follow the precedent that was set in previous Court cases, particularly *Stenberg v. Gonzales*, which clearly prohibited bans on abortion procedures that did not make an exception in cases where the woman’s health was in danger. The lack of use of precedent in this case meant that the Court could have been using other means to come to a decision. Could it have been using signals from the public? Also, the tradition of the Court had been to defer to the medical field in determining which procedures were medically necessary; *Gonzales v. Carhart* marked a
departure from that tradition by preventing physicians from performing a specific medical procedure (George 2008). The Court’s decision could have an effect on future cases on abortion, giving it leeway to repudiate the precedent of *Roe v. Wade*.

**Conclusion**

I chose these cases because of their saliency to the American public. More individuals are aware of these cases than other abortion cases. As a result of that salience, more public opinion poll data is available to be analyzed. In Chapter VIII, I use data from various polling organizations, such as Gallup and the General Social Survey, to determine public opinion both before and after each of the four abortion cases discussed in the above paragraphs. I examine public opinion taken before and after the ruling of these four cases in order to see whether it impacted the decision of the Supreme Court. I use frequency tables to verify whether there is a connection between the two variables. Was the Court influenced by public opinion when deciding these abortion cases? Is there a correlation between public opinion and the Supreme Court? Nowhere in the United States Constitution is the word abortion mentioned (or even privacy, the reasoning used by the Supreme Court to guarantee women the right to an abortion). As a result of that lack of specification, the Supreme Court justices have more flexibility to interpret and set abortion policy according to not only their own ideology but also public opinion as well.
CHAPTER VII

CORRELATION BETWEEN SUPREME COURT DECISIONS AND PUBLIC OPINION ON ISSUES OF THE DEATH PENALTY

As a result of the saliency of the issue, public opinion regarding the death penalty has and continues to be greatly analyzed and gathered. The death penalty, like abortion, is one of the issues that concerns the American public and serves to divide it on fundamental principles. Some view the death penalty as a deterrent and retributive punishment while others regard it as disproportionate and cruel. The main purpose of this chapter is to test the impact of public opinion on Supreme Court decisions regarding the death penalty. Do Supreme Court decisions correlate with public opinion in regards to the death penalty? In past chapters, I suggest that public opinion is an external factor that can influence Supreme Court decisions. In order for the Supreme Court to successfully make important policy changes, and because it cannot fully control policy outcomes, it has to be responsive to public opinion. The Court needs to invite public support for its decisions in order to avoid challenges from the other branches of government, thereby protecting its legitimacy and influence (Spaeth and Segal 2002).

As a morality policy, the death penalty is a perfect subject for this project because public opinion can play a large role in the issue. Morality policies are generally
salient, simple, and can generate wide public participation. In cases of morality policy, policymakers have the ability and incentive to reflect the wishes of the public and they are more responsive to their constituents’ values on morality policy than on non-morality policies (Mooney and Lee 2000). Because the public is more aware of issues regarding morality policy, policymakers cannot afford to ignore their opinions. And, given that the Supreme Court has been characterized as a policymaker that wants to make lasting policy changes, it is reasonable to theorize that in order for the Court to realize its goals, it has to pay attention to the wishes of the public (Mishler and Sheehan 1993).

Scholar Gregg Murray writes that a major political and legal justification for the implementation of the death penalty is often the significant public support that exists for the practice, although that support is based on one dimensional measures of public opinion (Murray 2003). He suggests that attitudes toward the practice may change if individuals are made aware of all the different dimensions that exist in the issue, given its complexity (Murray 2003). Murray agrees that the American public is not very knowledgeable about capital punishment, and, similar to Justice Thurgood Marshall, states that should the American public become informed about capital punishment, support for the death penalty would erode. Scholars Stacy Mallicoat and Gregory Brown concur that most individuals’ attitudes toward the death penalty stem from emotion and personal values instead of solid information or rational arguments (Mallicoat and Brown 2008). Popular support is needed for the continued existence of the death penalty. Should the American public come to reject the use of capital punishment in the United States, it is very likely that state legislatures, Congress, and the Supreme Court would follow the lead of the majority (Ellsworth and Gross 1994).
Throughout this chapter, I collect and analyze public opinion data regarding the cases discussed throughout the thesis. I enter public opinion data into frequency distribution tables and graphs in order to determine the relationship between public opinion and the Supreme Court’s decisions. All of the data in this thesis is from secondary sources: the General Social Survey, the Gallup poll, and the Harris-Interactive poll.

Conducted by the National Opinion Research Center, the General Social Survey (GSS) is a questionnaire used to collect data on the demographics, behavior, and attitudes of residents of the United States. Beginning in 1972, these data are the longest running project funded by the Sociology Program of the National Science Foundation (GSS 2009). It monitors social change in the United States and is a unique source for data. The National Opinion Center at the University of Chicago conducts a series of interviews from a random sample of the population. The survey covers a wide range of topics, from attitudes towards guns, religion, and the government. It is also regarded to be the best source of data on social trends (GSS 2009).

The Gallup Poll, which I also use as a source for data collection, has been around since 1935. It is designed to study human behavior and public opinion in the United States and abroad in some cases. It is a reputable polling organization that strives to provide economic, social, and political indicators. The Harris Interactive polling organization has been a producer of the Harris poll surveys since 1963. The organization specializes in public opinion research, using a variety of approaches, such as telephone surveys, internet surveys, and online panels (Harris-Interactive 2010). The Harris Poll is highly respected throughout the world and has been used in countless research projects.
The surveys measure trends, opinions, and behaviors, as well as motivation of the general public.

Data in the following chapters is in chronological order of the cases, starting with the oldest and ending with the most recent. I use public opinion data taken several years before and after the cases are decided to determine the relationship provided for in the hypothesis. I also use this data in order to discover any trends or changes in public opinion after a decision has been rendered by the Court.

**Furman v. Georgia, June 1972**

In the case of *Furman v. Georgia* (1972), the Court decided that the death penalty constituted a cruel and unusual punishment because its implementation was arbitrary and therefore violated the Eighth Amendment of the United States Constitution. I use data taken from the Gallup polls in November of 1971 and in November of 1972 to analyze public opinion regarding the death penalty in this case. The Gallup polls asked whether individuals were in favor of the death penalty for a person convicted of murder. As Table 1 and Figure 1 demonstrate, only 49% of individuals supported capital punishment in 1971, with 40% rejecting the process and 11% being unsure of their position. In the fall of 1972, 57% of individuals were in favor of the death penalty, 32% were not in favor of capital punishment, and 11% did not provide an opinion. The results show that only 49% of individuals supported death penalty right before the issue was brought to the attention of the Supreme Court. Though this percentage might show a very slight correlation between the Court’s decision and public opinion, margin of errors would keep anyone from definitely concluding that such a relationship existed. Perhaps it
Table 1. Public opinion data regarding the death penalty in the years of 1971 and 1972.

<table>
<thead>
<tr>
<th></th>
<th>November 1971</th>
<th>November 1972</th>
</tr>
</thead>
<tbody>
<tr>
<td>Favor Capital Punishment</td>
<td>49%</td>
<td>57%</td>
</tr>
<tr>
<td>Oppose Capital Punishment</td>
<td>40%</td>
<td>32%</td>
</tr>
<tr>
<td>No Opinion</td>
<td>11%</td>
<td>11%</td>
</tr>
</tbody>
</table>


Figure 1. Public opinion data regarding the death penalty in the years of 1971 and 1972. The survey question was “Are you in favor of the death penalty for a person convicted of murder?”

was because there was not a strong majority support for the issue that the Supreme Court decision did not correlate with public opinion. Although, right after the decision was handed down by the Supreme Court in 1973, the numbers changed by 8%. This shift in public opinion support for the death penalty implies that a majority of individuals did not approve of the Court’s decision, a statistic that perhaps prepared the stage for how the Court would decide the next death penalty case that was brought to its docket, *Gregg v. Georgia*, barely four years after the decision in *Furman v. Georgia*.

*Gregg v. Georgia*, July 1976

In *Gregg v. Georgia* (1976), the Court ruled that the death penalty as implemented did not violate the Constitution and did not constitute a cruel and unusual form of punishment. The Court stated that the death penalty had long been accepted in American society, which viewed capital punishment as a necessary societal function. The Court stated as proof of that view the fact that since the Court’s ruling in *Furman v. Georgia*, numerous legislatures had enacted new laws to provide for the death penalty, presumably as a result of pressure from their constituents (*Gregg v. Georgia* 1976).

The General Social Survey provides the data necessary for the analysis in this case. The variable taken from the General Social Survey asked whether individuals favor or oppose the death penalty for persons convicted of murder. I analyze data taken from 1975, a year before the Court rendered its decision, and in 1977, a year after the decision. Table 2 and Figure 2 illustrate that in 1975, 64.4% of individuals were in favor of capital punishment, a number that increased again in 1977 to 72.1%. In 1975, the sample of
Table 2. Public opinion data regarding the death penalty in the years of 1975 and 1977.

<table>
<thead>
<tr>
<th></th>
<th>1975</th>
<th>1977</th>
</tr>
</thead>
<tbody>
<tr>
<td>Favor Capital Punishment</td>
<td>64.4%</td>
<td>72.1%</td>
</tr>
<tr>
<td>Oppose Capital Punishment</td>
<td>35.6%</td>
<td>27.9%</td>
</tr>
</tbody>
</table>


Figure 2. Public opinion data regarding the death penalty in the years of 1975 and 1977. The survey question was “Do you favor or oppose the death penalty for persons convicted of murder?”

individuals surveyed was 1,383 while in 1976 it increased to 1,423. The results show that the Supreme Court’s decision did in fact correlate with public opinion.

The Supreme Court decided the case, *Furman v. Georgia*, in 1972 and found that the use of the death penalty was unconstitutional. In that year, public opinion favored capital punishment, though failing to be a super majority. It could be said that as public opinion became even stronger in the following years, the Supreme Court capitulated to public opinion when it overturned the case *Furman v. Georgia* and instead issued its decision in *Gregg v. Georgia*, a case that allowed the use of the death penalty. The overwhelming majority of the public who supported the use of capital punishment likely had some influence on the Court, who, barely four years later, shared the same opinion as that of the public.

It may be a coincidence that the Court decided in favor of the death penalty amid high percentages of support for the practice, but it could also be that the Court, at least in this instance, was in fact swayed by public opinion. As further proof that the Court may have been influenced by public opinion, the Supreme Court’s plurality opinion in this case pointed out that the sentiments of society should serve as indications to the Court, guiding the Court in whether it should rule in favor or opposition of capital punishment. And, in fact, the Court found that society had come to view capital punishment as a criminal sanction that is necessary for the social order to reign (Bedau 1982). Justice Stewart also remarked that an indication that society has come to accept capital punishment as appropriate is the response that occurred from state legislatures after the *Furman v. Georgia* ruling was handed down. Legislators were triggered to enact
new statutes that provided for the death penalty in accordance with the *Furman v. Georgia* ruling (*Gregg v. Georgia* 1976).


In 1976, the Supreme Court decided that mandatory death penalty laws were unconstitutional (*Woodson v. North Carolina* 1976). After *Furman v. Georgia*, many states changed their laws to require mandatory death sentences, particularly in cases of first degree murder (*Woodson v. North Carolina* 1976). In the plurality opinion of *Woodson v. North Carolina*, the Court pointed to the fact that the public had rejected mandatory rulings, with the practice being viewed as unduly harsh (*Woodson v. North Carolina* 1976). Justice Potter Stewart noted that the history of the United States has been to allow in some cases of murder for the offender to be punished by imprisonment rather than death. Once more, the Court detailed that “evolving social values” had rejected mandatory death sentences and that the North Carolina statute had departed from contemporary standards (*Woodson v. North Carolina* 1976). According to the opinion, juries, while not given unrestrained discretion, should still maintain some flexibility in deciding whether to send someone to death because if they are not given that freedom, they may choose to free certain defendants facing mandatory death sentences rather than consign them to die, regardless of their guilt (Kennedy 1988). The opinion cited polls that showed that the majority of individuals favored that the death penalty be administered on a discretionary rather than mandatory basis (Kennedy 1988).

Support for mandatory death penalty is shown to be weaker than general support for the death penalty itself (Ellsworth and Gross 1994). Individuals given a
choice between a mandatory death penalty and a discretionary death penalty most often choose the latter (Ellsworth and Gross 1994). The American public prefers that juries be allowed to make the decisions in regards to the facts of specific cases.

It is clear that proponents of mandatory death penalties want the discretion to spare an occasional sympathetic killer, while some opponents of capital punishment want the discretion to execute a few especially villainous ones. (Ellsworth and Gross 1994, 36)

Regardless of what drives attitudes about the death penalty, it is undeniable that those attitudes are intense and divisive.

Public opinion data for this analysis is taken from the Harris-Interactive polls. The polls asked whether individuals favor mandatory death penalty for persons convicted of first degree murder. The question is as follows: “Do you feel that all persons convicted of first degree murder should get the death penalty, that no one convicted of first degree murder should get the death penalty, or do you feel that whether or not someone convicted of first degree murder gets the death penalty should depend on the circumstances of the case and the character of the person?” Essentially, the question asks whether individuals favor or oppose a mandatory death penalty. Of the people polled in 1973, as shown in Table 3 and Figure 3, only 28% favored a mandatory death sentence, 16% opposed the death penalty for those convicted of murder, 53% agreed that even in a first degree murder case, the decision to sentence someone to death should depend on the circumstances of the case and the character of the person, and 3% were unsure. In 1977, although the number of respondents who favored a mandatory death sentence rose to 40%, it still remained below the majority. Thirteen percent of individuals opposed the death penalty for those convicted of murder, 44% agreed that the decision to sentence
Table 3. Public opinion data regarding mandatory death penalty.

<table>
<thead>
<tr>
<th>“Do you favor or oppose a mandatory death penalty for persons convicted of murder?”</th>
<th>1973</th>
<th>1977</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mandatory Capital Punishment</td>
<td>28%</td>
<td>40%</td>
</tr>
<tr>
<td>Oppose Capital Punishment</td>
<td>16%</td>
<td>13%</td>
</tr>
<tr>
<td>Discretionary Capital Punishment</td>
<td>53%</td>
<td>44%</td>
</tr>
<tr>
<td>Unsure</td>
<td>3%</td>
<td>3%</td>
</tr>
</tbody>
</table>


Figure 3. Public opinion data regarding mandatory death penalty. The survey question was “Do you favor or oppose a mandatory death penalty for persons convicted of murder?”

someone to death should depend on the circumstances of the case and the character of the person, and 3% were unsure. Both in 1973 and in 1977, the number of those who opposed a mandatory death penalty outnumbered those who were in favor of the practice. These numbers are all consistent with the ruling of the Supreme Court. They show that the Court’s opinion in the case of *Woodson v. North Carolina* did in fact correlate with public opinion regarding the subject of the mandatory death penalty. The results demonstrate a clear correlation, if not causation, between public opinion and Supreme Court decisions.

*McCleskey v. Kemp*, April 1987

The next significant death penalty case decided by the Supreme Court was *McCleskey v. Kemp* in 1987. The question presented in this case concerned a study that showed that the death penalty is administered in a discriminatory manner towards minorities. The defendant in the case argued that both the race of the defendant and that of the victim play a large role in the imposition of the death penalty. The Supreme Court held that in order for the Court to find that there was a violation of the Equal Protection Clause, the defendant would have had to establish that he received the death penalty only because of his race or that of his victim. The Court found that the defendant failed to provide specific evidence that would show he was discriminated against in his own trial and instead relied on the broad findings of a statistical study (*McCleskey v. Kemp* 1987).

A 1985 Gallup poll that sampled 1,523 individuals asked whether people agreed that a black person was more likely than a white person to receive the death penalty for the same crime. The results inTables 4 and 5, and Figure 4 show that only
Table 4. Public opinion data regarding discrimination and the death penalty in 1985.

<table>
<thead>
<tr>
<th>“Do you agree or disagree that a black person is more likely than a white person to receive the death penalty for the same crime?”</th>
<th>January 1985</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agree</td>
<td>39%</td>
</tr>
<tr>
<td>Disagree</td>
<td>53%</td>
</tr>
<tr>
<td>No Opinion</td>
<td>8%</td>
</tr>
</tbody>
</table>


Table 5. Public opinion data regarding discrimination and the death penalty in 2000.

<table>
<thead>
<tr>
<th>“Generally speaking, do you believe the death penalty is applied fairly or unfairly in this country today?”</th>
<th>June 2000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fairly Applied</td>
<td>51%</td>
</tr>
<tr>
<td>Unfairly Applied</td>
<td>41%</td>
</tr>
<tr>
<td>No Opinion</td>
<td>8%</td>
</tr>
</tbody>
</table>


39% of individuals believed this was the case, 53% did not agree, and 8% provided no opinion. A study done by Gallup in June of 2000 found that 41% of individuals in a sample of 1,003 agreed that the death penalty was unfair due to racial differences, while 51% disagreed with that statement and 8% remained unsure.

Though the questions asked are worded differently, the conclusions remain the same. Furthermore, although the poll from 2000 was taken more than 10 years after the case was decided by the Supreme Court, the data can still be used to show correlation between Supreme Court decisions and public opinion. The data illustrates that a majority
of the public agreed both before and after the case was brought before the Supreme Court that the penalty was not unfairly applied and was not imposed in a discriminatory manner. The results are in accordance with the hypothesis that public opinion does correlate and can set precedence for Supreme Court decisions. Because of the saliency of this case, it is not surprising to note the correlation between the Supreme Court decision and public opinion. The Court has been shown to be a majoritarian institution, meaning that it can respond to majority opinions. In most cases, the Court has to pay attention to
public opinion if it wants its decisions to be enforced. The case of *McCleskey v. Kemp* showed that the Court is likely capable of being affected by public opinion.

*Atkins v. Virginia*, June 2002

The Supreme Court decided *Atkins v. Virginia* in 2002. This case focused on whether it was constitutional for the death penalty to be administered to the mentally retarded. The Supreme Court ruled that executions of the mentally retarded constitute cruel and unusual punishment and thus violate the Eighth Amendment (*Atkins v. Virginia* 2002). The Court maintained that society had now found the execution of the mentally retarded to be excessive. Using the “evolving standards of decency” argument, the Court was forced to conclude that the execution of the mentally retarded was no longer acceptable. The Supreme Court reasoned that because executions of the mentally retarded had become so uncommon in society, the practice should be classified as cruel and unusual punishment (*Atkins v. Virginia* 2002). The opinion of the Court noted that because mentally retarded individuals are limited in areas of reasoning, they are unable to act with the same level of moral responsibility as those who are not mentally retarded and so should not be punished in the same way (*Atkins v. Virginia* 2002).

In May of 2002, a Gallup Poll asked whether individuals favored or opposed the death penalty being administered to the mentally retarded. Table 6 and Figure 5 show that only 13% of those polled agreed that the death penalty should be imposed on the mentally retarded while 82% opposed and 5% failed to provide an opinion on the subject. Although data regarding public opinion on this issue after the case was decided is not available, the poll provided in May 2002, and in previous years, show that the majority
Table 6. Public opinion data regarding capital punishment for the mentally retarded.

<table>
<thead>
<tr>
<th>“Do you favor or oppose the death penalty for the mentally retarded?”</th>
<th>May 2002</th>
</tr>
</thead>
<tbody>
<tr>
<td>Favor Capital Punishment</td>
<td>13%</td>
</tr>
<tr>
<td>Oppose Capital Punishment</td>
<td>82%</td>
</tr>
<tr>
<td>No Opinion</td>
<td>5%</td>
</tr>
</tbody>
</table>


Figure 5. Public opinion data regarding capital punishment for the mentally retarded. The survey question was “Do you favor or oppose the death penalty for the mentally retarded?”


opinion in the United States opposed capital punishment for the mentally retarded, statistics that collided with the Supreme Court’s decision regarding the issue.
Roper v. Simmons, March 2005

The case of Roper v. Simmons in 2005 involved a boy who committed murder at the age of 17 and was sentenced to death in the state of Missouri after he turned 18. Simmons challenged his sentence, stating that the standards of decency in the United States had changed and that it was no longer acceptable for a defendant to be executed for a crime committed while under the age of eighteen (Roper v. Simmons 2005). The case compared minors to mentally retarded persons, arguing that like mentally retarded persons, minors lacked full mental culpability and, therefore, should not be held fully responsible for their actions (Roper v. Simmons 2005). Using state laws that had been passed regarding the execution of minors, the Court found that the national consensus on this issue had changed and that to impose the death penalty on minors violated the Eighth and Fourteenth Amendments. The Court pointed out that a relatively low number of states allowed the execution of minors and of those that did permit it, it was done so infrequently. The Supreme Court observed that executions of minors had become abhorrent to society (Boots, Heide, and Cochran 2004). The Court also mentioned that because juveniles possessed a lack of maturity and an underdeveloped sense of responsibility, were more vulnerable to peer pressure, and did not have well developed characters, they should not be compared with adults (Roper v. Simmons 2005, 543 U.S. 551). Moreover, the possibility still existed for juveniles to be reformed because they were still underdeveloped.

A May 2002 Gallup Poll determined individuals’ opinions regarding the execution of minors. Table 7 and Figure 6 show that only 26% of individuals favored the death penalty on minors and 69% opposed it, while 5% had no opinion. Studies since the
Table 7. Public opinion data regarding juveniles and the death penalty.

<table>
<thead>
<tr>
<th>“Do you favor or oppose the death penalty for juveniles?”</th>
<th>May 2002</th>
</tr>
</thead>
<tbody>
<tr>
<td>Favor Capital Punishment</td>
<td>26%</td>
</tr>
<tr>
<td>Oppose Capital Punishment</td>
<td>69%</td>
</tr>
<tr>
<td>No Opinion</td>
<td>5%</td>
</tr>
</tbody>
</table>


Figure 6. Public opinion data regarding juveniles and the death penalty. The survey question was “Do you favor or oppose the death penalty for juveniles?”

Source: Data adapted from Gallup, Inc. 2010b. Death penalty. http://www.gallup.com/poll/1606/death-penalty.aspx (accessed August 18, 2010). Impression of the death penalty on minors and 69% opposed it, while 5% had no opinion.
1930s often reveal that a substantial majority of the American public opposes the imposition of the death penalty on juveniles (Boots, Heide, and Cochran 2004). Although data regarding public opinion on this issue after the case was decided is not available, the poll provided in May 2002 show that a majority of individuals in the United States rejected the death penalty for minors. These studies and the public opinion data provided here are all consistent with the Supreme Court’s ruling in Roper v. Simmons, which demonstrate that Supreme Court decisions do in fact coincide with public opinion.

Conclusion

The data collected in this chapter demonstrate that a correlation does exist between public opinion and Supreme Court decisions. Public opinion follows a positive relationship with Supreme Court decisions in all reported instances. Before Furman v. Georgia was heard by the Court, only 49% of individuals favored the death penalty and the Court ruled accordingly by finding that the practice was unconstitutional. By the time of Gregg v. Georgia, the number of individuals who favored capital punishment had increased. In that case, it seemed that the Court’s position on the issue shifted dramatically, ruling along the same view as that of the public. In the other following cases concerning the death penalty, the Court’s decisions also paralleled public opinion. Because the death penalty is a morality issue, it is not surprising that the Supreme Court is so responsive to public opinion. Policymakers have the ability to reflect the wishes of the public in cases of morality policy because those policies require little of the technical knowledge that can inhibit citizen participation and engagement. Because the public is more than willing to express its opinion in cases of morality policy, policymakers such as
the Supreme Court are able to take note of majority opinion and then act accordingly in order to ensure that the policy is enduring and supported by the different branches of government. In fact, through its plurality and majority opinions, the Supreme Court has stated that public opinion should direct policy in cases such as the death penalty. Although public opinion data after the cases of *Atkins v. Virginia* and *Roper v. Simmons* were decided is not available, this does not take away from the conclusions that there is a relationship between public opinion and Supreme Court decisions. The data collected in this chapter provides strong support for the hypothesis that public opinion, as it relates to the morality policy of the death penalty, strongly correlates with Supreme Court decisions on the topic of capital punishment.
CHAPTER VIII

CORRELATION BETWEEN SUPREME COURT DECISIONS AND PUBLIC OPINION ON THE ISSUE OF ABORTION

The issue of abortion is and has been on the forefront of the American political agenda since the 1970s. It is a highly controversial issue that is characterized by the fundamental conflicts it generates among the public over core values and beliefs. The Supreme Court is one of the primary branches of government that has set policy in this area. Because the Court is responsible for much of the regulation set in this issue area, the question of whether the Court’s decisions concerning abortion contains a positive relationship with public opinion must be asked.

I expect Supreme Court decisions to correlate with public opinion because abortion is a salient issue in the United States, one that does not require the public to gather technical information. Because the debate regarding abortion is framed around fundamental values, it is rather easy for the mass public to participate in the debate, unlike other more technical issues. Abortion policy has the power to influence individuals to take extraordinary actions and to influence their political behavior. In Chapter IV I addressed in detail why it is important for the Supreme Court to pay attention to public opinion in situations involving the issue of abortion.
One reason is that in order for the Court to keep its influence and legitimacy, it must pay attention to the mood of the public. Also, an argument can be made that the Court needs to pay attention to public opinion if it, in turn, wants legislative support. The Supreme Court must calculate the extent to which Congress and the Executive branch will support its rulings, as it does not have the power to enforce its own decisions (Mishlan and Sheehan 1993). The legislature can take certain steps to chastise the Supreme Court if prodded by the public. Congress is in charge of the budget and so can take away the Supreme Court’s funding. Congress can also realign the Court’s appellate jurisdiction, which it has the ability to control as shown through the 1789 Judiciary Act and other succeeding acts (Mishlan and Sheehan 1993). Ultimately, the Court responds to public opinion because it is concerned about policy outcomes, which it cannot fully control, and it wants to avoid challenges from the other branches of government.

Throughout this chapter, I collect and analyze public opinion data regarding the Supreme Court’s abortion cases discussed throughout the thesis. I enter public opinion data into frequency distribution tables and graphs in order to determine the relationship between public opinion and the Supreme Court’s decision. As I mentioned in the last chapter, I use data from the General Social Survey, the Gallup Poll, the Harris-Interactive poll, and the ABC News polling unit to examine the relationship between the Supreme Court and public opinion. I examine this data in chronological order of the cases, starting with the oldest and ending with the most recent. Public opinion data taken from several years before and after cases are decided is used to determine the relationship provided for in the hypothesis. This data is also used in order to discover any trends or changes in public opinion after a decision has been rendered by the Court.
In the 1972 case of *Roe v. Wade*, the Supreme Court ruled that state criminal laws that made it illegal for a woman to obtain an abortion unless it was to save the life of the woman, and without regards to other factors, such as the stage of the pregnancy, violated the Due Process Clause of the Fourteenth Amendment (*Roe v. Wade* 1973). The Supreme Court invoked the Fourteenth Amendment and other Constitutional provisions in stating that they guaranteed a woman’s right to privacy in the case of pregnancy termination. The Court also ruled that it would be left to the judgment of a woman’s physician to determine whether to abort before the end of the first trimester. Only after the first trimester could the states regulate abortion procedures, taking into account the health of the woman (*Roe v. Wade* 1973). The Court found that the Ninth and Fourteenth Amendment created a penumbra that implied a right to personal privacy. The Court created a framework with which to protect a woman’s right to an abortion stating that during the first trimester, a woman’s right to abort is strongest. The states could regulate abortion during the second trimester to protect the health of the woman. And during the third trimester, the states could prohibit abortion in order to protect whatever interest it may have in the potential life of the fetus with respect to allowing procedures to protect the health of the woman (*Roe v. Wade* 1973).

Public opinion data for this analysis is taken from the Gallup poll. In December of 1969, the poll asked, “Would you favor or oppose a law which would permit a woman to go to a doctor to end a pregnancy at any time during the first three months”? Of all the respondents, as shown in Table 8 and Figure 7, 40% favored such a law, while 50% opposed it, and 10% were undecided. In a following survey in March of
Table 8. Public opinion data regarding abortion in the years of 1969 and 1974.

<table>
<thead>
<tr>
<th>“Would you favor or oppose a law which would permit a woman to go to a doctor to end a pregnancy at any time during the first three months?”</th>
<th>December 1969</th>
<th>March 1974</th>
</tr>
</thead>
<tbody>
<tr>
<td>Favor Abortion</td>
<td>40%</td>
<td>47%</td>
</tr>
<tr>
<td>Oppose Abortion</td>
<td>50%</td>
<td>44%</td>
</tr>
<tr>
<td>No Opinion</td>
<td>10%</td>
<td>9%</td>
</tr>
</tbody>
</table>


Figure 7. Public opinion data regarding abortion in the years of 1969 and 1974. The survey question was “Would you favor or oppose a law which would permit a woman to go to a doctor to end a pregnancy at any time during the first three months?”

1974, 47% of respondents favored a law that would permit a woman to go to a doctor to end a pregnancy during the first three months, 44% opposed it, and 9% were undecided.

Table 8 and Figure 7 show that in the case of *Roe v. Wade*, public opinion did not coincide with the Supreme Court decision. The majority of Americans did not favor abortion before the ruling of the case was rendered, and the number of those who did support abortion remained low at 47% after the decision was made public. One possible explanation for the absence of a correlation between the two variables, public opinion and Supreme Court decisions, is that at the time *Roe v. Wade* was brought to the attention of the Court, the issue of abortion was not at the forefront of the political agenda. It was not until after the decision was delivered that the public became more aware and more involved with the issue. Because abortion regulation was not quite so salient to the public before the 1970s, it can be said that public opinion was not as strong, or strong enough, to correlate with the Supreme Court decision (Rose 2007).

*Planned Parenthood of Southeastern Pennsylvania v. Casey*, June 1992

This case involved provisions in the Pennsylvania Abortion Control Act of 1982. The Act proclaimed that a woman seeking an abortion must give her consent prior to the procedure and must be provided with information regarding abortion, and then must wait 24 hours before the procedure (*Planned Parenthood of Southeastern Pennsylvania v. Casey* 1992). The act also required that a minor must obtain the consent of a parent or a judge in order to obtain an abortion (*Planned Parenthood of Southeastern Pennsylvania v. Casey* 1992). Furthermore, it required that a married woman sign a statement indicating that she had notified her husband of her decision to get an abortion,
although this notification statement would be excused in the case of an emergency 

The Supreme Court found that all the provisions provided in the Abortion Act, except the husband notification statement, were constitutional. The Court perceived the husband notification provision of the Act as an undue burden on a woman’s constitutional right to choose to terminate an abortion (*Planned Parenthood of Southeastern Pennsylvania v. Casey* 1992). The undue burden test was one that diverged from the previous standard used by the Court in *Roe v. Wade*. The previous test provided for the states to show a compelling interest in the pregnancy of women. Though the Court still maintained that states have a compelling interest in a fetus throughout the course of a pregnancy, the states now had to show that they were not creating an undue burden on a woman wanting to terminate a pregnancy with their abortion regulations. In the majority opinion of the Court, the justices chose to carefully reaffirm *Roe v. Wade* while at the same time limiting the constitutional protections of women (Whitman 2002).

Tables 9, 10, 11, 12 and Figure 8 show that public opinion coincided with the Supreme Court decision regarding most provisions of the Pennsylvania Abortion Control Act of 1982. Public opinion and the Court disagreed only in respect to the provision requiring a husband notification statement. A 1992 poll show that 86% of individuals favored that a woman seeking an abortion be provided with information regarding abortion, 12% opposed such a requirement, and 2% had no opinion. Table 9 shows that 73% of respondents favored a 24 hour wait regarding abortion procedures, 22% opposed such a wait, and 4% provided no opinion. Table 10 illustrates that 70% of individuals favored a law that required women under 18 to obtain parental consent before
Table 9. Public opinion data regarding abortion and the information requirement.

<table>
<thead>
<tr>
<th>Question</th>
<th>January 1992</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Do you favor or oppose a law requiring doctors to inform patients</td>
<td>Favor</td>
</tr>
<tr>
<td>about alternatives to abortion before performing the procedure?”</td>
<td>Oppose</td>
</tr>
<tr>
<td>favoring providing information</td>
<td>no opinion</td>
</tr>
<tr>
<td>provide information</td>
<td>86%</td>
</tr>
<tr>
<td>oppose information</td>
<td>12%</td>
</tr>
<tr>
<td>have no opinion</td>
<td>2%</td>
</tr>
</tbody>
</table>

Source: Data adapted from Gallup, Inc. 2010a. Abortion.  

Table 10. Public opinion data regarding abortion and the 24-hour notice.

<table>
<thead>
<tr>
<th>Question</th>
<th>January 1992</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Do you favor or oppose a law requiring women seeking abortions to</td>
<td>Favor</td>
</tr>
<tr>
<td>wait 24 hours before having the procedure done?”</td>
<td>oppose</td>
</tr>
<tr>
<td>favoring 24 hour notice</td>
<td>no opinion</td>
</tr>
<tr>
<td>provide 24 hour notice</td>
<td>73%</td>
</tr>
<tr>
<td>oppose 24 hour notice</td>
<td>22%</td>
</tr>
<tr>
<td>have no opinion</td>
<td>4%</td>
</tr>
</tbody>
</table>

Source: Data adapted from Gallup, Inc. 2010a. Abortion.  

Table 11. Public opinion data regarding abortion and parental consent for minors.

<table>
<thead>
<tr>
<th>Question</th>
<th>January 1992</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Do you favor or oppose a law requiring women under 18 to get parental</td>
<td>Favor</td>
</tr>
<tr>
<td>consent for any abortion?”</td>
<td>oppose</td>
</tr>
<tr>
<td>favoring parental consent for minors</td>
<td>no opinion</td>
</tr>
<tr>
<td>provide parental consent for minors</td>
<td>70%</td>
</tr>
<tr>
<td>oppose parental consent for minors</td>
<td>23%</td>
</tr>
<tr>
<td>have no opinion</td>
<td>7%</td>
</tr>
</tbody>
</table>

Source: Data adapted from Gallup, Inc. 2010a. Abortion.  
Table 12. Public opinion data regarding abortion and the husband notification requirement.

<table>
<thead>
<tr>
<th>“Do you favor or oppose a law requiring that the husband of a married woman be notified if she decides to have an abortion?”</th>
<th>January 1992</th>
</tr>
</thead>
<tbody>
<tr>
<td>Favor Husband Notification</td>
<td>73%</td>
</tr>
<tr>
<td>Oppose Husband Notification</td>
<td>25%</td>
</tr>
<tr>
<td>No Opinion</td>
<td>2%</td>
</tr>
</tbody>
</table>


Figure 8. Public opinion data regarding stricter regulations of abortion

seeking an abortion, 23% opposed it, and 7% had no opinion. Another 1992 poll demonstrated that 73% of people favored a law that would require women to notify their husbands before seeking an abortion, 25% opposed it, and 2% provided no opinion.

Although data was not available for the time period following the 1992 decision of Planned Parenthood of Southeastern Pennsylvania v. Casey, the data that was available before the decision shows a clear preference from the public for tighter restrictions regarding abortion that was reinforced by the Supreme Court. A correlation between public opinion and the Supreme Court decision is evident concerning all provisions except the one that required a husband notification statement.

Stenberg v. Carhart, June 2000

This case regards a Nebraska law prohibiting partial-birth abortion. Any violation of the law was deemed to be a felony and doctors performing partial-birth abortion were at risk of losing their licenses to practice medicine (Stenberg v. Carhart 2000). Primarily two abortion methods were discussed in the case: dilation and evacuation (D&E) and dilation and extraction (D&X). Partial-birth abortion is associated with the D&X method, which is also considered to be the safer of the two methods, in regards to the health of the woman. Although previous cases concluded that states could promote their preference for childbirth, they also stipulated that states could not endanger a woman’s health when regulating abortion. The Supreme Court found that the Nebraska law could indeed endanger women’s health by preventing them from seeking what is considered to be the safer and superior method of abortion, dilation and extraction (Stenberg v. Carhart 2000). It also held that the Nebraska law created an undue burden
on a woman’s decision to terminate a pregnancy because it banned the most commonly used second trimester abortion procedure (*Stenberg v. Carhart* 2000). Moreover, the law was found to be unconstitutional because it did not include a provision that would provide an exception to the ban in order to preserve the life of the woman (*Stenberg v. Carhart* 2000). The statute was also found to be unduly vague, with the possibility that it could ban physicians from performing the dilation and evacuation method of abortion, not just the dilation and extraction method (*Stenberg v. Carhart* 2000).

Table 13 and Figure 9 provide public opinion polls taken from the Gallup polling organization. The results show that a majority of individuals favor laws that

**Table 13. Public opinion data regarding partial-birth abortion in the year 2000.**

<table>
<thead>
<tr>
<th>“Would you favor or oppose a law which would make it illegal to perform a specific abortion procedure conducted in the last six months of pregnancy known as a “partial birth abortion,” except in cases necessary to save the life of the mother?”</th>
<th>March 2000</th>
<th>October 2000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Favor</td>
<td>66%</td>
<td>63%</td>
</tr>
<tr>
<td>Oppose</td>
<td>29%</td>
<td>35%</td>
</tr>
<tr>
<td>No Opinion</td>
<td>5%</td>
<td>2%</td>
</tr>
</tbody>
</table>


would make it illegal to perform procedures known as partial-birth abortion. In March 2000, three months before the Supreme Court ruled on the case, 66% of respondents were in favor of laws criminalizing partial-birth abortion, 29% opposed, and 5% did not respond. Four months after the Court had rendered its decision, the number of those who favored laws that would make the partial-birth procedure illegal fell to 63%, while those
Figure 9. Public opinion data regarding partial-birth abortion in the year 2000. The survey question was “Would you favor or oppose a law which would make it illegal to perform a specific abortion procedure conducted in the last six months of pregnancy known as a ‘partial birth abortion,’ except in cases necessary to save the life of the mother?”


Public opinion on this issue did not coincide with the Supreme Court opinion. While the ruling of the Court allowed the partial-birth procedure to continue, public opinion polls show that the majority of respondents clearly opposed partial-birth procedures and favored laws that would make the practice illegal. In this instance, public opinion did not correlate with the Supreme Court decision.
Gonzales v. Carhart, April 2007

As a response to the Supreme Court’s ruling in Stenberg v. Carhart, Congress passed the Partial-Birth Abortion Ban Act in 2003, which criminalized partial-birth procedures (Gee 2007). While the act did not regulate abortion procedures used in the first trimester, it did so for those used in the second trimester and later stages of pregnancy. It prohibited performing partial-birth procedures that were not necessary to save the life of a woman. The Court found that a health exception was unnecessary in order for the Act to be constitutional because of the medical uncertainty that the prohibition would create any significant health risks at all or that the procedure would even be necessary in some cases (Gonzales v. Carhart 2007). The Court also noted that because there were alternatives that could be used instead of the procedure prohibited, the Partial-Birth Abortion Ban Act did not create an undue burden to a woman seeking to terminate her pregnancy. The ruling in Gonzales v. Carhart is believed to have severely limited a woman’s right to choose an abortion, in addition to eroding the principle findings of Roe v. Wade. It also failed to follow the precedent that was set out in the previous Court cases, particularly Stenberg v. Gonzales, which clearly prohibited bans on abortion procedures that did not make an exception in cases where the woman’s health was in danger.

Polling data show that public opinion did correlate with the Supreme Court decision in this case. In Table 14 and Figure 10, the results revealed that in October 2003 68% of respondents believed that the partial-birth abortion procedure should be illegal, with only 25% believing that it should be legal, and 7% not providing an opinion. The results remained the same in May 2008, with 72% still agreeing with the Supreme
Table 14. Public opinion data regarding partial-birth abortion in the years 2003 and 2008.

<table>
<thead>
<tr>
<th>“Do you think that this (partial-birth) procedure should be legal or illegal?”</th>
<th>October 2003</th>
<th>May 2008</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal</td>
<td>25%</td>
<td>22%</td>
</tr>
<tr>
<td>Illegal</td>
<td>68%</td>
<td>72%</td>
</tr>
<tr>
<td>No Opinion</td>
<td>7%</td>
<td>5%</td>
</tr>
</tbody>
</table>


Court that partial-birth abortion should be illegal, 22% believing it should be legal, and 5% of individuals providing no opinion.

This also shows that the Supreme Court might have capitulated to public opinion by overturning its previous ruling in *Stenberg v. Carhart* seven years earlier. One explanation is that the overwhelming majority of the public who did not support the partial-birth abortion procedure might have had some kind of influence on the Court. It could be said that in this instance, the Court was in fact swayed by public opinion. There were also changes made in the composition of the Supreme Court. Justices whose conservative views greatly resembled the views of the Executive branch and the majority in Congress were added to the bench. The decision made by the Court regarding *Stenberg v. Carhart* could have been made as a result of ideological realignment in the Supreme Court. Public opinion was exercised on the Court indirectly through the choice of justices chosen by both the President and Congress, who, in turn, were chosen by the people (McGuire and Stimson 2004; Mishler and Sheehan 1993).
Conclusion

While cases of the death penalty seem to provide stronger evidence for the argument that public opinion correlates with Supreme Court decisions, the abortion cases still should not be discounted. Some cases did not correlate with the Supreme Court decision because the subject was not as salient at the time of the decision. For example, there was not a strong correlation between public opinion and the Supreme Court decision in *Roe v. Wade*. This could have been because the public was not as aware of the issue of abortion at the time the case was brought to the Court’s docket. People had not had a chance to mobilize either in support or opposition of abortion. In other cases,
particularly the ones involving partial-birth abortion, the Supreme Court clearly showed its willingness to sometimes yield to public opinion and reverse past decisions, particularly in the case of *Gonzales v. Carhart*. This case was decided by the Court after the composition of the Court was realigned, a phenomenon which perhaps made it possible for the Court to rule differently than it had in the similar case of *Stenberg v. Carhart*. The case of *Planned Parenthood of Southeastern Pennsylvania v. Casey* also provides strong evidence for a positive relationship between public opinion and Supreme Court decisions.
CHAPTER IX

CONCLUSION

My purpose in writing this thesis was to establish a correlation between public opinion and Supreme Court decisions. By examining two cases of morality policy, abortion and the death penalty, I found that a positive relationship did exist between the Supreme Court and public opinion.

In order to show that a relationship between Supreme Court decisions and public opinion existed in cases of morality policy, I demonstrated that the Court is a policymaker. It would be unnecessary to study the Supreme Court if it did not have an influence in setting the direction of policy in the United States, therefore the question of whether the Supreme Court is able to set policy in the United States through its decisions should be investigated. The literature provided from various scholars notes that the Supreme Court can in fact affect national policy. Thomas R. Marshall showed that the Supreme Court has the ability to impact and set enduring policy. Scholar Robert Dahl pegs the Court as a policymaker because it can be called upon to settle questions of severe controversy. Many other scholars also argue that the Supreme Court is a policymaker (Dahl 1957; Casper 1976; Baum 2001).

The reason why I chose to focus on morality policy is simple. The public pays particular attention to decisions made by the Supreme Court regarding morality policy. This is because issues of morality policy are fairly simple, giving citizens a better chance
to communicate their desires to their policymakers. Morality policies generate conflict over basic moral values and often seek to regulate social norms that elicit strong moral responses from individuals (Mooney and Lee 1995). Morality policies are characterized by debate over core values typically grounded in religious beliefs (Patton 2004).

The Supreme Court is comprised of nine dynamic individuals who may be influenced by outside factors, though they try to be impartial and make unbiased decisions. As mentioned throughout this thesis, there are a number of reasons why the Supreme Court may be influenced by public opinion. The Court is not only a legal institution but a political institution as well. Its role as a political institution requires that it pay attention to public opinion in order to remain legitimate.

The relationship between the two variables might exist for a number of reasons. I point out in the literature review that public opinion can influence Supreme Court decisions as a result of the nomination and confirmation process. The general public elects officials reflecting their views who are charged with appointing justices to the Court. These officials then appoint justices who are aligned with their beliefs to the Court (Mcguire and Stimson 2004). It is also imperative that the Supreme Court respond to public opinion if it in turn wants legislative support. Because the Court does not have any enforcement powers, it must gain the support of both the legislative and the executive branches that do have the power to enforce the Court’s decisions (Mischler and Sheehan 1993). The legislature can also take certain steps to chastise the Supreme Court if prodded by the public. Congress is in charge of the budget and so can take away the Supreme Court’s funding. Congress can also realign the Court’s appellate jurisdiction, which it has the ability to control. The American public may not be able to directly
control the actions of the Supreme Court, but they can influence Congress, who in turn can exert pressure on the Court. Ultimately, although the members of the public may not be able to directly influence the actions of the Supreme Court, by exerting pressure on Congress, they can affect the decisions of the Court.

Furthermore, scholars Flemming and Wood note that the Supreme Court can respond directly to changing public moods and are more responsive regarding salient issues (Flemming and Wood 1997). Their research notes that justices respond quickly to shifts in public mood with no time lag as indicated by other scholars. One of the reasons offered by Flemming and Wood for the responsiveness of individual justices to public opinion is exposure. They hypothesize that because justices are often exposed to public mood through newspapers, travel, speeches, and interest groups involved in litigation in the Court, they are more apt to be responsive to public opinion. Also, justices’ awareness of public opinion enables them to respond to those moods because they are concerned about policy outcomes that they cannot fully control. This lack of control leads them to pay attention to what the public wants in order to avoid challenges from the other branches of government who are held accountable by the general public. Many scholars find that it would be impossible for the justices to remain completely unaffected by public opinion. The Court does not often render counter-majoritarian decisions even though it is fairly capable of doing so. More often than not, the Court’s agenda tends to reflect society’s agenda as well. In fact, there have also been signals from the justices themselves that point to consideration of public opinion by the Supreme Court.

The research that I collected throughout the thesis shows a clear correlation between public opinion and the Supreme Court. The results in *Furman v. Georgia* show
that only 49% of individuals supported the death penalty right before the issue was brought to the attention of the Supreme Court. Though this percentage might show a very slight correlation between the Court’s decision and public opinion, margin of errors would keep anyone from definitely concluding that such a relationship existed. But, right after the decision was handed down by the Supreme Court in 1973, the numbers changed by 8%. This shift in public opinion support for the death penalty implies that a majority of individuals did not approve of the Court’s decision, a statistic that perhaps prepared the stage for how the Court would decide the next death penalty case that was brought to its docket, *Gregg v. Georgia*, barely four years after the decision in *Furman v. Georgia*. It could be said that as public opinion became even stronger in the following years, the Supreme Court capitulated to public opinion when it overturned *Furman v. Georgia* and instead issued its decision in *Gregg v. Georgia*, a case which allowed the use of the death penalty. The overwhelming majority of the public who supported the use of capital punishment likely had some influence on the Court.

As further proof that the Court may have been influenced by public opinion, the Supreme Court’s plurality opinion in this case pointed out that the sentiments of society should serve as indications to the Court, guiding the Court in whether it should rule in favor or opposition of capital punishment. And, in fact, the Court found that society had come to view capital punishment as a criminal sanction that is necessary for the social order to reign (Bedau 1982). Justice Stewart remarked that an indication that society has come to accept capital punishment as appropriate is the response that occurred from state legislatures after the *Furman v. Georgia* ruling was handed down. Legislators were triggered to enact new statutes that provided for the death penalty in
accordance with the *Furman v. Georgia* ruling (*Gregg v. Georgia* 1976). It may be a coincidence that the Court decided in favor of the death penalty amid high percentages of support for the practice, but it could also be that the Court, at least in this instance, was in fact swayed by public opinion.

At the time the Supreme Court decided that a mandatory death penalty was unconstitutional in *Woodson v. North Carolina*, 53% of individuals agreed and thought that a discretionary policy towards the death penalty was more suitable. The data demonstrates that public opinion did indeed correlate with the Supreme Court’s decision regarding a mandatory death penalty. In the case of *McCleskey v. Kemp*, the data illustrates that a majority of the public agreed both before and after the case was brought before the Supreme Court that the penalty was not unfairly applied and was imposed in a discriminatory manner. The results are in accordance with the hypothesis that public opinion does correlate and can set precedence for Supreme Court decisions. Because of the saliency of these cases, it is not surprising to note the correlation between the Supreme Court’s decision and public opinion. The Court has been shown to be a majoritarian institution, meaning that it can respond to majority public opinions. In most cases, the Court has to pay attention to public opinion if it wants its decisions to be enforced. The case of *McCleskey v. Kemp* showed that the Court is capable of being affected by public opinion.

*Atkins v. Georgia* also proves that positive correlation exists between public opinion and Supreme Court decisions. The opinion poll of May 2002 shows that a majority of individuals opposed capital punishment for the mentally retarded, statistics that collided with the Supreme Court decision regarding the issue. The same is true for
Roper v. Simmons. Studies since the 1930s often reveal that a substantial majority of the American public opposes the imposition of the death penalty on juveniles (Boots, Heide, and Cochran 2004). And the data show that 69% of people rejected the application of the death penalty to minors, a statistic that coincided with the Supreme Court decision in that case.

The issue of abortion did not provide as much overwhelming evidence to support the hypothesis that a correlation exists between public opinion and the Supreme Court. In the case of Roe v. Wade, public opinion did not coincide with the Supreme Court decision. The majority of Americans did not favor abortion before the ruling of the case was rendered, and the number of those who did support abortion remained low after the decision was made public. One possible explanation for the absence of a correlation between the two variables, public opinion and this Supreme Court decision, is that at the time Roe v. Wade was brought to the attention of the Court, the issue of abortion was not at the forefront of the political agenda. It was not until after the decision was delivered that the public became more aware and more involved with the issue. Because abortion regulation was not quite so salient to the public before the 1970s, it can be said that public opinion was not as strong, or strong enough, to correlate with the Supreme Court decision (Rose 2007).

Planned Parenthood of Southeastern Pennsylvania v. Casey was different from Roe v. Wade because it did show a correlation. The data show a clear preference from the public for tighter restrictions regarding abortion that was reinforced by the Supreme Court. A correlation between public opinion and the Supreme Court decision is evident concerning all provisions except the one that required a husband notification
statement. The research shows that 86% of individuals favored a woman seeking an abortion be provided with information regarding abortion, 73% of respondents favored a 24 hour wait regarding abortion procedures, 70% of individuals favored a law that required women under 18 to obtain parental consent before seeking an abortion, and 73% of people favored a law that would require women to notify their husbands before seeking an abortion. Again, one way to explain this correlation is that the Court needs to pay attention to public opinion if it wants its policies to be enforced. Another reason for the existence of a correlation between the Supreme Court and public opinion is that justices who share the same ideology as the public are elected to the Court, and, as a result, the decisions rendered by the Supreme Court mirrors that of the public.

One instance where public opinion did not correlate with the Supreme Court decision is the case of *Stenberg v. Carhart*. The results show that a majority of individuals, 66%, favored laws that would make it illegal to perform procedures known as partial-birth abortion in March 2000, three months before the Supreme Court ruled on the case. Although, in *Gonzales v. Carhart* opinion polls reveal that 72% of respondents believed that the partial-birth abortion procedure should be illegal. This shows that, like *Georgia v. Gregg*, the Supreme Court might have capitulated to public opinion by overturning its previous ruling in *Stenberg v. Carhart* seven years earlier. Another explanation for the two very different rulings made by the Supreme Court concerning the same issue, partial-birth abortion, is the changes that were made in the composition of the Supreme Court. Justices whose conservative views greatly resembled the views of the Executive branch and the majority in Congress were added to the bench after the decision in *Stenberg v. Carhart* was made. The decision made by the Court regarding *Stenberg v.*
Carhart could have been made as a result of ideological realignment in the Supreme Court. Public opinion was exercised on the Court indirectly through the choice of justices chosen by both the President and Congress, who, in turn, were chosen by the people (McGuire and Stimson 2004; Mishler and Sheehan 1993).

I could have reached a more conclusive decision about the correlation between public opinion and the Supreme Court if I was able to examine, not just a few cases concerning the morality issue of the death penalty and abortion, but all the Supreme Court decisions concerning these two issues of morality policy. I would also have wanted to go beyond merely these two issues and include others, such as physician assisted suicide cases, obscenity cases, religion, or even gay rights cases. A wider range of cases and issues included in this study would have made the thesis all the more richer and enlightening.

In the future, I would like to take this research further and perform more sophisticated analysis than merely a frequency distribution. I want to include regression analyses or cross-tabulations in my models in order to show a succinct relationship between public opinion and Supreme Court decisions. Another approach that I could take in future research is to also collect aggregate ideological data of the Supreme Court, as well as gather data about the ideological preferences of the individual justices. In concert with public opinion polls, the ideological data would help to provide a vivid picture of the relationship between Supreme Court decisions and public opinion.

Ultimately, the research done in this thesis does show a correlation between Supreme Court decisions and public opinion. In almost every case, public opinion regarding the particular questions asked in the case matched with the resulting decision.
handed down by the Court. These results were not surprising. Despite the belief by some individuals that the Supreme Court is insulated from the public, I collected data that showed otherwise. Though the Court may protect minority rights in some cases, it is still a majoritarian branch of government in that it does pay attention to majority opinions, something which it must do in order to secure its legitimacy and set enduring policies.
REFERENCES


Furman *v.* Georgia. 408 U.S. 238 (1972).


Hamilton, Alexander. 1788. Federalist papers No. 78. 

Harris, Louis. 1977. Increasing support for executions. 


Spaeth, Harold J., and Jeffrey A. Segal. 1999. Majority rule or minority will: Adherence to precedent on the U.S. Supreme Court. New York: Cambridge University Press.


