

Elite Opinion and the Supreme Court

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As members of the nation's highest court, Supreme Court justices are held to the utmost standard of impartiality. There has been considerable debate, both in the media and amongst scholars regarding if Supreme Court justices are truly removed from outside influence, and specifically public opinion. Considerable research exists examining the relationship between the Court and public opinion; however, Supreme Court justices represent the elite of society in their educational and socioeconomic background. As such, elite opinion is much more representative of justices and their peers. This study examines a potential correlation between elite opinion and the decisions of the Supreme Court. A measurement of elite opinion is ascertained from unsigned editorials in the New York Times, widely recognized as an elite newspaper. A convenience sample of cases has been selected, specifically First Amendment Supreme Court cases from 1994-2005. During this period, the roster of the Court remained unchanged, allowing study of the views of individual justices over a sufficient time period. First Amendment cases were chosen due to the large amount of media and elite attention they generally attract. Ultimately, analysis reveals that Supreme Court decisions align with elite opinion in 76% of the cases examined. On an individual justice level, Justice John Paul Stevens is the closest match to elite opinion at 86% and Justice Antonin Scalia is the worst match, at only 38% correlation. These results cast doubt on the true impartiality of the Court and lead to further avenues of study.

An independent, fair, and competent judiciary is the basis of the American legal system (American Bar Association 2007). Judges are prohibited from a number of potentially compromising activities, including political participation, advocacy, and publicly opining about non-legal matters. As members of the nation's highest court, Supreme Court justices are held to the highest standard of impartiality. Judicial standards are both formally written into law and informally required by the bar association, which regulates its own membership and serves as an arbiter of standards for judicial behavior. Using the Constitution and legal precedent as their guide, justices are expected to make decisions without regard to public opinion, the current political climate, or even their personal views. However, substantial debate exists, in the media and amongst scholars, regarding whether justices are truly removed from outside factors. Some scholars contend that public opinion strongly influences Supreme Court decisions (McGuire and Stimson 2004). Others, however, argue that the effect of public opinion on the Court is less significant than it is on other branches of government (Stimson, Mackuen, and Erikson 1995).

Public opinion is typically determined through surveys and polls of a random sampling of Americans. In theory, polls illuminate the views of average citizens and provide a barometer for the mood of the country. Logically, for public opinion to have a significant impact on the Court, justices must be part of this public, connecting and engaging with typical Americans. Supreme Court justices, however, are traditionally not average. Historically, the vast majority of justices came from socially advantaged families, and nearly two-thirds attended a top college or university (Schmidhauser 1959). In the past half century, the number of Supreme Court justices with an elite background has increased. Since 1949, Supreme Court justices have received a better education than both presidents and Congressmen, with more than three-fifths attending a top university (Kurtz and Simon 2007). As is clear from their background, the justices do not have experiences or educations similar to those in the general public; thus public opinion data is neither representative of justices nor their peers. Instead, Supreme Court justices, like politicians, scholars,

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and the media, are members of the elite. They are more educated and better informed about important issues than the average American.

The use of polling data to determine whether and how public opinion affects the Court does not provide the full picture of outside influences on Supreme Court decisions. Instead, elite opinion reflects the views of those closest demographically to Supreme Court justices. By comparing the effect of elite opinion on the decisions and ideology of the Court, it will become clear if justices are swayed by the beliefs and opinions of their peers. I believe there will be a strong correlation between elite opinion as measured by unsigned *New York Times* editorials and the decisions of the Supreme Court.

Literature Review

An understanding of the existing scholarly research and analysis relevant to this project is essential. I first explore the study of public opinion, which is a relatively new construct. The relationship between public opinion and the Supreme Court is then explored. Next, it is of central importance to understand the connection between elite opinion and the Court, which is at the core of this study. Finally, the scholarly literature regarding measurements of the Supreme Court and ideology are examined. Ultimately, this analysis will provide the groundwork for my own research design regarding the relationship between elite opinion and the Supreme Court.

Public Opinion and the Court

An understanding of public opinion is necessary to fully comprehend why it is an inadequate measure for Supreme Court justices. Public opinion is the view held by a majority of constituents on a particular issue. Even for politicians, though, public opinion is not easy to ascertain; John F. Kennedy (1956) explains, "All of us in the Senate live in an iron lung – the iron lung of politics, and it is no easy task to emerge from that rarefied atmosphere in order to breathe the same fresh air our constituents breathe." Defining public opinion is complicated because there are many factors that influence public views, such as disagreement on how to measure those views and uncertainty about the effect of public opinion on various aspects of American government and society. The first true examination of public opinion was Walter Lippmann's (1922) *Public Opinion*, which was groundbreaking in its arguments. Lippmann contends that a variety of barriers influence man's interpretation of the world and therefore public opinion, including censorship, opportunity, and speed. He argues that the media is especially vulnerable to manipulation and propaganda, which, when disseminated to the public, places severe limitations on individual opinion. Often seen as a case against the functionality of democratic government, Lippmann explains that "for the most part we do not first see, and then define, we define first and then see" (Lippmann 1922, 54). This interpretation illustrates that public opinion can be subject to manipulation and that individuals are incapable of understanding their environment on their own.

Since Lippman's analysis, numerous scholars have examined ways that people respond to surveys designed to measure political and policy preferences among the public. Some scholars argue that surveys are not the optimal format for measuring public opinion since respondents are likely to give answers that require less effort or alter their responses in an attempt to satisfy the interviewer, instead of giving the best possible answer (Krosnick and Abelson 1991). Zaller (1992) contends that respondents suffer from an overload of information that they do not properly interpret, so they simply answer the question based on the information that is most salient at the time of the survey. Another approach suggests opinions are based on a mental tally of positive and negative events instead of on the events themselves (Lodge, Steenbergen, and Brau 1995). As disparate as these theories may be, scholars collectively agree that different factors from the memory of respondents, such as party identifications and preferences of groups and persons, are essential to the responses given in public opinion surveys (Saris 2004).

Typical surveys ask for responses and opinions about very specific events – a recent foreign policy decision, perhaps, or the performance of a political candidate in a debate. Political

scientists then attempt to apply this data to a larger scale and measure the mood of the general public at a specific period of time. Public mood “implies that publics see every public issue through general dispositions” (Stimson 1999, 20). The concept of public mood allows scholars to measure public opinion over time. Furthermore, “mood is the major dimension underlying expressed preferences over policy alternatives in the survey research record. It is properly interpreted as left versus right – more specifically, as global preferences for a larger, more active federal government as opposed to a smaller more passive one across the sphere of all domestic policy controversies” (Stimson, Mackuen, and Erikson 1995, 548).

Public opinion scholars largely accept Stimson’s domestic public mood index regarding public opinion, and consequently Stimson’s measurement dominates recent studies. Published in 1991, and updated in 1999, the domestic policy mood index mostly follows popular depictions of modern American politics. The liberal highpoint is in the early 1960s, followed by a dramatic shift to conservatism in years surrounding 1980. In the early 1990s, the public mood once again crept towards the liberal end of the spectrum, although the shift was not as pronounced as in the 1960s (Stimson 1999). Thus, when examining the relationship between public opinion and the Supreme Court, scholars have typically relied on the domestic policy mood index or similar models loosely based on this measure.

In “Federalist No. 78,” Alexander Hamilton (1788) describes the judiciary as the “least dangerous” branch and contends that “the independence of the justices may be an essential safeguard against the effects of occasional ill humors in the society.” Politicians and scholars throughout American history have likewise agreed that the Court should be removed from the pressures of public opinion. As such, this question has been the focus of much scholarly research, though there is little consensus about the influence of public opinion on the Court as a whole and on individual justices.

Using Sheehan’s domestic policy mood index, scholars have found a reciprocal relationship between the ideology of the public mood and the ideology of the Supreme Court as a whole for the majority of the period since 1956. The Court’s reaction to public opinion occurs at a slight time lag, confirming “the existence of a responsive Court whose decisions not only reflect changes in public opinion but also serve to reinforce and legitimize opinion change in an iterative process” (Mishler and Sheehan 1993, 96). Examining the relationship between public opinion and individual justices, other scholars conclude that public opinion directly and quickly affects decisions by individual members of the Court, a result that holds across various issue areas and is not restricted to only a few justices (Flemming and Wood 1997). Furthermore, a unique study that used overturned court decisions to quantify ideology has also found that public opinion has a powerful influence on the decisions of the Supreme Court, an impact “far greater than previously documented” (McGuire and Stimson 2004, 1033).

Other scholars are less enthusiastic about the association between public opinion and the ideology of the Court. Adding to their earlier article about the collective Court, Mishler and Sheehan (1996) re-examine the impact of public opinion on individual justices. They conclude that while a majority of the justices from 1953-1992 show little or no evidence of public opinion effects, a still significant minority of justices are influenced by public opinion. Additionally, this impact is greatest on moderate justices who hold the swing vote position on the Court. Therefore, although public opinion does not affect most justices, Mishler and Sheehan (1996) assert that it likely has some effect on Supreme Court decisions.

Stimson, Mackuen, and Erikson (1995) examine the relationship between public opinion and all three branches of government. They determine that there is a connection between public opinion and the Supreme Court, but this relationship is significantly weaker than the link between public opinion and both the presidency and Congress. These scholars, therefore, conclude that the public has “a trace of influence” on Court decisions and on the “election-nomination-confirmation process” (Stimson, Mackuen, and Erikson 1995, 556).

Additionally, Marshall (1989) explores the connection between nationwide polls and corresponding Supreme Court decisions to understand the relationship between the Court and public opinion, finding the decisions of the Court reflect majority public opinion in approximately two-thirds of the cases. However, Marshall (1989) argues there is no direct or causal relationship between public opinion and Supreme Court decisions.

Elite Opinion and the Court

The identity of justices is lost amongst the considerable scholarship regarding public opinion and the Supreme Court. The underlying assumption of this research is that public opinion is relevant to the justices – either that they belong to the public and share this opinion, or that they are at least part of the public conversation. This assumption, however, is untrue. Studies demonstrate that rather than belonging to the public, Supreme Court justices are part of the privileged in American society.

Schmidhauser's (1959) groundbreaking study thoroughly examines the background of each Supreme Court justice from the inception of the Court until the article was written. He takes note of paternal occupation, occupational heredity, birthplace, ethnic origin, religious affiliation, educational background, non-political occupation, political party, and prior judicial experience. Following this exhaustive research, Schmidhauser concludes that socially advantaged justices make up an overwhelming majority on the Court. Furthermore, educational background is especially crucial, with the vast majority of justices attending the best colleges and universities in the country for both their undergraduate and legal degrees.

Kurtz and Simon (2007) scrutinize the educational background of the political elite from all three branches of American government in order to understand aspects of the education system and the process by which Americans become involved in politics. The study concludes that a graduate degree is a prerequisite for attaining a high-profile political office. Compared to top leaders in other sectors of society, politicians are more extensively educated, though less exclusively at the top American universities. Furthermore, Supreme Court justices are more educated than those in any other branch of government. As these studies make clear, Supreme Court justices are far more educated than the average American whose view is measured by public opinion data. These justices come from advantaged, elite backgrounds, and their education and career choices serve to make them even more elite. As such, public opinion does not represent the views of the justices or their peers. A more accurate measure is elite opinion.

Lazarsfeld (1944) was the first to propose a theory of elite opinion leadership. According to the theory, there are two steps in the transfer of information – from the media to elites, and then to the public (Lazarsfeld 1944). Many scholars have since examined the relationship between elite and public opinion, some concluding that there is no relationship (Isaacs 1998) and others finding a significant relationship (Paul and Brown 2001). Bork (2008) includes among the elites in American society “university faculties, journalists, entertainers, foundation staffs, mainline churches, and governmental bureaucracies” (36). Included in this group, according to the studies discussed earlier, are Supreme Court justices. Bork (2008) contends that “these elites and the courts rely upon each other. The elites guide the judiciary and make the judges’ decisions acceptable to the public, while the judiciary gives finality to elite opinion in a way that cannot be overturned by legislation” (36). The connections between elite and public opinion that Bork alludes to has remained the subject of much scholarly research. The Chicago Council on Foreign Relations publishes regular public opinion reports that compare American and international public opinion on a variety of international issues. Significantly, this study surveys both a random sample of Americans and “Americans in leadership positions with the greatest influence upon and knowledge about foreign relations” (Reilly 1975, 4). By including these two groups, these surveys allow the comparison of public opinion and elite opinion. Furthermore, there are definite distinctions between the mass public and the leadership samples (Oldendick and Bardes 1982). These survey results and studies demonstrate that a discernable difference between public and elite opinion

exists on foreign policy matters, a difference that may extend to domestic concerns and the Supreme Court.

Measuring the Supreme Court

In order to analyze the Court's responsiveness to outside factors, such as public opinion, it is first necessary to measure the ideology of the Supreme Court. Scholars typically code Court decisions as either liberal or conservative, which overlooks inherent qualitative problems. Unlike measures of public opinion, scholars do not agree on one particular measure or coding scheme for ideology; instead, each researcher typically designs their own measure.

McGuire and Stimson (2004) argue that measuring judicial ideology by coding cases as liberal or conservative is flawed beyond the obvious problems associated with the coding process. They question whether examining all the cases that come before the Court accurately reflects the Court's ideological preference. Instead, McGuire and Stimson analyze only the cases in which the Court reverses the decision of the lower court, because parties who have lost in a lower court are more likely to bring their case to the higher court when they perceive the court's ideology to be in their favor. Following this logic, if the litigant is correct in their assessment, then the Court will overturn of the lower court. McGuire and Stimson contend that examining only overturned decisions and coding them as liberal or conservative allows for an accurate portrayal of the Supreme Court's ideology.

Other scholars focus on the ideology of individual justices, rather than the collective Supreme Court. Segal and Cover (1989) utilize content analytic techniques to derive measures of the ideology of justices from 1953-1988. Using statements in newspaper editorials to assess the impact of individual justices' ideology on their positions in cases dealing with civil liberties and civil rights, the study finds a strong correlation between ideology and judicial opinions.

Martin and Quinn's (2007) recently developed measure is a response and criticism of the work done by Segal and Cover. Their measure of individual justice ideology is derived from the votes cast by the justices and a Bayesian modeling strategy. This assessment generates term-by-term ideal point estimates for every justice since the 1937 term, while allowing for variation in case content. Essentially, this measure eliminates the possibility that ideology changes are the result of different case content (Epstein et al. 2007; Martin and Quinn 2007).

Although the correlation between public opinion and the Supreme Court is well studied, the potential relationship between elite opinion and the decisions of Supreme Court justices remains unexplored. Measuring elite opinion and comparing it to the votes of individual justices and the Court's decisions will provide insight into the true independence of the judicial branch.

Research Design

This study will use First Amendment cases from 1994-2005 to assess the relationship between elite opinion and court decisions. During this period, the makeup of the Court remained unchanged.¹ The stable composition of the Court reduces the potential influence of other internal factors, such as the shifting politics or relationships between the nine justices. Although the number of cases in this study, approximately sixty, is a sufficiently large sample, the nature of the Court prevents the sample size of justices from being statistically significant. Thus, the longitudinal study tracks changes over time.

Supreme Court cases focusing on First Amendment issues were chosen for several reasons. First, these cases frequently attract more attention from the public and the media, thereby increasing the likelihood that elites form an opinion on these issues. Furthermore, the Supreme Court decided approximately sixty First Amendment cases during the eleven-year period covered by this study, providing a sample size that is significant, yet manageable.

¹ Justices William Rehnquist, John Paul Stevens, Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, David Souter, Clarence Thomas, Ruth Bader Ginsberg, and Stephen Breyer

A comprehensive list of First Amendment Supreme Court cases from 1994-2005 was gathered from The First Amendment Center, an organization affiliated with Vanderbilt University. For additional insight, these cases have been categorized based upon which First Amendment right they concern – religion, speech, press, assembly, or petition. The decisions and votes of individual justices are accessible through the Supreme Court Database

Elite opinion within this experiment is evaluated through unsigned editorials in the *New York Times*. Widely considered an elite newspaper, the *New York Times* has the third largest circulation in the United States (Izadi and Saghaye-Biria 2007). Unlike the writings of an individual journalist, unsigned editorials are “constrained by the institutional nature of publishing organizations” (Grafton and Permaloff 2004, 2). As such, they are more representative of the elite as a whole and not a single reporter. Although there are other elite newspapers in the United States, namely the *Wall Street Journal* and the *Washington Post*, the *New York Times* is most appropriate for this study. The *Wall Street Journal*, though second only to the *USA Today* in national circulation, is primarily a business-oriented newspaper; therefore, less focus exists within the newspaper on First Amendment issues. The *Washington Post* is not a national paper, so while it may represent the elites in Washington, it is less representative of national elite opinion than the *New York Times*.

Times editorials are available through the newspaper’s website and the ProQuest archive. Both resources are searchable by both topic and date, which was essential to the collection of editorials used in this study. Because the *New York Times* editorials rarely mention cases by name, it was necessary to examine all of the editorials mentioning the Supreme Court from 1994-2005. The *New York Times* has not published editorials addressing every First Amendment case that has come before the Court. Therefore, some of the cases from this time period were left out of the analysis.

Upon collection of the *New York Times* editorials that address the First Amendment Supreme Court cases from 1994-2005, the position of the elite is determined by the editorial summaries. This determination requires careful reading and scrutiny of each editorial. The editorials, however, are typically straightforward in their opinion, decreasing the difficulties with the coding process. Two spreadsheets were formulated to analyze the data. The first lists the cases in chronological order and also includes a column summarizing the question at issue in the cases. An additional column summarizes the majority opinion in the case. To measure elite opinion, a column containing the headlines and dates of relevant *New York Times* editorials is next. The fifth and final column in this spreadsheet outlines the elite opinion as given in the editorial.

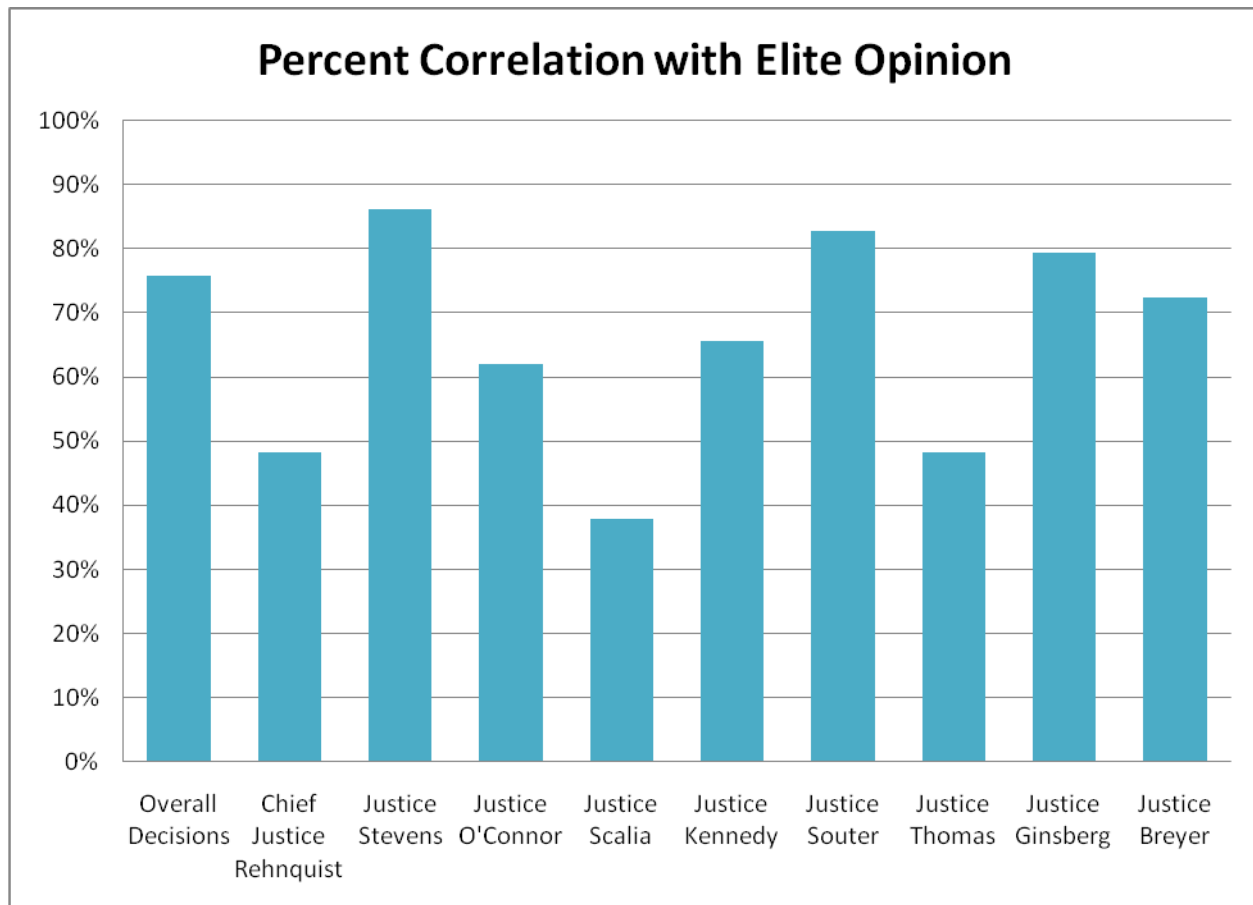
The second spreadsheet also lists the cases in chronological order, along with the date each was decided. Additionally, there is a column for the specific First Amendment right at issue in the case – religion, speech, press, assembly, or petition. The spreadsheet includes ten more columns – one for the Court as an entity, and nine for the individual justices. The next column lists the vote of the Court in the case, and the following nine columns list the votes of the individual justices, which are coded. A one (1) marks agreement with the majority while a zero (0) highlights disagreement with the majority. The final ten columns relate these votes (of the Court as a whole and of the nine individual justices) to elite opinion. Again, a one (1) marks agreement with elite opinion and a zero (0) dissension. Cases for which elite opinion could not be measured from the *New York Times* were not included in the study. From this second spreadsheet, it is possible to determine the percent correlation between the Supreme Court decisions and elite opinion as measured through the unsigned editorials in the *New York Times*. Furthermore, the votes of each justice will be compared to elite opinion.

Analysis

During the Rehnquist Court (1994-2005), the justices decided 56 First Amendment cases, primarily regarding freedom of speech issues. Of these 56 cases, 29 were directly mentioned in unsigned editorials in the *New York Times*. Some articles focused on one particular case that the elite newspaper thought was of particular interest. For example, *Bartnicki v. Vopper* (2001)

determined that the First Amendment protects newspapers when they disclose the contents of a communication illegally intercepted by a third party. Because this case dealt directly with both freedom of speech and freedom of the press, which are naturally relevant to the newspaper industry, the *New York Times* devoted several editorials to the issue and expressed their satisfaction when the Court ruled 6-3 to protect the newspapers. Other cases, however, were only briefly mentioned by the *New York Times* in their annual beginning or end of term editorials. Regardless, elite opinion was clearly determined for 52% of the cases in the original sample.

Figure 1: Percentage of Time that Justices' Opinion Matched Elite Opinion



A comparison of elite opinion to Supreme Court decisions reveals that elite opinion and the decisions were in agreement 75.86% of the time (Figure 1 and 2). Justice John Paul Stevens was in agreement with elite opinion more than any other justice, 86.21% of the time. Interestingly, Justice Stevens is also generally considered one of the most liberal justices on the Court (Savage 2009). At the other end of the spectrum is Justice Antonin Scalia, who agreed with elite opinion in 37.93% of the cases. Justice Scalia is also ideologically opposite from Justice Stevens, as Justice Scalia is widely considered the most conservative justice of the Rehnquist Court (Brisbin 1997). Justice Sandra Day O'Connor, often considered to be the swing or median justice, was in the middle of the pack regarding her agreement with elite opinion, ranking sixth among the nine with a percent correlation of 62.07% (Martin, Quinn, and Epstein 2005).

The analysis presented here supports my original hypothesis that there is a strong relationship between elite opinion as measured by unsigned *New York Times* editorials and the decisions of the Supreme Court. As anticipated, this correlation is more pronounced for some justices than for others; it appears that the more liberal justices coincide with elite opinion more closely than the conservative justices.

Conclusion

This paper examines the correlation between elite opinion and Supreme Court justices' positions on first amendment cases during the Rehnquist Court, 1994-2005. My analysis relied on a measure of elite opinion based on the unsigned editorials of the *New York Times*, a leading American newspaper that is often considered representative of elite views on political matters. This study found that elite opinion and Supreme Court decisions agreed on cases 75.86% of the time. Additionally, the conformity among individual justices and the Supreme Court was analyzed, finding that Justice Stevens agrees with elite opinion more than his colleagues (86.21%), while Justice Scalia concurs with elite opinion less than the other justices (37.93%).

These findings illustrate a link between elite opinion and the Supreme Court, a connection that has not been sufficiently studied. Although significant research exists analyzing the relationship between public opinion and the Supreme Court, scholars have not closely examined the correlation with elite opinion. However, they have previously determined that Supreme Court justices are members of the elite in American society, and therefore, elite opinion should be used because it is a more accurate measurement than public opinion.

Despite the significance of these results, limitations exist with this study. Any study of the Supreme Court is limited by the nature of the Court. There are only nine justices, and they each serve life terms. Due to this format, any sample of the Supreme Court is limited in scope. In this study, only nine individual justices were studied. For the study to be truly meaningful, more justices from a wider variety of backgrounds should be assessed. Furthermore, the particular justices on the Court that were studied may not be truly indicative of the typical Supreme Court. For example, Justices O'Connor and Ginsberg were included in this sample, the first two women to serve on the Supreme Court and therefore not truly representative of a typical justice throughout history. This may be meaningless in terms of the relationship with elite opinion, but nevertheless, it is a limitation of the study. Furthermore, the number of cases examined in this study is relatively small, caused both by time restraints and the limited number of cases the Supreme Court agrees to hear each year.

This study establishes a relationship between elite opinion as measured by unsigned *New York Times* editorials and the Supreme Court, providing many questions for future studies. The sample should be expanded, both regarding the types of cases examined and the time period. Furthermore, other newspapers, such as the *Washington Post* and the *Wall Street Journal*, could be used to supplement the definition of elite opinion. Additional background and biographical information about each justice should also be analyzed in order to possibly determine potential explanations for the apparent relationship with elite opinion. Ultimately, this study differs from prior scholarship which compares general public opinion to the Supreme Court, thereby providing a starting point for other scholars interested in studying the relationship between elite opinion and the Supreme Court.

Appendix 1: Percentage of the Time that Justices' Position Matched Elite Opinion

Justice	Percent
Justice Stevens	86.21%
Justice Souter	82.76%
Justice Ginsberg	79.31%
All Decisions	75.86%
Justice Breyer	72.41%
Justice Kennedy	64.92%
Justice O'Connor	62.07%
Chief Justice Rehnquist	48.28%
Justice Thomas	48.28%
Justice Scalia	37.93%

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