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When Are Judges Influenced by Public Opinion?

Switzerland and the US Compared

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When Are Judges Influenced by Public Opinion?

Switzerland and the US Compared

Odile Ammann*

> "By the term *Public Opinion Tribunal*, understand a fictitious entity – a fictitious tribunal the existence of which is, by the help of analogy, feigned under the pressure of inevitable necessity for the purpose of discourse to designate the imaginary tribunal or judiciary by which the punishments and rewards of which the popular or moral sanction is composed are applied."
>
> (Jeremy Bentham, 'Constitutional Code Rationale', in *First Principles Preparatory to Constitutional Code*, edited by Philip Shoffield, Clarendon Press, Oxford 1989, Chapter 5, §1, 283)

Abstract

One way for judges to be responsive to the concerns of ordinary people is to take public opinion into account in their decisions. In this paper, I examine cases in which the US

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Supreme Court and the Swiss Federal Tribunal have explicitly done so. To identify relevant decisions, I use a keyword-based citation-analysis, complemented by a qualitative analysis of the rulings. I compare the case law of these two courts based on the subject matter at stake, the facets of public opinion courts mention, the method they use to ascertain public opinion, and the way they justify their reliance on public opinion.

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I. Introduction

Judicial populism, or the relationship between courts and public opinion, has been attracting scholarly attention for centuries. The stance Jeremy Bentham took on this issue, mentioned in the introductory excerpt, is strikingly innovative compared to that of most scholars, judges, and the public today. Not only did he recommend that courts consult public opinion – he even stated that this method should be institutionalized. But what are the merits and pitfalls of such a proposal?

The word populism has a pejorative meaning in ordinary discourse.[1] Yet populism, defined as the "support for the concerns of ordinary people",[2] is not illegal, illegitimate, or otherwise misguided per se (provided, inter alia, that these concerns are captured with accuracy). Populism, so conceived, is opposed to the concerns of non-ordinary people and, hence, of the minority.

One way for judges to be populists in this sense, i.e. to address the concerns of ordinary people, is to take public opinion into account in their decisions. Public opinion, which I define as the views adopted by a majority of people in a jurisdiction, can be reflected in opinion polls, institutionalized forms of popular decision making, or more diffuse patterns of behavior.[3]

Domestic constitutions usually require courts to decide cases impartially and independently. However, adjudicators cannot realistically ignore public opinion. Most of them are wary of the social acceptance of their judgments.

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[1] André Munro, 'Populism', Encyclopaedia Britannica, 11 February 2010, <https://academic.eb.com/levels/collegiate/article/populism/473094>.
[2] <https://en.oxforddictionaries.com/definition/populism>.
[3] I do not focus on state counting, although I briefly mention this method in section IV.3. (*infra*). On this topic, see e.g. Corinna Barrett Lain, 'The Unexceptionalism of "Evolving Standards"', (2009) 57:2 UCLA Law Review 365-419; Corinna Barrett Lain, 'The Doctrinal Side of Majority Will', (2010) 3 Michigan State Law Review 775-793.

This assumption is mainstream, but how courts rely on public opinion in practice is less clear. Are they more sensitive to it regarding specific issues? What facets of public opinion do they consult? What resources do they use to ascertain public opinion, and what justifications do they mention in support of their practice?

In this paper, I examine cases in which courts explicitly consult public opinion in their decisions. I focus on the US Supreme Court and the Swiss Federal Tribunal. To identify decisions relying on public opinion, I use a keyword-based citation analysis, complemented by a qualitative analysis of the relevant rulings. I establish a typology of the practice based on the subject matter of the case, the aspect of public opinion used, the evidence based on which public opinion is identified, and the reasoning put forward by the courts to justify their reliance on public opinion. I also provide tentative explanations of the trends observed in the case law.

First, I explain why we should be concerned about judges' reliance on public opinion, and why applying an empirical method to our enquiry is appropriate (II.). I then provide some methodological clarifications (III.), before moving on to the study properly called (IV.). Section V. concludes.

II. Why Care About Swiss and US Courts' Reliance on Public Opinion?

Several reasons justify focusing on the Swiss Federal Tribunal's and the US Supreme Court's reliance on public opinion. First, judicial populism has become highly topical in the wake of recent political events (1.). Second, there is a scholarly gap on this issue (2.). Third, scholarly and public assumptions about judges' relationship to public opinion are rarely based on a closer analysis of judicial decisions (3.). Finally, the Swiss and US Supreme Court offer two interesting case studies (4.).

1. (Judicial) Populism as a Topical Issue

Populism is probably as old as democracy itself, and it has been an object of study for years. What is clear is that recent political developments, such as Brexit and Donald Trump's election, have brought this topic back to the forefront of scholarly debate.[4]

One issue that has been sparking interest for some time (although other State organs and civil society actors feature more prominently in discussions about populism) is the extent to which courts do, must, and/or should act in a populist way.[5] International courts are often accused of not being populist enough, i.e. of ignoring the concerns of ordinary people.[6] Opposite tendencies are likely to arise when domestic courts review official policies.[7] In such high-profile cases, judges may cave in to popular pressure and – to express it simplistically – give the people what they want.

Judicial populism is, of course, not new.[8] Nor are popular or official pressures on judges whose decisions are unwelcome.[9] However, recent appeals to popular sovereignty and criticisms of the elites, in the US, Switzerland, and more generally across the world,[10] invite us to revisit this issue in light of today's circumstances.

[4] E.g. Or Bassok, 'Trapped in the Age of Trump: The American Supreme Court and 21st Century Populism', 28 April 2017, <http://www.iconnectblog.com/2017/04/trapped-in-the-age-of-trump-the-american-supreme-court-and-21st-century-populism/>.

[5] E.g. Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*, Farrar, Straus and Giroux, New York 2009; Ulrich Haltern, *Verfassungsgerichtsbarkeit, Demokratie und Misstrauen*, Duncker Humblot, Berlin 1998; I-CONnect/Verfassungsblog Mini-Symposium on Populism and Constitutional Courts, and other relevant posts available at <https://www.iconnectblog.com/>.

[6] One example is the criticism voiced against the European Court of Human Right's reliance on a "European consensus". For a recent analysis, see Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, Cambridge, CUP 2015.

[7] E.g. Trump v International Refugee Assistance Project, Docket No. 16-1436, Trump v Hawaii, Docket No. 16-1540; R (Miller) v Secretary of State for Exiting the European Union, [2017] UKSC 5 [19].

[8] E.g. Jorge González-Jácome, 'In Defense of Judicial Populism – Lessons From Colombia', <http://www.iconnectblog.com/2017/05/in-defense-of-judicial-populism-lessons-from-colombia/>;
David G. Barnum, 'The Supreme Court and Public Opinion: Judicial Decision-Making in the Post-New Deal Period', (1985) 47:2 Journal of Politics 652-666.

[9] One example is President Franklin Delano Roosevelt's court packing plan in the late 1930s.

[10] Some illustrations are discussed in the I-CONnect/Verfassungsblog Mini-Symposium on Populism and Constitutional Courts (*supra*, footnote 5).

Current events urge us to take stock of the legal safeguards that constitutional democracies have established to protect individuals from arbitrary power. One way of doing so is to assess how courts have been responding to public opinion since these safeguards were established up until today.

2. A Scholarly Gap

Existing work on populism is predominantly conceptual and normative. First, scholars (especially philosophers[11] and political scientists[12]) have sought to identify the essential and necessary features of populism. Second, they have analyzed it through the lens of (normative) democratic theory.[13] Studies examining how populist behavior unfolds in practice are scarce in comparison.

This is not to say that empirical studies are non-existent. Quite to the contrary, there is a rich literature on the empirical relationship of courts with legislatures[14] and domestic constituencies.[15] Public choice theory and the study of judicial self-interest,[16] as well as economic analysis,[17] are prominent methods used in this context.

What lawyers will miss in this empirical literature is the lack of focus on judicial reasoning. Scholars (mostly political scientists) are typically interested in quantifying the case law, uncovering larger trends, and establishing causal relationships.[18]

[11] Nadia Urbinati, 'Democracy and Populism', (1998) 5:1 Constellations 110-124; Ben Stanley, 'The Thin Ideology of Populism', (2008) 13:1 Journal of Political Ideologies 95-110; Koen Abt/Stefan Rummens, 'Populism Versus Democracy', (2007) 55:2 Political Studies 405-424.
[12] Cas Mudde/Cristóbal Rovira Kaltwasser, 'Populism', in Michael Freeden/Marc Stears (eds), *The Oxford Handbook of Political Ideologies*, Oxford, OUP 2013, 493-510; Benjamin Moffitt, *The Global Rise of Populism – Performance, Political Style, and Representation*, Stanford University Press, Stanford 2016.
[13] Koen Abt/Stefan Rummens, 'Populism Versus Democracy', (2007) 55:2 Political Studies 405-424.
[14] Tom S. Clark, 'The Separation of Powers, Court Curbing, and Judicial Legitimacy', (2009) 53:4 American Journal of Political Science 971-989.
[15] Stephen Jessee/Neil Malhotra, 'Public (Mis)Perceptions of Supreme Court Ideology – A Method for Directly Comparing Citizens and Justices', (2013) 77:2 Public Opinion Quarterly 619-634.
[16] Joanna Shepherd, 'Measuring Maximizing Judges: Empirical Legal Studies, Public Choice Theory, and Judicial Behavior', (2011) 2011:5 University of Illinois Law Review 1753-1766.
[17] Richard Posner, 'What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)', (1993) 3 Supreme Court Economic Review 1-41.
[18] Christopher J. Casillas/Peter K. Enns/Patrick C. Wolfahrt, 'How Public Opinion Constrains the U.S. Supreme Court', (2011) 55:1 American Journal of Political Science 74-88; Michael W. Giles/Bethany

Moreover, for a variety of reasons which cannot be developed here,[19] empirical work is more common in the US than elsewhere. In Switzerland, for instance, such studies are rare. Thus, analyzing the reasoning based on which courts consult public opinion contributes to filling a scholarly gap.

3. A Lack of Knowledge of What Is Happening on the Ground

Awareness of what is happening in the court rooms is also important given how often courts' activity is discredited in public debate and domestic politics. Examples include Donald Trump's criticism of judgments interfering with his policies,[20] the attacks spurred by tabloids on UK judges after the High Court's Brexit ruling in late 2016,[21] and the targeting of Swiss judges by some political groups.[22] One factor favoring such simplifications is the difficulty (and perhaps even the impossibility) to detect when courts follow or disregard popular concerns.

Textual analyses of judgments have limitations. They cannot identify what lies below the surface. However, they can inform current debates about the position courts do and/or should adopt vis-à-vis popular opinion. These insights are complementary to, and can enrich, conceptual and normative work on (judicial) populism.

4. Why A Swiss-US Comparison?

Blackstone/Richard L. Vining, 'The Supreme Court in American Democracy: Unraveling the Linkages Between Public Opinion and Judicial Decision Making', (2008) 70:2 Journal of Politics 293-306.

[19] On this topic and on the relationship between empirical research and legal scholarship, see Odile Ammann, *The Interpretation of International Law by Swiss Courts – Methods and Reasoning*, PhD thesis, University of Fribourg, 126 ff.

[20] CNN, 'Trump Attacks Another Federal Judge', 5 February 2017, <https://edition.cnn.com/2017/02/04/politics/donald-trump-attacks-federal-judge-travel-ban/index.html>.

[21] The Daily Mail, 'Enemies of the People – Fury Over "Out of Touch" Judges Who Defied 17.4M Brexit Voters and Could Trigger Constitutional Crisis', 3 November 2016, < http://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html >.

[22] Swiss People's Party (SVP), 'Volksinitiative "Schweizer Recht statt fremde Richter (Selbstbestimmungsinitiative)"' <https://www.svp.ch/kampagnen/uebersicht/selbstbestimmungsinitiative/um-was-geht-es/>.

The highest[23] courts of Switzerland and the US, respectively, offer interesting illustrations of how judicial populism functions in practice. First, judges serving on these courts have – de facto at least – a political affiliation, in the sense that they publicly endorse a set of values and beliefs that pertain to the way society should be organized, and that are associated with an existing party.[24] Second, in 2017, when this study was conducted, the political majorities in these jurisdictions were held by parties (the Swiss People's Party) or leaders (Donald Trump) emphasizing the importance of popular sovereignty and criticizing judicial review. Third, the parallels between these two legal and political systems, including federalism and bicameralism, facilitate and warrant a comparison.[25]

It goes without saying that this case law cannot be compared without taking the necessary precautions, given the different institutional, political, legal, and social contexts in which the two courts operate. Important points of divergence include the fact that US Supreme Court judges are nominated by the President and confirmed by the Senate and have life tenure, while judges serving on the Swiss Federal Tribunal are elected by the Federal Assembly (the federal parliament) for four years, must stand for reelection, and transfer a share of their income to the political party to which they are affiliated. The US is a representative democracy, with elements of direct democracy in some States. Switzerland is a semi-direct democracy that protects popular sovereignty at the federal, cantonal, and municipal level. US Supreme Court judges write lengthy, detailed rulings and separate opinions, strike down statutes deemed unconstitutional, and follow the doctrine of *stare decisis*. Swiss judges do not. Finally, Switzerland has ratified treaties restricting judges' margin of appreciation, such as the European

[23] I focus on these two courts, and not on lower courts, because of the richness of their case law, and because of their domestic legal authority regarding legal interpretation. Of course, state courts and cantonal courts would constitute interesting objects of study as well.

[24] US Supreme Court judges are nominated by the President and confirmed by the Senate, and their political views are one criterion in the selection process. Similarly, the judges serving on the Swiss Federal Tribunal are elected by the Federal Assembly (the federal parliament). A candidate's chances of success are relatively low if he/she does not belong to a political party.

[25] On US-Swiss cross-fertilization, see Giordana Campagna/Raffael Nicolas Fasel, 'Ein Trumpf gegen Trumps – Die Exekutiven der Schweiz und der USA im Vergleich', Jusletter of 7 November 2016.

Convention of Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR). The US, by contrast, have not. These differences must be factored into the interpretation of the findings (*infra*, IV.) for the comparison to be meaningful. However, such differences are a precondition of any comparative endeavor, and they do not rule out a comparison per se.

III. Methodology

The findings of a keyword-based citation analysis are of limited use if they are not accompanied by methodological clarifications. In this section, I explain the scope of the study (1.), the caveats applying to it (2.), its underlying concepts (3.), and the keyword selection process (4.).

1. The Scope of the Study

What is scope, i.e. the object, time frame, and goal of the present study?

The object of the search consists in judgments of the US Supreme Court and of the Swiss Federal Tribunal, respectively. In the latter case, I focused on decisions published in the Court's official compendium, as all rulings (both published and unpublished) are only available from 2000 onwards. I did not differentiate between public and private law cases. The distinction is controversial, often blurred in practice, and hence difficult to implement in the coding.

The temporal starting point of the search is the date from which cases published in the Swiss Federal Tribunal's official compendium can be accessed online (1 January 1954). The study reflects the state of the two online databases I used (Westlaw and the Swiss Federal Tribunal's database) on 1 July 2017. I initially chose a time frame of 15 years. Given the dearth of relevant Swiss cases, it emerged that all decisions of the Swiss Federal Tribunal's official compendium had to be included.

The study aims at identifying cases in which both courts explicitly mention populist considerations, defined as the concerns of ordinary people (*supra*, I.). For this purpose, I used a number of keywords as proxies (*infra*, 4. and appendix).

2. Some Methodological Caveats

A first proviso that warrants repetition is that my study is not normative. I do not identify when and how courts must (from a legal perspective) or should (from a moral or other normative perspective) follow populist considerations. However, the study can provide elements for a normative theory clarifying when courts must and/or should rely on such considerations.

A range of methodological caveats derive from the fact that the author of this paper is not a social scientist, but a lawyer who is interested in the reasoning of the courts under scrutiny. First, my search is confined to explicit populist considerations.[26] I do not seek to filter out cases in which the courts are guided by public opinion without being transparent about it. This is a significant limitation, and it is important to stress that this study is only a starting point to map and understand the practice. Due to its empirical method, the present study must be seen as a complement to, and not as a substitute for, an analysis of legal reasoning. Indeed, it is likely that explicit references to public opinion occur in a random way. It seems evident, for instance, that the US Supreme Court was basing its decision in *Lawrence v Texas* on evolving social mores and public opinion, even if it did not mention it explicitly.[27] Perhaps courts always consider, and even follow,[28] public opinion, no matter what legal question they are called to resolve. Perhaps judges' explicit references to public opinion do not tell us anything, as public opinion might not have had any actual impact on the issue at stake.

[26] One example of a scholar who has focused on such explicit references to majoritarian considerations is Corinna Barrett Lain, see *supra*, footnote 3.
[27] Lawrence v Texas, 539 US 558, 2003.
[28] This view is held by scholars such as Michael Klarman and Jeffrey Rosen. See Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*, Oxford/New York, OUP 2004; Jeffrey Rosen, *The Most Democratic Branch: How the Court Serves America*, Oxford/New York, OUP 2006.

Yet while all of the aforementioned concerns are legitimate, addressing them would require a comprehensive qualitative study of the case law. Such a study is beyond the scope of this short paper. A second methodological caveat is that the unit of analysis is the individual, written judgment. I am not looking at the sociological, strategic, psychological behavior of judges more generally, nor am I concerned about the evolution of the case law over time. Third, I focus on aggregate decisions, as opposed to the positions of individual judges, except for the separate opinions of US judges, to which I refer occasionally. Fourth, my goal is not to analyze the decisions in their political, social, and historical context. While such analyses are, without doubt, of great epistemic value, they go beyond the scope of my study.

It is important to acknowledge that identifying all instances of judicial populism is not feasible. Besides the sheer number of cases, one difficulty is judges' fluctuating, unpredictable terminology. Moreover, a keyword-based citation analysis is underinclusive by definition. Despite these obstacles, finding as many cases as possible in which the courts explicitly rely on public opinion is essential to reach meaningful conclusions about the practice.

A final, obvious caveat is that there are many things that this study does not do. I do not look at courts' relationship to the other branches,[29] for instance. Moreover, although these topics deserve scholarly attention, I am not concerned about how courts influence public opinion,[30] nor do I look at the broader, societal effects of their judgments.

3. Conceptual Clarifications

[29] On the relationship between US Supreme Court judges and the US Congress, for instance, see Tom S. Clark, 'The Separation of Powers, Court Curbing, and Judicial Legitimacy', (2009) 53:4 American Journal of Political Science 971-989.

[30] E.g. James W. Stoutenborough/Donald P. Haider-Markel/Mahalley D. Allen, 'Reassessing the Impact of Supreme Court Decisions on Public Opinion: Gay Civil Rights Cases', (2006) 59:3 Political Research Quarterly 419-433; Charles H. Franklin/Liane C. Kosaki, 'Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion', (1989) 83:3 American Political Science Review 751-771.

One challenge in the present study is that its conceptual building blocks can seem slippery. First, what is populism, and how can it be captured in the case law? Second, what is public opinion, and how does it relate to populism, if at all?

The notion of populism is used in an inflationary way in public debate, and scholarly definitions abound and conflict.[31] Indeed, populism can be viewed through many lenses (historical, sociological, economic, etc.), and definitions tend to be ideologically tainted. For populism to be a workable concept, I opted for a thin and relatively open-ended definition, i.e. the "support for the concerns of ordinary people".[32]

Why assume that populism, so defined, is closely related to the consultation of public opinion, the "views prevalent among the public"?[33] First, "concerns" and "views" can be viewed as synonyms for my purposes. They can be relatively tangible (e.g. when they are expressed in opinions polls or popular decisions), or more diffuse (when they are described as values, beliefs, or traditions). Second, "ordinary people" and "the public" (which encompasses "ordinary people in general"[34]) largely overlap as well. It therefore seems fair to link populism and reliance on public opinion in this study.

Of course, these two terms are not congruent if a thicker concept of populism is used. Moreover, reliance on public opinion is *one way* for courts to act in a populist way. Other forms of judicial populism do exist, e.g. a rhetoric appealing to the majority, be it in judgments or outside the courtroom.

[31] E.g. in political sociology: J. Allcock, '"Populism": A Brief Biography', (1971) 5:3 Sociology 371-387. See also Ben Stanley, 'The Thin Ideology of Populism', (2008) 13:1 Journal of Political Ideologies 95-110.
[32] <https://en.oxforddictionaries.com/definition/populism>. This definition overlaps with other dictionary definitions, e.g. <https://www.merriam-webster.com/dictionary/populist>; <https://www.thefreedictionary.com/populism>.
[33] <https://en.oxforddictionaries.com/definition/public_opinion>.
[34] <https://en.oxforddictionaries.com/definition/public>.

4. Defining the Keywords

As previously noted, I consider that courts consult public opinion when they explicitly say so. This assumption is, of course, counterfactual, but proceeding differently would not be practically feasible in a keyword-based citation analysis.

How did I choose these keywords? First, I identified a range of keywords from scratch[35] which could serve as indicators of courts' reliance on these considerations. I then canvassed all decisions containing these terms to eliminate irrelevant cases. Moreover, given that both courts, to some extent at least, use idiosyncratic language to refer to the same concept, the keywords were not identical for both institutions and had to be refined incrementally. A perfect identity of keywords is, of course, also precluded by the fact that the two judicial bodies work in different languages. For the same reasons, the German, French, and Italian keywords used to analyze the case law of the Swiss Federal Tribunal are not always literal translations, but are adjusted to the expressions used by the Court.

The keywords fall into four categories: (i) public opinion and popular will, (ii) social norms, values, and beliefs, (iii) majoritarian considerations, and (iv) social change. While these categories overlap in part, they help thinking about possible keywords. The keywords I used are listed in the appendix (*infra*, VI.). I did not rely on keywords linked to legislative history and to the intention of the drafters, since legislative acts are only loosely connected to public opinion.

I started by analyzing the practice of the Swiss Federal Tribunal. Its opinions are usually shorter and more concise. To ensure comparability, it seemed fitting to take the concepts and categories used by the Court as a starting point, and then to search for analogous ones in the US practice.

[35] I later double checked these keywords by consulting, Jurivoc, the Swiss Federal Tribunal's trilingual thesaurus (<https://www.bger.ch/fr/index/juridiction/jurisdiction-inherit-template/jurisdiction-jurivoc-home.htm>).

The keywords used for the Swiss Federal Tribunal were entered in all three official Swiss languages, i.e. German, French, and Italian.[36] I excluded cases referring to processes of direct democracy (e.g. federal constitutional initiatives and popular voting rights). In such cases, the Court is typically protecting institutionalized processes through which popular opinion is formed and expressed. It is not seeking to capture popular opinion on a specific matter.

For the US Supreme Court, I first looked for the English translation of the keywords used for the Swiss Federal Tribunal. To reduce the risk of missing relevant cases due to inappropriate terminology, I then searched for several equivalent terms. I eliminated cases pertaining to US voting laws and gerrymandering, which are difficult to compare with Swiss law and raise issues that are distinct from popular opinion and its influence on judicial interpretation.

To recall an earlier caveat (*supra*, 3.), it is important to acknowledge the inherent limitations, and especially the underinclusiveness, of citation analysis. Tackling this problem requires reading every decision to determine whether it contains populist reasoning. This is only feasible if the number of cases is relatively small, e.g. if the temporal scope of the search is limited. Moreover, even when this option is chosen, the coding must still be replicable: there must be a clearly defined (and, arguably, keyword-based) distinction between relevant and irrelevant cases.

Another way in which the study is limited is that it yields few insights into instances where courts do not act in a populist way. Of course, the bodies under scrutiny sometimes highlight the irrelevance of public opinion to the issue at hand. In many other rulings, however, counter-majoritarian attitudes are less easily detectable.

Citation analysis can be overinclusive if decisions containing a given keyword are automatically classified as relevant without further analysis. This was not an issue in my

[36] Proceedings before the Swiss Federal Tribunal take place in one the four national languages (German, French, Italian, or Romansh). Since hardly any proceedings have been conducted in Romansh, I excluded this language from the search.

case, since I read all potentially relevant decisions and excluded those that turned out to be false positives.

IV. Findings

When are the Swiss Federal Tribunal and the US Supreme Court influenced by public opinion? To respond with a reasonable degree of precision, I break down the case law based on four criteria which I consider the most relevant, feasible, and objectively detectable: the subject matter of the case (1.), the facet of public opinion (e.g. public morality, opinion polls, etc.) invoked or rejected by the court (2.), the method based on which public opinion is identified (3.), and the reasoning justifying the court's reliance on (or neglect of) public opinion (4.).

1. Subject Matters

Myriad issues are at stake in cases where courts explicitly refer to public opinion. Some topics are idiosyncratic and partly reflect peculiarities of the Swiss versus US legal landscape (b.). Other subject matters overlap (a.).

a. Areas of Overlap

The four main subject matters[37] in relation to which both courts explicitly mention public opinion are criminal law, criminal proceedings, procedural guarantees more generally, and controversial moral issues.

One first commonality in the case law is that both courts refer to public opinion to interpret substantive provisions of *criminal law*. Yet as soon as we zoom in, differences emerge. In the US, most relevant cases concern capital punishment and involve an interpretation of the Eighth Amendment's prohibition of "cruel and unusual

[37] Of course, cases may fall under more than one category, and as will become apparent, the boundary between these subject matters is not hermetic.

punishments". In this context, the Supreme Court typically examines "the evolving standards of decency that mark the progress of a maturing society"[38] ("ESD test"). The Court has done so when reviewing the constitutionality of capital punishment for 16- and 17-year-old offenders,[39] mentally disabled persons,[40] and mandatory executions of murderers of police officers.[41] It has also assessed the constitutionality of capital punishment *simpliciter*.[42] As I will emphasize (*infra*, 3.), the Justices have frequently disagreed about the implications of this test.

Justice Scalia has suggested that European States disregard public opinion with respect to capital punishment.[43] As a matter of fact, the issue is absent from the Swiss case law, as Switzerland abolished the death penalty in 1942. Criminal cases in which the Swiss Federal Tribunal refers to public opinion mainly involve the Swiss Criminal Code. The Court is primarily concerned about ascertaining public morality and social norms on an issue, e.g. to determine what constitutes an offence against a person's honor,[44] an error of law,[45] or manslaughter,[46] whether offenders shock accepted notions of morality,[47] or whether specific punishments have become obsolete.[48]

A related area of overlap concerns *criminal proceedings*. The US and Swiss practice converge in emphasizing that public opinion is relevant with respect to some issues, but that it cannot jeopardize judicial independence. Other aspects are idiosyncratic to the two courts' respective legal orders, e.g. US cases on jury trial and capital punishment, and Swiss rulings influenced by international human rights law and especially by the ECHR.

[38] This test was first articulated in Trop v Dulles, 356 US 86, 1958.
[39] Roper v Simmons, 543 US 551, 2005; Stanford v Kentucky, 492 US 361, 1989.
[40] Atkins v Virginia, 536 US 304, 2002; Penry v Lynaugh, 492 US 302, 1989.
[41] Roberts v Louisiana, 431 US 633, 1977.
[42] Roberts v Louisiana, 428 US 325, 1976.
[43] Kansas v Marsh, 548 US 163, 2006.
[44] BGE 105 IV 111.
[45] BGE 99 IV 249.
[46] BGE 115 IV 8.
[47] BGE 99 IV 57.
[48] BGE 98 Ia 301.

In the US, Justice Stevens, borrowing an expression from Oliver Wendell Holmes,[49] has cautioned against the "hydraulic pressure of public opinion" in capital punishment cases.[50] The Court has acknowledged that criminal proceedings must meet the expectations of the public in some respects, e.g. in terms of celerity[51] and publicity.[52] On the other hand, resisting public opinion is a condition of judicial independence.[53] Similar requirements apply to jurors,[54] who are sometimes explicitly admonished by State laws or judges not to "be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling".[55] Pretrial hearings must not be pressurized by public opinion either.[56]

The Swiss Federal Tribunal too notes that judges' sensitivity to public opinion in criminal cases may violate judicial independence and impartiality[57] and the presumption of innocence,[58] guarantees deriving from Switzerland's Constitution and from its international obligations. Moreover, other institutional features of criminal proceedings, such as the remuneration of public defenders,[59] cannot hinge on public opinion. Still, whether a court is independent and impartial partly depends on the perception of the public.[60] This perception may require specific institutional arrangements, such as separating investigatory and judicial functions.[61]

The relationship between *judicial independence* and public opinion has also been stressed outside criminal law and procedure.

[49] See his dissent in Northern Securities Co. v United States, 193 US 197, 1904.
[50] See his dissent in Payne v Tennessee, 501 US 808, 1991.
[51] Carroll v US, 354 US 394, 1957.
[52] Gentile v State Bar of Nevada, 501 US 1030, 1991.
[53] E.g. Beck v Alabama, 447 US 625, 1980.
[54] Groppi v Wisconsin, 400 US 505, 1971.
[55] E.g. Victor v Nebraska, 511 US 1, 1994; California v Brown, 1987, 479 U.S. 538.
[56] Gannett Co, Inc v DePasquale, 443 US 368, 1979.
[57] BGE 116 Ia 14.
[58] BGE 130 II 217.
[59] BGE 109 Ia 107.
[60] BGE 115 Ia 224.
[61] Ibid.

Once again, the US case law reveals the tension between judicial independence and the practice of judging. In *Chisom v Roemer*, the Court notes that "ideally public opinion should be irrelevant to the judge's role because the judge is often called upon to disregard, or even to defy, popular sentiment". However, judges without life tenure cannot be "credit[ed] with total indifference to the popular will while simultaneously [being required] to run for elected office".[62] Quoting Alexander Hamilton, pursuant to which judges have "no influence over either the sword or the purse", the Court has also highlighted that judges need to secure the public acceptance of their decisions, lest their rulings risk not being obeyed.[63]

Similarly, the Swiss Federal Tribunal deems it counterfactual and wrong to require judges to be insulated from social mores and public opinion. However, courts must resist influences that endanger their independence and impartiality.[64] These two guarantees are often stressed in the Swiss case law, even when public opinion is not explicitly mentioned. A plausible explanation is that they are protected by Swiss constitutional law[65] and international law,[66] while US law is less explicit in this regard.

A fourth and last common cluster of cases mentioning public opinion deals with *controversial moral issues*. While many US cases concern free speech, Swiss cases frequently pertain to the concept of obscenity.

US rulings typically focus on the First Amendment, which provides inter alia that "Congress shall make no law [...] abridging the freedom of speech, or of the press". The US case law is more protective of speech than the Swiss practice, and US public opinion

[62] Chisom v Roemer, 501 US 380, 1991. See also Estes v Texas, 381 US 532, 1965. Some Justices have stressed in their separate opinions that judicial independence and impartiality requires standing up against public opinion. See the dissents of Justice Stevens and Justice Ginsburg in Republican Party of Minnesota v White, 536 US 765, 2002. See also Justice Kennedy's concurrence stressing judicial independence in Missouri v Jenkins, 495 US 33, 1990, at 69.
[63] Williams-Yulee v Florida Bar, 135 SCt 1656, 2015.
[64] BGE 105 Ia 157, at 6 a).
[65] Art. 30(1) of the Swiss Constitution of 18 April 1999.
[66] Art. 6(1) ECHR, art. 14(1) ICCPR.

is largely irrelevant when deciding whether to grant this protection.[67] Another strand of First Amendment cases highlights the importance of an "informed", "critical" public opinion to restrain State power.[68] The main implication of this case law is that the freedom of the press must be guaranteed. Another consequence is that not *any* public opinion is worthy of protection, a point that is rarely stressed in the Swiss case law. It is worth noting that Justice Thurgood Marshall, dissenting in a case pertaining to the constitutionality of capital punishment, has highlighted that it is problematic to rely on opinion polls that are based on the views of uninformed participants.[69]

Other controversial issues in relation to which US judges invoke public opinion (mostly in separate opinions) include drug policy,[70] gay marriage,[71] abortion,[72] and the right to refuse medical treatment.[73]

Swiss cases dealing with obscenity and analogous concepts mention public opinion and contemporary standards relatively frequently.[74] The Swiss Federal Tribunal has emphasized the variability of conceptions of morality in place and time,[75] and it has deferred to the cantonal authorities regarding the identification of local public opinion on some issues.[76] It has stated that what constitutes obscenity depends on the perception of the ordinary citizen. Identifying this perception is deemed a question of

[67] E.g. Pope v Illinois, 481 US 497, 1987.
[68] Houchins v KQED, Inc, 438 US 1, 1978; NY Times Co v US, 403 US 713, 1971; Pittsburgh Press Co v Pittsburgh Commission on Human Relations, 413 US 376, 1973. See also, outside the remit of First Amendment cases: Buckley v American Constitutional Law Foundation, 525 US 182, 1999; Barr v Matteo, 360 US 564, 1959.
[69] Gregg v Georgia, 428 US 227, 1976. See also Justice Marshall's concurrence in Furman v Georgia, 408 US 238, 1972.
[70] See Justice Stevens' dissent in Morse v Frederick, 551 US 393, 2007.
[71] See Justice Roberts' dissent in Obergefell v Hodges, 576 US _____, 2015.
[72] Justice Scalia's dissent in Webster v Reproductive Health Services, 492 US 490, 1989 highlights the pressure of public opinion on the Court.
[73] Cruzan by Cruzan v Director, Missouri Dept of Health, 497 US 261, 1990. In this case, the Court looked at public opinion polls revealing how people would like to be treated if they were too sick to make decisions.
[74] E.g. BGE 97 IV 99; BGE 96 IV 64.
[75] BGE 126 III 534; BGE 133 II 136.
[76] E.g. whether peep shows ought to be prohibited in the canton of St. Gallen, see BGE 106 Ia 267.

law; therefore, according to the Court, opinion polls are of little use.[77] The Court has also consulted the evolution of public opinion with respect to other moral issues, e.g. gambling.[78]

b. Idiosyncrasies

One area of the law in which the US practice is much richer than the Swiss one is *anti-discrimination law*.

The US Supreme Court often refers to public opinion in rulings pertaining to public schools and education.[79] Many of these cases are interlinked with issues of racial discrimination. In this context, the Justices usually refuse to take public opinion into account. They have held that State governments cannot invoke the hostility of public opinion to justify their failure to desegregate public schools.[80] In *Grutter v Bollinger*,[81] Justice Ginsburg's concurrence notes that public support of equal opportunities for minority students has so far been insufficient to trigger equality in practice. More generally, the Court has highlighted the countermajoritarian role of fundamental rights,[82] and the fact that the majority cannot infringe these rights even if it wants to.[83]

The Swiss case law on the relationship between public opinion and anti-discrimination law (and fundamental rights more generally) is surprisingly scarce in comparison. Historical reasons only partly explain this difference. The Swiss Federal Tribunal's restraint is likely due to the institutional supremacy of the Federal Assembly,

[77] BGE 117 IV 276. See also BGE 103 IV 196.
[78] BGE 126 III 534.
[79] E.g. to identify the perception of corporal punishment in schools, Ingraham v Wright, 430 US 651, 1977, to demonstrate the "assimilative" effect of public schools (i.e. their capacity to build bridges across communities), Amback v Norwick, 441 US 68, 1979, and "the integrative" effect between schools and housing, Freeman v Pitts, 503 US 467, 1992.
[80] Board of Education of Oklahoma City Public Schools, Independent School Dist No 89, Oklahoma County, Okl v Dowell, 498 US 237, 1991.
[81] Grutter v Bollinger, 539 US 306, 2003.
[82] Fortson v Morris, 385 US 231, 1966; Pope v Illinois, 481 US 497, 1987; Schuette, 134 SCt 1623, 2014.
[83] Palmer v Thompson, 403 US 217, 1971.

to the fact that the Court cannot strike down federal acts deemed unconstitutional, and to the centrality of direct democracy in the Swiss political order.

Another asymmetry concerns the Swiss Federal Tribunal's reluctance to engage in *evolutionary interpretation*. The Court acknowledges that shifts in public opinion may require reinterpreting the law,[84] and it has done so in a judgment pertaining to the obligations of spouses.[85] However, in most cases, concerning for example married[86] and unmarried[87] couples, labor law,[88] civic service,[89] and animal protection,[90] it has deemed such societal changes not weighty enough to intervene. This contrasts with the US practice where evolutionary interpretation, though controversial, is more frequent.[91] This divergence is, again, likely owed to several features of the Swiss legal and political order, including semi-direct democracy, legislative supremacy, and – for constitutional cases at least – the flexibility of the Swiss Constitution, which can be amended relatively easily (e.g. whenever a popular initiative is accepted). The US Constitution is much more rigid in comparison.

Each of the two jurisdictions mentions public opinion regarding issues that are not (as) present in the other jurisdiction. In the US, such cases deal with the features of domestic criminal procedure, e.g. jury trial,[92] while the Swiss Federal Tribunal has relied on public opinion in a greater diversity of cases, pertaining for example to land

[84] E.g. BGE 105 Ib 49, on the law of nationality. See also BGE 125 V 205, BGE 109 II 15 (on family law).
[85] BGE 97 V 178.
[86] See BGE 129 V 425.
[87] BGE 110 V 1.
[88] BGE 91 I 98.
[89] BGE 129 V 425.
[90] BGE 129 III 715.
[91] E.g. recently Obergefell v Hodges, 576 US _____, 2015.
[92] E.g. Simmons v South California, 512 US 154, 1994, regarding the risk of juror confusion, and Carter v Kentucky, 450 US 288, 1981, on the importance of giving no inference-instruction.

use law,[93] property law,[94] or to interpret the concept of honor in criminal law[95] and divorce law.[96]

2. Facets of Public Opinion

So far, I have not distinguished between the facets of public opinion invoked or rejected by the courts. While they both refer to the concept of "public opinion", a closer look reveals that they put different emphases on its various expressions.

"Public opinion" is, in both cases, the most frequently encountered keyword. In the US, most hits concern the keywords "public opinion" and "evolving standards" (the latter allows finding cases on the ESD test).[97] In Switzerland, "public opinion" and "public morality" yield the greatest number of hits.[98]

The Swiss Federal Tribunal has sought to ascertain public morality on issues that are not as present in the US case law, e.g. in family law or regarding specific criminal offences. However, keywords pointing to the evolution of social norms and conceptions are less frequently mentioned in the Swiss case law than in the US Supreme Court's. Most US judgments dealing with such evolutions pertain to the ESD test.

As previously mentioned regarding anti-discrimination law (*supra*, 2.), keywords related to majoritarian considerations are more present in the US case law than in the Swiss practice. Given the importance of direct popular participation in the Swiss system, the dearth of reflections about majoritarian decision making and its pitfalls is

[93] BGE 89 I 464 (on the objective criteria used by the Court to decide whether a construction is damaging to the landscape); BGE 101 II 248 (on the level of noise caused by cow bells).
[94] BGE 126 II 366, where the Court notes that the opinion of the majority is not decisive to determine what is an unacceptable level of noise.
[95] E.g. BGE 105 IV 111.
[96] E.g. BGE 95 II 209.
[97] Public opinion yielded 148 hits, while evolving standards yielded 77. Not all of these cases were relevant for the purposes of this study, but many of them did concern at least one facet of public opinion.
[98] Public opinion yielded 62 hits, and public morality yielded 29 hits. Many decisions refer to the concept of popular will, but they mostly concern processes of direct democracy which are excluded from the scope of the search.

surprising, but it can be explained by Swiss courts' traditionally deferential role vis-à-vis lawmaking processes.

The US Supreme Court is keener[99] than the Swiss Federal Tribunal to cite concrete expressions of public opinion, such as opinion polls, social science data, and other relevant scholarship, even if the Justices disagree about many aspects of this practice. These resources are rarely used in the Swiss case law, which is less (or less visibly) documented and does not use footnotes. The Swiss Federal Tribunal is reluctant to allow the use of opinion polls.[100] It considers that judges may rely on them if cantonal procedural law authorizes it,[101] but that polls are inappropriate[102] or useless[103] with respect to specific issues. Arguably, caution vis-à-vis opinion polls is indeed warranted, given their many methodological pitfalls, their inherent underinclusiveness, and the risks that they be used opportunistically by litigants and by judges.

3. Method

Although both courts have, at times, asserted the existence of a given public opinion without further substantiation, the US practice is far more detailed and concerned about methodological issues than the laconic Swiss case law.

This becomes particularly salient with regard to Eighth Amendment cases and the ESD test. In this context, the Court has repeatedly clarified that it consults State laws, which are "barometers of contemporary values".[104] It also uses jury determinations.[105] Separate opinions reveal the methodological controversies dividing the Justices. While they agree that the ESD test demands relying on "conceptions of

[99] The use of these resources is not uncontroversial, however (*infra*, 3.).
[100] BGE 133 II 429, pertaining to appellations of origin and the term "raclette". The Court recommends "caution" when consulting opinion polls to identify the usage of the term.
[101] BGE 103 IV 196.
[102] E.g. to establish a danger of confusion in trademark law: BGE 126 III 315.
[103] E.g. to determine what qualifies as obscenity: BGE 117 IV 276.
[104] Sawyer v Smith, 497 US 226 (1990). For another example out of many, see Kennedy v Louisiana, 554 US 407, 2008.
[105] E.g. Atkins v Virginia, 536 US 304, 2002.

modern American society as reflected by objective evidence"[106] (though some even criticize this test as such[107]), they diverge in their understanding of what satisfies this requirement. Justices often split along ideological lines. Conservatives fiercely criticize the method used by Liberals, considering it subjectively tainted,[108] and denouncing the reliance on a "snapshot" of public opinion at a random point in time.[109] Vice versa, Liberals claim that the Conservatives' approach is not objective, e.g. when foreign practices are ignored.[110]

Another resource based on which the US Supreme Court identifies public opinion – even outside Eighth Amendment cases – is, as previously noted, social science data and scholarship.[111] Methodological issues have been discussed especially in connection with opinion polls, which are regularly used in capital punishment cases. This practice is deemed problematic by individual Justices. One reason is the alleged lack of information of some of the poll participants,[112] because democratically enacted State laws should prevail over the views of "private organizations speaking only for themselves [when identifying public opinion]".[113] Other arguments advanced by these Justices are that public opinion polls are inconclusive[114] or methodologically flawed.[115] The Court itself has stated that public perceptions must be expressed in legislation in order to be taken into account,[116] and it has acknowledged that the use of polls is

[106] E.g. Stanford v Kentucky, 492 US 361, 1989; Kennedy v Louisiana, 554 US 407, 2008; Atkins v Virginia, 536 US 304, 2002; McCleskey v Kemp, 481 US 279, 1987. The emphasis on objectivity is a recurrent theme in separate opinions pertaining to Eighth Amendment cases: Alito in Hall v Florida, 572 US ___, 2014; Alito in Miller v Alabama, 567 US 460, 2012; Thomas in Miller v Alabama, 567 US 460, 2012; Gregg v Georgia, 428 US 153, 1976; White in Harmelin v Michigan, 501 US 957, 1991.
[107] See Alito in Miller v Alabama, 567 US 460, 2012; Thomas in Graham v Florida, 560 US 48, 2010; Thomas in Farmer v Brennan, 511 US 825, 1994.
[108] See Justice Scalia's vocal concurrence in Glossip v Gross, 576 US ___, 2015, criticizing the method used by Justice Breyer. See also Justice Rehnquist's dissent in Ford v Wainwright, 477 US 399, 1986.
[109] Scalia and O'Connor in Roper v Simmons; Thomas in Graham v Florida, 560 US 48, 2010.
[110] See Justice Marshall's dissent in California v Ramos, 463 US 992, 1983.
[111] E.g. Freeman v Pitts, 503 US 467, 1992 regarding the integrative effect between schools and housing; Justice Ginsburg's concurrence in Grutter v Bollinger, 539 US 306, 2003.
[112] See Justice Marshall's concurrence in Furman v Georgia, 408 US 238, 1972.
[113] See Justice Rehnquist's dissent in Atkins v Virginia, 536 US 304, 2002.
[114] See Justice Blackmun's dissent in Roberts v Louisiana, 431 US 633, 1977.
[115] Ramdass v Angelone, 530 US 156, 2000.
[116] Penry v Lynaugh, 492 US 302, 1989.

controversial.[117] Some Justices have highlighted that judicial independence commands that courts do not make their decisions hinge on the results of such polls.[118]

Nothing of the kind can be observed in the Swiss case law. Besides the fact that methodology is seldom discussed, the Court is less transparent than the US Supreme Court about the way in which it does or does not take public opinion into account. Rarely has it compared cantonal laws to highlight shifts in public opinion. It has merely expressed concerns about the role of public opinion in judicial decision making by highlighting that it may jeopardize judicial independence.[119]

4. Justifications

Finally, based on these previous observations, what rationales do the two courts cite for following, respectively ignoring, public opinion?

As regards the former, the US Supreme Court has primarily highlighted that public opinion (i) constrains government power, (ii) is a vector of moral progress (this narrative is, at least, what the ESD test suggests), and (iii) allows courts to respond to social needs and, thereby, to strengthen public trust in the judiciary.

The Swiss Federal Tribunal mainly considers that public opinion is worth consulting because it (i) operates as a reality check on judges, who should not be disconnected from society, (ii) allows courts to settle difficult moral issues and to identify the content (or, at least, the social interpretation of) moral concepts used in the law (e.g. honor), and (iii) enables judges to clarify the meaning of indeterminate concepts protecting the public interest (e.g. what constitutes an "unaesthetic construction", an "unusually high level of noise", or a "particularly abject way of killing").

[117] Roberts v Louisiana, 428 US 325, 1976.
[118] See Justice Steven's dissent in Republican Party of Minnesota v White, 536 US 765, 2002 (regarding the First Amendment).
[119] *Supra*, 1.

Both courts agree that public opinion should not jeopardize judicial independence and impartiality. Another point of convergence is that public opinion is ill-suited to settle some issues, e.g. when courts face questions of law, or when they must decide as a rational citizen (and not as the majority of citizens) would. Finally, both courts acknowledge that public opinion should not jeopardize individual rights, even if the specific rights and their legal sources differ in the two legal orders.

The US Supreme Court has stressed that taking public opinion into account creates difficulties when it (i) prevents judges from obeying the law, (ii) puts undue pressure on them, (iii), is not informed, (iv) prevents the greater realization of fundamental rights, (v) is inconclusive, and (vi) is not identified accurately.

Surprisingly, the Swiss Federal Tribunal's has rarely ever dwelled on these concerns, even if some considerations connected to judicial independence surface in the case law. However, once again, it is important not to evaluate the Swiss practice out of context, but in light of its legal, political, and institutional constraints (*supra*, II.4.).

V. Conclusion

Jeremy Bentham's recommendation of institutionalizing judicial resort to public opinion has yet to become reality. As a matter of fact, this study has shown that the way the US Supreme Court and the Swiss Federal Tribunal make use of this resource remains hesitant. Their reliance on public opinion is inconsistent from one subject matter to another, not all facets of public opinion are mentioned or given equal weight, its method of ascertainment is indeterminate, and the normative basis for relying on it seems precarious. The case law also highlights (but does not resolve) the inherent tension between the influence of public opinion and judicial independence.

The US case law is strikingly richer and more detailed than the Swiss practice. Several features of the Swiss and US legal order explain this discrepancy: the aversion against popular and legislative backlash is presumably greater in Switzerland, given judges' need to be reelected. Swiss courts may also be wary of being subsequently contradicted by the European Court of Human Rights, while the US are not subject to

the jurisdiction of a supranational court. Moreover, in a semi-direct democracy like Switzerland, judicial deference towards majoritarian considerations is more deeply engrained, at least based on the sample of cases under scrutiny. Finally, the absence of separate opinions and the laconic style of Swiss rulings conceal the methodological difficulties raised by the ascertainment of public opinion. On the other hand, the Swiss practice is less dispersed than the US case law, which is riddled with disagreements and, at times, difficult to comprehend in light of its prolixity, richness, and multifaceted character (e.g. via separate opinions).

Two main difficulties emerge from the two courts' reliance on public opinion. First, they may be tempted to assert it rather than to demonstrate its existence. Second, they (and especially the Swiss Federal Tribunal) may lean towards making public opinion prevail over fundamental guarantees. These trends are worrying: while taking the concerns of ordinary people into account is not misguided per se, judges need to do justice to the complexity, nuances, and biases that inhere in the concept of public opinion. Failing to do so would turn this concept into a convenient and malleable tool through which courts ensure the social acceptance of their judgments. On this point, it is fitting to recall the writings of Hannah Arendt, quoted in a judgment of the US Supreme Court of 1967, pointing out the many voices which the term "people" can easily eclipse:[120]

> "The word 'people' retained for them (the Founding Fathers) the meaning of manyness, of the endless variety of a multitude whose majesty resided in its very plurality. Opposition to public opinion, namely to the potential unanimity of all, was therefore one of the many things upon which the men of the American Revolution were in complete agreement; they knew that the public realm in a republic was constituted by an exchange of opinion between equals, and that this realm would simply disappear the very moment an exchange became superfluous

[120] WEB Dubois Clubs of America v Clark, 389 US 309, 1967.

because all equals happened to be of the same opinion."[121]

[121] Hannah Arendt, *On Revolution*, Penguin Books, London 1990, 93.

VI. Appendix: Keywords

Table 1: Keywords Used for the Swiss Federal Tribunal

Category	Keyword	Linguistic versions (D/F/I)
1. Public opinion and popular will	Public opinion	Öffentliche Meinung, opinion publique, opinione pubblica
	Popular opinion	Verbreitete Meinung, opinion populaire, opinione popolare
	Popular will	Volkswille, volonté populaire, volontá popolare
	Opinion poll	Meinungsumfrage, sondage d'opinion, sondaggio d'opinione
2. Social norms, values, and beliefs	Social norms	Soziale Normen, normes sociales, norme sociali
	Public morals	Öffentliche Moral, moralité publique, moralità pubblica
	Swiss conceptions	Schweizerische Anschauungen/Auffassung, conceptions suisses, concezione svizzera[122]
	Common conception	Allgemeine Anschauung/Auffassung,

[122] "Concezioni svizzere" did not yield any results, and the keyword was therefore entered in the singular form.

		conception commune, concezione(-i) comune(-i)
	Widespread conception	Verbreitete Anschauung/Auffassung, conception répandue, concezione diffusa
	Popular conscience	Bewusstsein der Bevölkerung, conscience populaire, coscienza popolare
	Popular belief	Verbreiteter Glaube, croyance populaire, credenza popolare
3. Majoritarian considerations	Majority interest	Interesse der Mehrheit, intérêt(s) de la majorité, interesse(-i) della maggioranza
	Majority of the population	Mehrheit der Bevölkerung, majorité de la population, maggioranza della popolazione
	Opinion of the majority	Mehrheitsmeinung, opinion de la majorité, opinione della maggioranza
4. Social change	Social change	Gesellschaftlicher Wandel/Entwicklung, évolution sociale/de la société, evoluzione sociale/della societá
	Contemporary conceptions	Heutige Anschauungen/Auffassung,

		conceptions actuelles, concezioni attuali

Table 2: Keywords Used for the US Supreme Court

Category	**Keyword**
1. Public opinion and popular will	Public opinion
	Popular opinion
	Popular will
	Opinion poll
	Gallup poll
2. Social norms, values, and beliefs	Social norms
	Public morals
	Public morality
	American conception(s)
	Common conception
	Popular conscience
	Popular belief
3. Majoritarian considerations	Majority interest
	Interest of the majority
	Majority of the population
	Majority of the people
	Opinion of the majority
4. Social change	Social change
	Contemporary conceptions
	Evolving conceptions

	Evolving standards

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