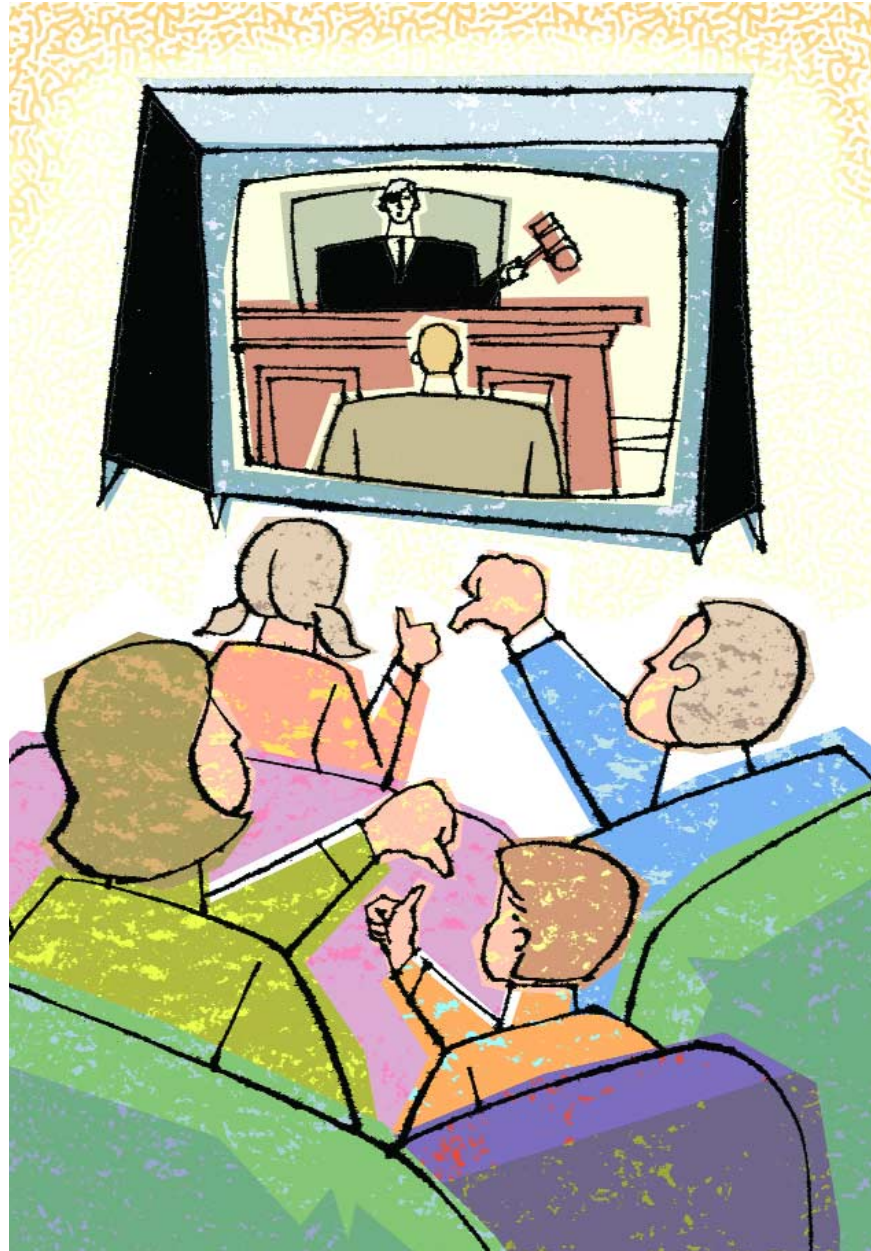


# THE AMERICAN PUBLIC'S ASSESSMENT OF THE REHNQUIST COURT

The apparent drop in public support for the Supreme Court during Chief Justice Rehnquist's tenure may be nothing more than the general demonization of government over the last 25 years.

ARTVILLE



by **HERBERT M. KRITZER**

**H**ow did the public view the Supreme Court during the period of the late William Rehnquist's service as chief justice? We know that there have been at least some ups and downs. A 2001 article in *Judicature* reported evidence that the election-determining decisions in late 2000 differentially affected public confidence in the Court depending on whether the respondent was a self-identified Democrat, Republican, or Independent, although within six months the impact of *Bush v. Gore* already showed signs of dissipating.<sup>1</sup>

Now that the Rehnquist era has ended, it is worth asking the broader question of how the public's view of the Court varied over the entire period that Rehnquist occupied the Court's center chair. First, is there any broad pat-

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1. Herbert Kritzer, *The Impact of Bush v. Gore on Public Perception and Knowledge of the Supreme Court* 85 *JUDICATURE* 32 (2001); see also James Gibson et al., *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?* 33 *BRIT. J. POL. SCI.* 535 (2003); and Stephen Nicholson and Robert Howard, *Framing Support for the Supreme Court in the Aftermath of Bush v. Gore*, 65 *J. POL.* 676 (2003).

tern of increase or decrease in support for the Court, either generally or within partisan subgroups? One might hypothesize that as the Court moved increasingly toward the right, if that is actually the case, Democrats lost confidence in the Court over time while Republicans increased in confidence. Second, are there any other moments that produced sharp shifts in support for the Court similar to what we observed in the wake of *Bush v. Gore*? For example, did the reaffirmation of the right to abortion in *Planned Parenthood of Pennsylvania v. Casey* have any measurable impact on the public's view of the Court?

## Data

To examine these questions, one needs time series data in which the same question has been asked of the public repeatedly over time. I identified five such series:

- Gallup Poll (“Gallup”): “I am going to read you a list of institutions in American society. Would you tell me how much confidence you, yourself, have in each one — a great deal, quite a lot, some or very little ... The U.S. Supreme Court?” (31 replications from 1973 through 2005; 21 during the Rehnquist Court).

- General Social Survey (“GSS”): “I am going to name some institutions in this country. As far as the people running these institutions are concerned, would you say you have a great deal of confidence, only some confidence, or hardly any confidence at all in them? ... U.S. Supreme Court” (23 replications from 1973 through 2004; 12 during the Rehnquist Court).

2. The few observations in late June 1988 were grouped with the third quarter for that year. The one major lapse in the survey occurred from March 20, 2001, through July 17, 2001 (meaning that there is no observation for the second quarter of 2001); other lapses ranged from a few days to as much as three weeks. The final quarter's observation is for only about half the quarter. In the graphs below, all data for this series is plotted at the mean date for the quarter.

3. Gregory Caldeira and James Gibson, *The Etiology of Support for the Supreme Court*, 36 AM. J. POL. SCI. 635 (1992); Joseph Tanenhaus and Walter Murphy, *Patterns of Public Support for the Supreme Court: A Panel Study*, 43 J. POL. 24 (1981).

- National Election Studies (“NES”): “I'd like to get your feelings toward some of our political leaders and other people who are in the news these days. I'll read the name of a person and I'd like you to rate that person using something we call the feeling thermometer. Ratings between 50 degrees and 100 degrees mean that you feel favorable and warm toward the person. Ratings between 0 degrees and 50 degrees mean that you don't feel favorable toward the person and that you don't care too much for that person. You would rate the person at the 50 degree mark if you don't feel particularly warm or cold toward the person. ... Still using the thermometer, how would you rate the Supreme Court?” (7 replications from 1980 through 2004 during the Rehnquist Court).

- Pew Research Center for the People & the Press [and others] (“Pew”): “Now I'd like your opinion of some groups and organizations in

the news... Would you say your overall opinion of the Supreme Court is very favorable, mostly favorable, mostly unfavorable, or very unfavorable?” (15 replications from 1985 through 2005; 14 during the Rehnquist Court.)

- Wisconsin Continuous National Telephone Survey (“WISCON”): “On a scale of 1 to 10, where 1 means very poor and 10 means excellent, how would you rate the job the Supreme Court is doing?” (more or less continuous from June 27, 1988 through May 7, 2002; aggregated into 55 quarterly observations<sup>2</sup>).

The first two of these are quite similar; the other three differ substantially and may tap somewhat different reactions to the Court. All of these questions reference what political scientists call “diffuse support”;<sup>3</sup> none are direct measures of “specific support” related to specific decisions or actions of the Court, such as has been previously described in connec-

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tion with *Bush v. Gore* (2000).

For purposes of analysis, I have combined “a great deal” and “quite a lot” from the Gallup series and “very favorable” and “mostly favorable” from the Pew series. In the discussion that follows I focus on the percentage giving the combined responses for Gallup and Pew, the percentage responding “a great deal of confidence” for the GSS series, the percentage of respondents providing a positive response (51 or higher) to the feeling thermometer scale for the NES series, and the percentage giving a response in the positive range (six and higher) from the WISCON series.

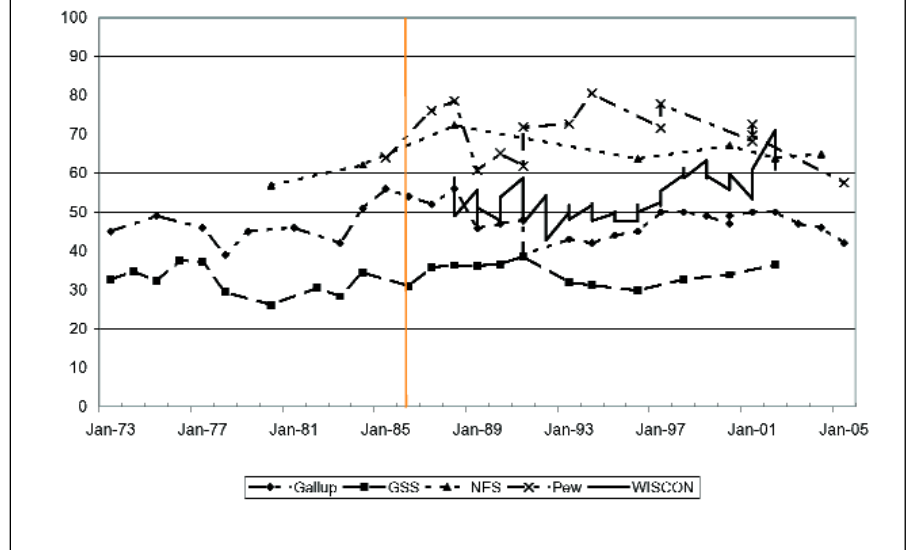
Lastly, three of the series extend back into the tenure of Warren Burger as chief justice. To further our understanding, I include the full period for which each measure is available.

### General patterns

Figure 1 plots all five time series together (the line patterns shown will be used consistently to represent the various series). The first thing one observes about these measures is that each has its own level, and fluctuates within a relatively narrow range. The only measure that intersects the others repeatedly is the WISCON series; only one other pair of measures, NES and Pew, overlap, although GSS and Gallup come close at one point. Second, the range of variation differs from series to series, from as little as 12 points for the GSS feeling thermometer to as much as 28 points for the WISCON measure. If I limit the comparisons to the period since William Rehnquist became chief justice (he was confirmed on September 17, 1986), the minimum range drops to 9 points for the GSS and the NES, and the maximum range stays at 28 points.

A third pattern is, with one possible exception, the lack of consistency in patterns among the series. The pair that shows some consistency is Gallup and Pew, although even that is at best a crude consistency. More generally, one series might be showing a tendency of increasing support

**Figure 1. The public views the Supreme Court**



while another is steady or declining.<sup>4</sup> Some of this inconsistency may reflect the specific survey dates involved; some may reflect nothing more than sampling variations; and some may reflect differing responses produced by a specific question wording or response alternative offered. A good example is to focus on shifts around the time of the confirmation battle for Clarence Thomas. The Gallup Poll, which conducted a survey just after the confirmation hearings in October 1991, shows a sharp drop of about 9 points compared to a survey taken in the early spring of 1991. By contrast, the Pew Series shows a positive upswing of about 7 points comparing a survey taken in November 1991 after Thomas was confirmed to the previous survey conducted in May 1990. WISCON shows a drop of 7 points in the last quarter of 1991, but then rises back to its previous level in the first quarter of 1992 before settling back to the range of late 1991 for the remainder of 1992.

Three series provide measures near the end of Rehnquist’s tenure, both Pew and Gallup having May or June 2005 surveys and NES a survey in late 2004. Two of the three show

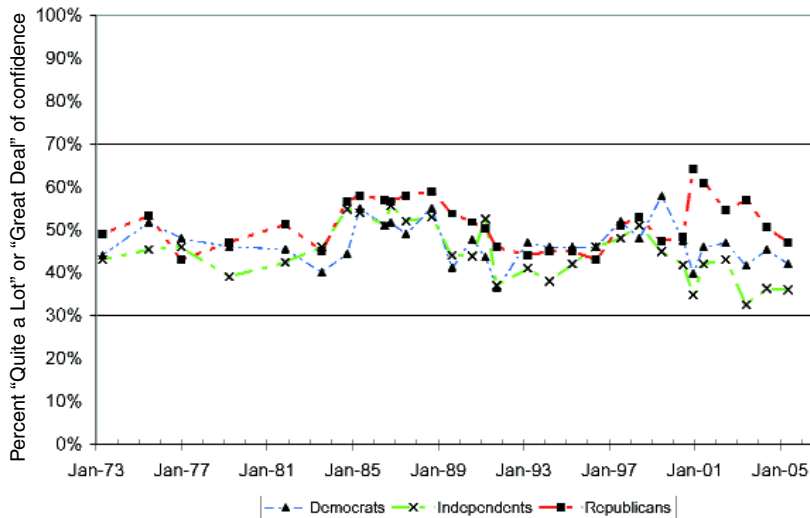
distinctive drops over the last four years. In fact, the Pew series at 57 percent favorable is at the lowest level since it began, falling under 60 percent for the first time. In the most recent Gallup survey 42 percent of respondents report that they have a great deal or quite a lot of confidence in the U.S. Supreme Court; this is close to Gallup’s lowest level which was 39 percent in 1991 right after the tumultuous confirmation hearings for Clarence Thomas.<sup>5</sup>

In contrast, the NES feeling thermometer was at a mean of 65 percent positive in late 2004, down slightly from late 2000 when 67 percent of the respondents gave a positive response (the survey having been in the field from November 8, 2000, through December 18, 2000, and thus having been mostly completed before the *Bush v. Gore* decision was announced on December 12, 2000).

4. I also created a series of figures separating Republicans, Democrats, and Independents. The comparisons within party identification across surveys was essentially the same as what I describe above: each series has its level, and there is relatively little intersection other than that involving the WISCON series.

5. Thomas was confirmed October 15, 1991. The percentage reporting a great deal or quite a lot of confidence stayed in the low to mid 40s through 1996.

**Figure 2. Gallup series by party identification**



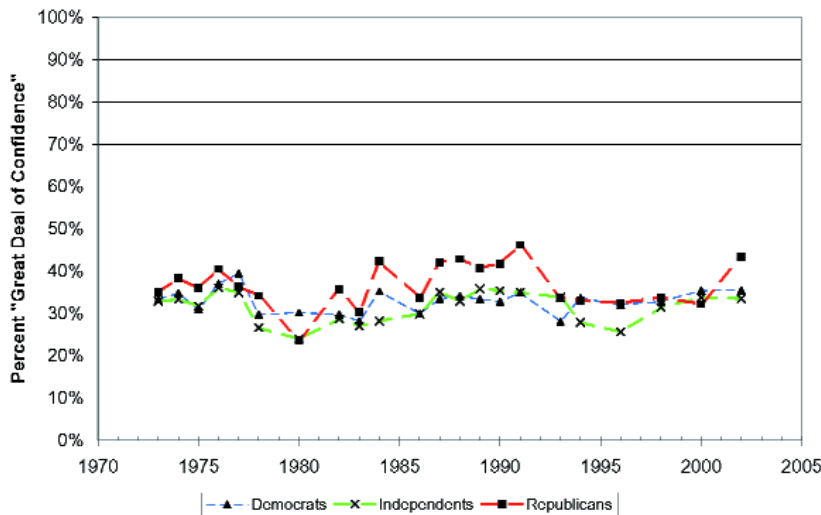
**Series-specific patterns**

Figure 2 shows the Gallup series, measuring citizen’s confidence in the Supreme Court separately for Democrats (blue), Republicans (red), and Independents (green). For most of the period covered by the Gallup series, the differences among the three partisan groups has been relatively small, most often (in 21 of 30 polls for which figures were available separately by party identification) less than 10 percentage points. Throughout the period, Republicans tended to have a higher level of confidence than Democrats or Independents.<sup>6</sup> Not surprisingly, the biggest gap between the parties comes in the wake of *Bush v. Gore*, when the spread between Democrats and Republicans was 24 percentage points, and the gap between Republicans and Independents was even greater (30 percentage points).

The gap between Republicans and the other two groups has sharply narrowed in the last couple of years. However, that reflects a sharp drop in the support among Republicans, from a high of 64 percent of Republicans reporting “quite a lot” or a “great deal” of confidence in the Supreme Court immediately after *Bush v. Gore* (the highest level of support among Republicans in the series) to the most recent figure in the high 40s. One can only speculate on the reason for the drop in confidence among Republicans. Is it due to decisions dealing with issues such as gay rights and affirmative action, or the Court’s unwillingness to intervene in the Terry Schiavo case? Is it due to attacks on the courts generally by Republican and conservative leaders? Unfortunately, it is not possible to pinpoint the reason for this sharp decline.

The General Social Survey series ends in 2004. As shown by Figure 3, in this series, which uses a question quite similar to Gallup but provides a different set of response alternatives, the pattern of movement among the groups of partisan identifiers is generally similar over time. Only once in the 22 times the General Social Survey asked about confidence in the

**Figure 3. GSS series by party identification**



The 2004 figure of 65 percent was considerably above the low for the

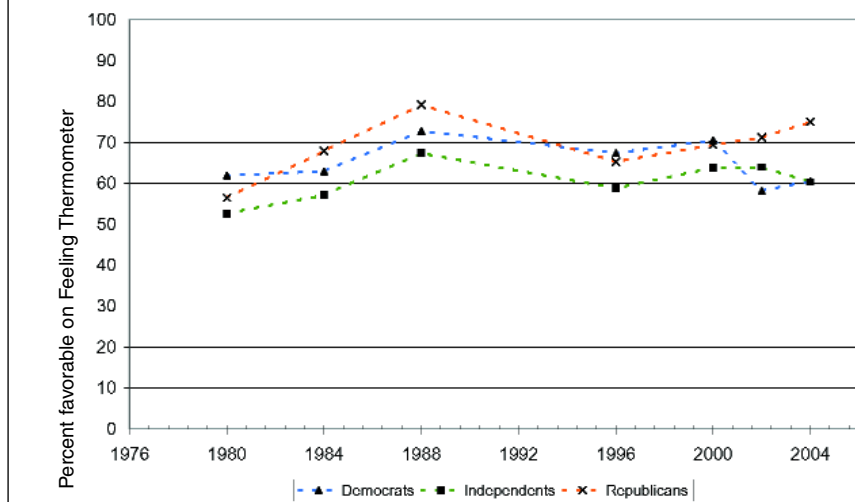
series, which was 57 percent (in 1980), but also considerably below the series’ high point of 72 percent positive in 1988; however, five of the seven measurements in this series fell in the range of 62 percent to 67 percent, indicating that the 2004 figure was typical for the series.

6. One difference between the Rehnquist and Burger Courts in the Gallup series is that there was more variability during Rehnquist’s tenure, although that may reflect in part that the series covers about 12 years of the Burger Court but the full 19 years of the Rehnquist Court.

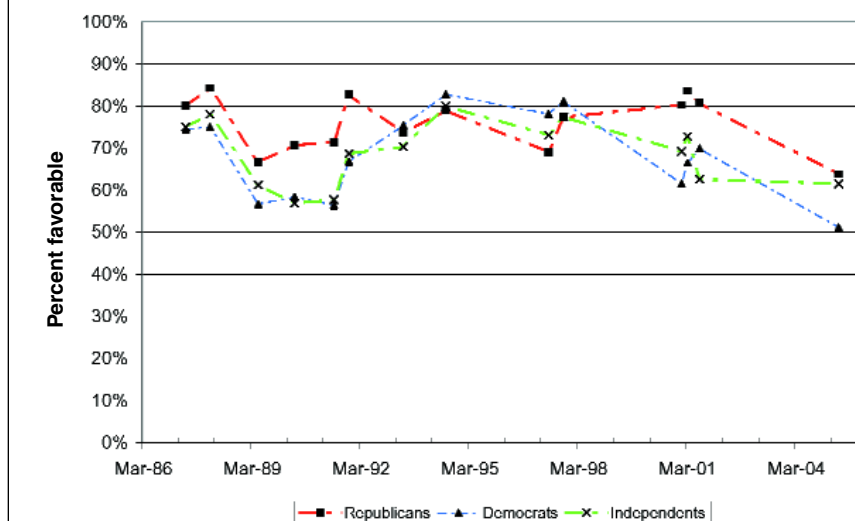
Supreme Court was the gap between Republicans and Democrats greater than 10 percentage points, and that was in 1991. In both of the post-*Bush v. Gore* surveys, the gap between Republicans and Democrats is just under 8 percentage points, a figure exceeded on four occasions (including 1991). Interestingly, comparing 2000 and 2002, before and after *Bush v. Gore*,<sup>7</sup> the level of support among Democrats and among Independents was essentially constant, shifting less than half a percentage point; only Republicans showed any shift, an increase from 32 percent having “a great deal of confidence” in the Supreme Court to 43 percent responding in that way in 2002. Only in 1991 did Republicans have a higher percentage of respondents with “a great deal of confidence” in the Court. In the most recent survey, 2004, both Democrats and Republicans show drops of 12 percentage points, while Independents increased in confidence by about six percentage points. More generally, Republicans showed the greatest variation in support according to this survey.<sup>8</sup> Unlike the Gallup series, it does not appear that there has been greater variability during the Rehnquist Court compared to the Burger Court.

Figure 4 shows the National Election Study (NES) feeling thermometer series. This is the most intermittent of the series. Through 2000, the three groups of partisans move more or less in tandem, typically with some alternation between Republicans and Democrats as to which group is the most favorable; during this time, the gap between Republicans and Democrats is never more than about 7 percentage points. Also, through 2000, Independents were consistently the least favorable toward the Court according to the NES series. The 2000 NES survey was virtually complete before the Supreme Court’s decision in *Bush v. Gore*, and Democrats and Republicans in that survey showed nearly identical levels of support for the Court, with Democrats actually slightly more favorable (71 percent) than were Republicans (69 percent).

**Figure 4. NES series by party identification**



**Figure 5. Pew series by party identification**



However, in the 2002 survey, Democrats dropped sharply to only 58 percent favorable and Republicans rose slightly to 71 percent favorable, to create the largest partisan gap in the series until that time. In 2004 the support among Democrats rose slightly (to 61 percent) but the gap

actually widened because support among Republicans increased even more (to 75 percent).

7. Data collection for the General Social Survey was always done from February through April.

8. The standard deviation for Republicans is 5, compared to 3 and 4 for Democrats and Independents, respectively.

**Figure 6. Wisconsin survey by party identification**

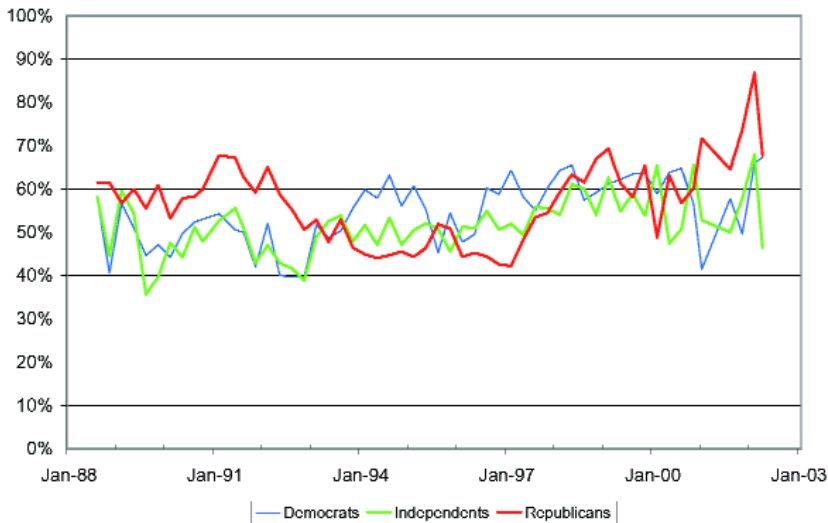
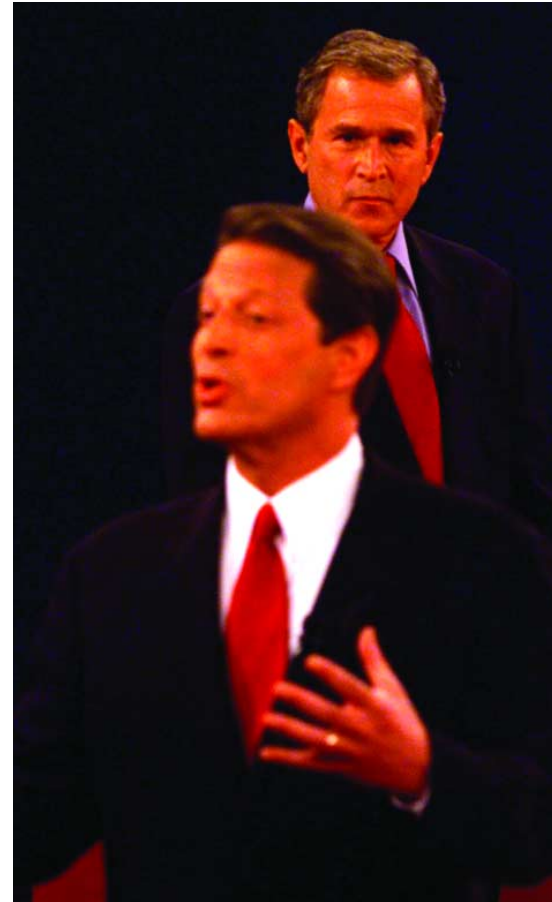


Figure 5 shows the Pew series during Rehnquist's tenure as chief justice.<sup>9</sup> Unlike the Gallup survey, this series shows only a vary modest increase (3 percentage points) in support among Republicans in the aftermath of *Bush v. Gore*; it does show a sharp decline in support by Democrats (about 20 percentage points) and a moderate decline (about 8 percentage points) among Independents. For *both* Democrats and Republicans, the June 2005 survey produced the lowest level of support during Rehnquist's tenure; for

Independents this survey had the second lowest level of support. Perhaps what is most striking about Figure 5 is that, with the exception of the polls in the wake of *Bush v. Gore*, the level of support among the partisan groups moved more or less in tandem ( $r = .50$  between Democrats and Republicans and  $.86$  between Democrats and Independents), much more so than for the Gallup series (where the corresponding correlations are only  $.16$  and  $.57$ ).<sup>10</sup>

The WISCON series exists only during the tenure of Chief Justice Rehnquist, and unfortunately ends in May 2002. This poll shows fairly substantial differences among partisan identifiers. In 30 of the 55 measurements, the gap was 10 percentage points or more, and on seven occasions it exceeded 20 percentage points. Some of this greater volatility may reflect smaller n's; the average quarterly sample size for the WISCON survey was 566 (compared to 1,000 to 2,000 for the other surveys), and on 18 occasions it was less than 500.<sup>11</sup> If I limit the comparison to respondents identifying as Republicans or Democrats, the gap exceeds 10 percentage points on 23 occasions and exceeds 20 percentage



**Although public opinion responded to controversial and highly visible events such as *Bush v. Gore*, it is difficult to find any lasting impact.**

points on 5 occasions; moreover, the trends for Democrats and Republicans move independently of one another ( $r = .04$ ).<sup>12</sup> Not surprisingly, the largest gap comes in the first quarter of 2001, immediately after *Bush v. Gore*. However, the timing of the other large gaps do not link to any clear or consistent pattern.

What is perhaps most striking about the analysis presented above is that one is likely to draw different conclusions about trends in support for the Supreme Court depending upon which survey series one looks at. It is not even clear that one can draw strong conclusions about whether one group of party identifiers is more supportive than others during a particular period of time. For example, while both the Gallup and Pew series currently show Republicans as more supportive of the Court than are Democrats, there

9. I omitted from the figure the single measure in this series prior to Rehnquist assuming the center chair (from a 1985 survey). I have also omitted from this figure, and from Figure 1, a survey conducted October 12-24, 2005, after the confirmation of John Roberts to succeed Justice Rehnquist. I discuss the results for this survey in "Transitioning to the Robert's Court, page 174."

10. There is also substantial overtime variability in PEW series with the standard deviations for Republicans, Democrats, and Independents equal to 7, 10, and 8 respectively.

11. On eight occasions it was less than 400, although one of those was the last quarter which covered a period of less than six weeks. Limiting the comparison to quarters with samples of at least 500 respondents, 18 of 37 show gaps of 10 percentage points or more, and 2 show gaps of 20 percentage points or more.

12. The correlation in trends between Democrats and Independents is  $.55$  and between Republicans and Independents  $.29$ ; the latter correlations for the Gallup and Pew series are  $.26$  and  $.58$  respectively.

## TRANSITIONING TO THE ROBERTS COURT

How did the public view the Supreme Court in the wake of Justice Rehnquist's death in September and/or the confirmation of John Roberts in October? Pew conducted a survey October 12-24, after Roberts' confirmation. This survey found that 60 percent of respondents viewed the Court favorably; the percents favorable for Republicans, Democrats, and Independents were 72 percent, 59 percent, and 60 percent respectively.

In addition, Gallup ran two questions about the Supreme Court in mid-September for which there is at least some times series information available. The first asked, "Do you approve or disapprove of the way the Supreme Court is handling its job?" This series of questions only goes back to 2000, and is shown in Table 1. What this table shows is that the approval of the Court at the end of Justice Rehnquist's tenure was about average for the series.

**TABLE 1: Supreme Court job approval rating**

	% Approve	% Disapprove	% No opinion
2005 Sep 12-15	56	36	8
2005 Jun 24-26	42	48	10
2004 Sep 13-15	51	39	10
2003 Sep 8-10	52	38	10
2003 Jul 7-9	59	33	8
2002 Sep 5-8	60	29	11
2001 Sep 7-10	58	28	14
2001 Jun 11-17	62	25	13
2001 Jan 10-14	59	34	7
2000 Aug 29-Sep 5	62	29	9

The second series is less clearly directed at the Supreme Court itself: "As you know, our federal government is made up of three branches: an Executive branch, headed by the President; a Judicial branch, headed by the U.S. Supreme Court; and a Legislative branch, made up of the U.S. Senate and House of Representatives. First, let me ask you how much trust and confidence you have at this time in the Executive branch headed by the President, the Judicial branch headed by the U. S. Supreme Court, and the Legislative branch, consisting of the U.S. Senate and House of Representatives—a great deal, a fair amount, not very much, or none at all? ... The Judicial branch?" This question was asked in the 1970s and then dropped until 1997 since when it has been asked about once a year. Table 2 shows the pattern for this question, and shows no particular change this September compared to the prior year. It does show something of a declining trend since the late 1990s, but nothing particular striking.

**TABLE 2: Trust and confidence in the judicial branch headed by the Supreme Court**

	% Great deal	% Fair amount	% Not very much	% None at all	% No opinion
2005 Sep 12-15	13	55	25	6	1
2004 Sep 13-15	14	51	27	6	2
2003 Sep 8-10	13	54	27	5	1
2002 Sep 5-8	17	58	18	5	2
2001 Sep 7-10	17	57	20	4	2
2000 Jul 6-9	23	52	18	6	1
1999 Feb 4-8	29	51	13	5	2
1998 Dec 28-29	27	51	16	4	2
1997 May 30-Jun 1	19	52	22	5	2
1976 Jun	16	47	26	6	4
1974 Apr	17	54	20	5	5
1972 May	17	49	24	7	4

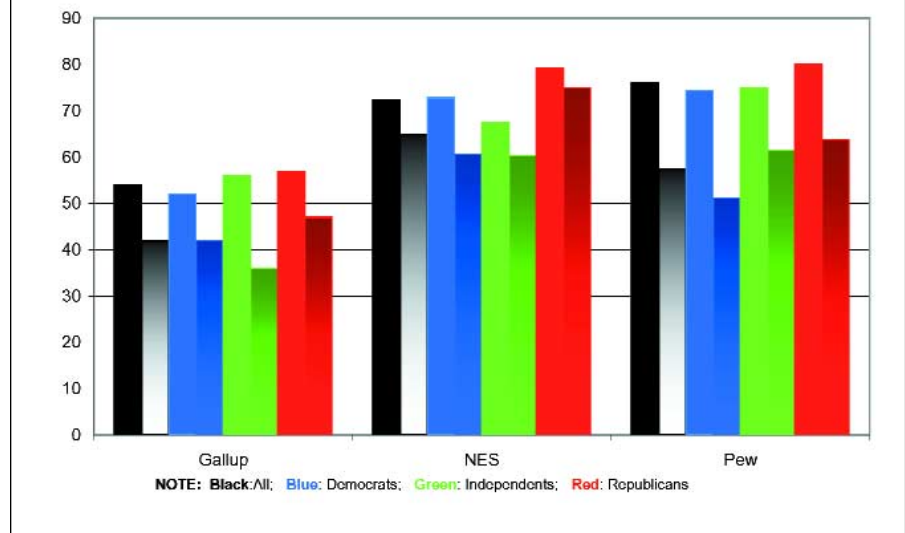
is little difference between Republicans and Democrats in the most recent NES study. Similarly, while both Gallup and Pew show declining support since 2000, NES continues to show a relatively steady level of support.

### Assessing net changes

While recognizing that the Supreme Court moved up and down in the public's eyes during William Rehnquist's tenure as chief justice, it is worth asking how things look if we compare the first results after Rehnquist took office with what we find in the last surveys during his tenure? Figure 7 shows these results for the four series for which there are surveys during the 18 months prior to Rehnquist's death (May 2005 for Gallup and Pew, November-December 2004 for NES, and March 2004 for GSS). In all but one comparison, support for the Supreme Court was higher in the first available survey after Rehnquist became chief justice than in the last survey; the one exception is Independents in the 2004 GSS survey. The magnitude of the differences vary substantially: 19 points for Pew, 12 points for Gallup, 7 for NES, and 4 for GSS. Still, there is one other consistent pattern: the decline in support has been lower for Republicans, averaging 9 points, than for Democrats, for whom the average is 14 points. Independents average 9 points as well if one includes GSS, which actually showed an increase in support; omitting GSS, the average decrease in support for Independents is 14 points.

Does this mean that the Court suffered in the public's eyes under William Rehnquist's leadership? Perhaps, but without comparing the patterns in support for the Court to that for the national governmental institutions, one cannot say whether these changes reflect something about the Court or something more

**Figure 7. Beginning and ending support**



general about the public's view of governmental institutions. Probably the best comparison is to Congress.<sup>13</sup> According to the Gallup Poll, in 1986 just after Rehnquist became chief justice, 41 percent of the population had a "great deal" or "quite a lot" of confidence in Congress; in the May 2005 survey this dropped to 22 percent. This drop was considerably larger than that for the Supreme Court over the same period. Controlling for party identification, the drops ranged from 16 percentage points for Republicans (from 44 percent reporting a "great deal" or "quite a lot" of confidence to 28 percent) to 28 percentage points for Democrats (from 47 to 19 percent).

According to the Pew series, Congress dropped from 74 percent favorable in 1987 to 49 percent favorable in May 2005, which is also greater than the drop for the Supreme Court. As with Gallup, all partisan groups showed declines: from 70 percent to 60 percent for Republicans, from 75 percent to 42 percent for Democrats, and from 74 percent to 48 percent for Independents.<sup>14</sup>

GSS shows only a 1 percentage point drop in confidence for Congress between 1988 and 2004, but that small drop reflects that only 16 percent of the respondents in 1988

reported a "great deal" of confidence in Congress. Democrats show a 3 percentage point drop, Independents less than a 1 point drop, and Republicans a 1 point gain.

NES shows a slight overall drop in support for the percentage of respondents expressing a positive feeling thermometer score for Congress between 1988 and 2004, from 58 percent to 56 percent. However, while the percent giving feeling thermometer scores toward Congress in the favorable range declined over this period for both Democrats (12 points) and Independents (6 points), it increased by about 11 percentage points for Republicans.

### Conclusion

It is difficult to draw clear or strong conclusions from the analysis presented above. Clearly, the measured level of support depends on how support is gauged. There does appear to have been a drop in support for the Supreme Court over the course of William Rehnquist's tenure as chief justice, but that may be nothing more than a reflection of the general demonization of government, particularly the federal government, that took place over the last 25 years. The level of support for the Court in recent years tended to be highest

13. For the "Presidency", responses are likely to be closely tied to specific views of the person occupying the office.

14. In the 1987 survey, Independents were grouped together with those reporting no party identification and some other party identification.



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among Republicans, which is not surprising given that seven of nine sitting justices during most of Rehnquist's tenure were appointees of Republican presidents. Public opinion, at least according to some measures, responded to controversial and highly visible events, such as the nomination of Clarence Thomas and the Court's *Bush v. Gore* decision.

In his dissent in *Bush v. Gore*, Justice Stevens observed:

It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.

Justice Stevens was by no means alone in this prediction: a blizzard of commentary by law professors, judicial politics scholars, and others argued that the Court's decision would undermine the legitimacy of the Court, and that it would be difficult for the Court to recover from what many viewed as a self-inflicted wound. Unless one is willing to attribute the apparent decline in support for the Court among the *winners* in *Bush v. Gore*, it is hard to sustain the argument that the decision produced a sharp, lasting drop in legitimacy.

According to Gallup (Figure 2), among Democrats, the Court recovered somewhat at least, soon after *Bush v. Gore*. Looking at GSS series (Figure 3), conducted some months before the 2000 election and then again in the Spring of 2002, there is no measurable drop in confidence among either Democrats or Republicans, and there is an increase among Republicans. For the Pew series (Figure 5), Democrats and Republicans both dropped, on almost a parallel track, between 2001 and 2005. In the WISCON series (Figure 6), which ended in 2002, Democrats regained much of the loss in support for the Court in the year after *Bush v. Gore*. Thus, it is difficult to find clear evidence of any lasting impact of *Bush v. Gore*, contrary to the dire predictions of Justice Stevens and many commentators. ☞

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