The Nature of Supreme Court Power

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Neither Force, Nor Will

> The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.
>
> Alexander Hamilton[1]

In June of 2007, the United States Supreme Court handed down its decision in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007; hereafter *Parents*). In his plurality opinion, Chief Justice John Roberts declared that the Fourteenth Amendment requires school districts to assign students "to the public schools *on a nonracial basis*" (*Parents* 2007, 84) and therefore prohibits the race-conscious programs in the Seattle and Louisville school districts designed to promote racial diversity. Sharon Browne, the principal attorney for the parents challenging the school's assignment process, called the rulings "the most important decisions on the use of race since *Brown v. Board of Education*" (Rosen 2007) and predicted that, like *Brown*, the Court's ruling would have "a tremendous impact on the rest of the nation" (Lambert 2007).

However, several legal scholars disagreed: "School districts are going to continue to do indirectly what they tried to do directly," said Peter H. Schuck of the Yale Law School. "There will be another layer of bureaucracy," said David A. Strauss, University of Chicago law professor, "but I wouldn't expect a large-scale retreat from what public schools have tried" (Rosen 2007). According to Michael Klarman of the University of Virginia School of Law, "Just as *Brown* produced massive resistance in the South and therefore had little impact on desegregation for a decade, this decision is going to be similarly inconsequential … I don't think the court decision will make much difference either way" (Rosen 2007).

[1] *The Federalist 78*.

The juxtaposition of these viewpoints is particularly interesting because they differ, not only in their predictions regarding the effects of the *Parents* ruling, but also in their understandings regarding the effects of the *Brown* ruling. The traditional view of the Court's decision in *Brown v. Board of Education* (1954) suggests that "*Brown* really did transform society by stopping *de jure* segregation, and without *Brown*, schools would look very different" (Rosen 2007).[2] This view suggests the Supreme Court is a powerful institution, capable of promoting justice and protecting minority rights by enforcing its interpretation of the Constitution. However, the view of *Brown* advanced by Schuck, Strauss, and Klarman is consistent with a very different understanding of the Court. This alternate view depicts the Court as an almost powerless institution that may issue high-minded rulings but lacks the power to ensure that those rulings are actually implemented. These competing views weave in and out of the most prominent histories of the Supreme Court and the most prevalent scientific examinations of the Court's influence.

The U.S. Supreme Court was described as a relatively weak institution even before it existed. Arguing for the merits of the new federal Constitution in *The Federalist 78*, Alexander Hamilton assured his readers that "the judiciary, from the nature of its functions, will always be the least dangerous branch to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them …" According to Hamilton, a

> simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to defend itself against their attacks. (Hamilton 1961)

Hamilton's description of a weak judiciary was borne out during the early years of the Supreme Court. The justices were originally forced to "ride circuit," travelling from town to town to hear lower-court cases. The first chief justice, John Jay, resigned from the Court to become governor of New York. When President Adams offered Jay a second appointment as chief justice, Jay refused, citing his poor health and arguing that the Court lacked "the energy, weight, and dignity which are essential to its affording due support to the national government" (Johnston 1890–93, 285). In the 1803 case *Marbury v. Madison*, Chief Justice John Marshall, speaking for the Court, strategically retreated in the face of political opposition from the president and Congress. Although *Marbury v. Madison* is widely credited with establishing the power of judicial review (Epstein and Walker 1995, 73; Irons 2006, 107), some scholars describe the Court as capitulating in this case, illustrating "the relative impotence of the federal judiciary during the first decades of the constitutional order" (Graber 1999, 28; see Graber 1998).

[2] Quoting David J. Armor, professor at the George Mason University School of Public Policy.

Examples of the Court's impotence extend well past the founding era. In *Worcester v. Georgia* (1831), the Court ruled that Indian tribes were "dependent domestic nations" with rights to lands they had not voluntarily ceded to the United States. President Andrew Jackson defied the ruling and ordered federal troops to expel Creek, Chickasaw, and Cherokee tribes from their lands (Irons 2006, 111). Chief Justice Taney's extremist proslavery decision in *Dred Scott v. Sandford* (1857) is said to have "doomed his cause to ultimate defeat" (Irons 2006, 177). In the decades that followed, the Court was subjected to court-packing, court-shrinking, and jurisdiction-stripping as the Radical Republicans worked to keep the justices in line (Irons 2006, 183; *Ex Parte McCardle* 1869).

These extreme tactics foreshadowed the famous showdown between the Court and President Franklin Roosevelt over New Deal economic policy. After the Court invalidated many of Roosevelt's most ambitious legislative enactments, the New Deal Democrats began to contemplate various methods of reversing the Court. The most popular proposal was a plan to "pack the Court" by allowing President Roosevelt to appoint a new justice for every sitting member over seventy and one-half years of age. The plan would have allowed Roosevelt to appoint as many as six new justices; however, the proposal never came to fruition. Once again, the Court retreated, reversing its previous rulings, yielding to the elected branches, and initiating a so-called "Constitutional Revolution" (Irons 2006, 316; *West Coast Hotel v. Parrish* 1937; *National Labor Relations Board v. Jones & Laughlin Steel Corp*. 1937).

Each of these events from the Court's history involves distinct institutional dynamics: in *Marbury*, the Court strategically ducked a controversial issue; in *Worcester*, the Court failed to implement its ruling; in *Scott* and *Lochner*, the Court was overwhelmed by political backlash. Yet, despite the differences between these cases, each one suggests the Court's underlying lack of power. In classrooms and textbooks, these episodes are frequently explained as evidence that Hamilton was correct: The courts control neither the "sword" nor the "purse."

In contrast, some scholars argue that the courts have been particularly influential during specific periods of American history. For example, Steven Skowronek describes the period between the end of Reconstruction and the beginning of the New Deal as an era of "courts and parties," during which judges played a major role in shaping public policy, especially economic regulation (Skowronek 1982). During the so-called *Lochner* Era at the beginning of the twentieth century, the Supreme Court struck down a wide range of state and federal laws aimed at regulating labor conditions and expanding the role of the government. Although the New Deal eventually reversed most of these policy choices, reformers were not successful at overcoming judicial will for almost half a century. This long period of judicial activism may indicate that the Court is only effective at postponing policy change, but even the act of delaying may shape the form a policy will eventually take. For example, by striking down the programs enacted during Roosevelt's first one hundred

days, the Court radically altered the economic policies that eventually emerged during the 1930s (Gillman 1993).

Scholars also frequently depict the 1950s, 60s, and 70s as a period during which the Supreme Court had an unusually strong influence over policy creation. The Warren and Burger Courts issued numerous groundbreaking opinions in a broad range of policy areas, purportedly altering public policy regarding race relations, civil liberties, criminal law, prison administration, political representation, environmental regulation, privacy, and the role of religion in public life. More recently, the Rehnquist Court has made significant changes in the structure of American politics through its revival of federalism. By breathing new life into the Tenth and Eleventh Amendments and reducing the scope of the previously all-encompassing Commerce Clause, the Court has fundamentally altered the role of state governments and limited the ability of the federal government to impose its will in several policy domains (see *United States v. Lopez* 1995; *Seminole Tribe v. Florida* 1996; *Alden v. Maine* 1999; *United States v. Morrison* 2000).

Many of these decisions have been extremely controversial, often provoking strong public reaction and raising objections that the Court is undermining democratic self-government (Waldron 1999, 332; Tushnet 1999; Kramer 2004). The classic articulation of these concerns is Alexander Bickel's "countermajoritarian difficulty." According to Bickel, the fundamental difficulty with the role of courts in the American political system is the concern that judicial review "thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens … it is the reason the charge can be made that judicial review is undemocratic" (Bickel [1962] 1986, 16–7). If Court rulings always prevail over majority will, then Bickel's difficulty undoubtedly poses a serious dilemma for those hoping to reconcile judicial review with democratic principles; if, however, the Court is effectively powerless, then Bickel's difficulty is little more than a hypothetical concern.

It is unlikely that either of these perspectives accurately depicts the Supreme Court's power. Surely the Court's rulings have significant consequences at least occasionally; otherwise lawyers and interest groups would not invest so much time, money, and energy into bringing cases before the Court and trying to win them. However, in a system of government designed to balance political power among separate branches, it would be surprising if the Court were always totally successful at altering policy. The true nature of the Court's power most likely lies somewhere between these extremes. The question then becomes, when is the Supreme Court powerful and when is it not? What factors distinguish those situations in which the Court is resisted, undermined, or simply ignored from those in which the Court initiates sweeping political and social change?

I will argue that the Supreme Court's ability to alter the behavior of state and private actors is dependent on two factors: the institutional context of the

Court's ruling and the popularity of the ruling. The probability of the Court successfully exercising power increases when:

(1) its ruling can be directly implemented by lower state or federal courts; or
(2) its ruling cannot be directly implemented by lower courts, but public opinion is not opposed to the ruling.

However, the probability of the Court successfully exercising power decreases when:

(3) its ruling cannot be directly implemented by lower courts and public opinion is opposed to the ruling.

The distinction between Supreme Court rulings that can and cannot be implemented by lower courts is a critical point that has gone unnoticed by other scholars of judicial politics. In contrast with most prominent empirical studies of judicial power, I find that the Supreme Court has extensive power to alter the behavior of state and private actors in a wide range of politically salient issue areas.

My study is limited to an examination of the Supreme Court's power to alter behavior when it attempts to do so. My goal is not to advance a normative argument regarding this power. Undoubtedly, my empirical argument has normative implications; my findings may inspire and embolden those who support judicial activism in order to promote particular political agendas, while simultaneously disheartening proponents of judicial restraint who decry the antidemocratic nature of the Court's power. However, my primary objective is to set the stage for this debate by asking how powerful the Court is and, more importantly, under what conditions it is more or less powerful.

My examination of Supreme Court power proceeds as follows: In Chapter 2, I explore competing theories of Court power and present a new theory of the conditions that determine whether the Court can successfully exercise power. In Chapter 3, I discuss the methodological issues involved in measuring judicial power and selecting cases for examination. I then apply the methods developed in Chapter 3 to test my theory on four types of Supreme Court rulings: those rulings that face little popular opposition and can be directly implemented by lower courts (Chapter 4), those rulings that face strong popular opposition and can be directly implemented by lower courts (Chapter 5), those rulings that face little popular opposition and cannot be implemented by lower courts (Chapter 6), and those rulings that face strong opposition and cannot be implemented by lower courts (Chapter 7). In Chapter 8, I summarize my findings and consider their implications for the future study of the Supreme Court and its role in American politics.

2

When Courts Command

> Armed with the power of determining the laws to be unconstitutional, the American magistrate perpetually interferes in political affairs … Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.
>
> Alexis De Tocqueville[1]

> By itself, the [Supreme] Court is almost powerless to affect the course of national policy.
>
> Robert Dahl[2]

In this chapter, I begin by developing a working definition of judicial power. I then consider several competing theories of Supreme Court power and the expectations these theories offer about the Court's ability to influence other actors. Most empirical studies of Court power find that the Court is a relatively weak political institution, but numerous positive theorists insist that it should be capable of altering behavior, at least in certain limited circumstances. Next, I suggest several factors that may influence whether the Court is successful at exercising power based on well-established findings from the judicial politics and electoral politics literatures. Specifically, I will argue that the probability of the Court exercising power depends on the institutional context and popularity of its rulings. Finally, based on these factors, I present a new theory of Supreme Court power.

DEFINING JUDICIAL POWER

Understanding when the Supreme Court is capable of exercising power requires a clear definition of judicial power. I base my definition on Jack Nagel's conception of power in his seminal work on the subject: "A power relation, actual

[1] Tocqueville (1945, 279–80).
[2] Dahl (1957, 293).

or potential, is an actual or potential causal relation between the preferences of an actor regarding an outcome and the outcome itself" (1975, 29). Adapting this definition to the judiciary, I define judicial power as an actual or potential causal relation between the preferences of a judge regarding the outcome of a case and the outcome itself. I take as assumed, as is common in the judicial politics literature, that Supreme Court justices are political actors with policy preferences – that is, preferences regarding policy outcomes – and Court decisions are reflections of those preferences (Segal and Spaeth 2002).[3] Therefore, the Supreme Court is powerful if there is an actual or potential causal relation between the Court's rulings and the outcome of those rulings. Evaluating the Court's power in a particular ruling requires an understanding of the preferences expressed by the Court in the ruling and the outcomes of that ruling.

In this study, I examine the behavior outcomes of Supreme Court rulings. Behavior outcomes are the behaviors of state and private actors that the Court intends to alter through its rulings. Other authors have referred to these outcomes as "behavior responses" (Canon and Johnson 1999, 25). As previous studies have noted, "for a judicial policy to have general effect in the political system, the behavior of many individuals must be affected" (Johnson 1967, 171). However, identifying what behavior outcomes the Court intended to alter in a particular ruling is not always a simple matter. Often the Court demands a specific change in behavior, but also intends other behavior changes as indirect consequences of its decision. In other situations, the Court may be indifferent or even completely opposed to the possible indirect consequences of its rulings.

To illustrate this point, consider the Court's intentions in issuing rulings in the following three cases: *Mapp v. Ohio* (1961), *Roe v. Wade* (1973), and *United States v. Lopez* (1995). In *Mapp*, the Court ruled that illegally obtained evidence must be excluded from a criminal trial. In *Roe*, the Court held that women have a constitutionally protected right to obtain an abortion. In *Lopez*, the Court invalidated the Gun-Free School Zones Act, which made it a crime to carry a gun near a school. In each of these cases, the Court's ruling could be directly implemented by lower courts; in order to conform to the Court's preferences in these rulings, lower court judges need merely refrain from admitting illegally obtained evidence, convicting defendants under abortion statutes, and convicting defendants under the Gun-Free School Zones Act. However, the language of the Court's opinions in these cases, as well as simple common sense, suggests that the Court held very different preferences regarding the indirect consequences of these rulings.

[3] A large and growing literature on judicial decision making argues that Supreme Court justices may act strategically in certain situations in order to achieve their policy preferences (i.e., Epstein and Knight 1998). Consequently, the Court's decisions may reflect their choice in a strategic game rather than their genuine policy preferences. For example, the Court may temper its rulings to avoid provoking a reaction from a hostile Congress. Regardless, when the Court does strike down a law, the ruling undoubtedly reflects the justices' preference relative to the status quo.

In *Mapp*, the majority specifically stated that "the purpose of the exclusionary rule 'is to deter – to compel respect for the constitutional guarantee in the only effective available way – by removing the incentive to disregard it'" (*Mapp v. Ohio* 1961, 656). In other words, the Court intended for the exclusion of illegally obtained evidence to deter the police from conducting illegal searches in the first place. In this case, the Court not only intended for its ruling to have indirect effects, the realization of these indirect effects was the primary goal of the decision.

In *Roe*, the Court clearly intended to grant women increased access to legal abortions; however, the Court did not necessarily intend to increase the number of abortions in the same way that it intended to stop illegal searches. One might expect the frequency of legal abortions to increase after *Roe*, but this was not necessarily the Court's intent. Nor is there any reason to believe the Court intended its ruling to have other indirect consequences that have been attributed to it, such as changes in adoption and crime patterns. In this case, the Court was not primarily interested in, and was possibly apathetic toward, the indirect consequences of its ruling.

The possible consequences of the Court's ruling in *Lopez* include the increased presence of guns near schools, as well as an increase in gun-related violence near schools; however, it goes without saying that the justices did not intend to increase gun violence. In this case, the Court obviously hoped that the possible indirect effects of its ruling would be mitigated by other factors, such as the deterrent effects of state and local gun laws.

In order to evaluate the Supreme Court's power, I will consider both the direct and indirect effects of its decisions. I will pay special attention to indirect effects when it is clear that the Court intended to alter behavior through the indirect consequences of its rulings. I will pay little or no attention to the unintended consequences of the Court's rulings, because a proper test of judicial power evaluates the causal relationship between the preferences of judges and the outcomes of their decisions; expecting the Supreme Court's rulings to also have unintended consequences would be a perverse test of its power.

Although I will assess both the direct and indirect effects of the Court's rulings, the reader should carefully consider what standards are appropriate for evaluating the Court's power in each issue area. Consider, for example, the Supreme Court's reapportionment rulings. In *Baker v. Carr* (1962), the Court decided that the constitutionality of legislative apportionment schemes could be challenged in federal court. Two years later, in *Reynolds v. Sims*, the Court ruled that "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable" (1964, 577). The *Reynolds* decision was an expression of the Court's preferences regarding the apportionment of state legislative districts; the Court preferred that the legislatures of the fifty states create legislative districts with as nearly equal population as practicable. The most direct behavior outcome expected in the *Reynolds* decision is the equal apportionment of legislative districts after the ruling. If there was

an actual causal relationship between the *Reynolds* decision and equal reapportionment of state legislative districts, then the Supreme Court successfully exercised power over this behavior outcome.

However, focusing on the most direct behavior outcomes of a ruling may severely limit our understanding of Supreme Court power. First, such a focus might set the bar too low when evaluating whether the Court has exercised power by ignoring its failure to indirectly alter behavior patterns through its rulings. Second, limiting my examination to the direct effects of the Court's rulings may obscure the full extent of the Court's power. For example, some scholars claim that supporters of the *Baker* and *Reynolds* decisions were hoping that "[r]eapportionment would lead the way to liberal social legislation" (Rosenberg 2008, 293). One could argue that causing the reapportionment of legislative districts is not the critical test of the Court's power in these rulings. Instead, one must examine whether or not the reapportionment of state legislatures caused future legislatures to enact different types of legislation. If many advocates of reapportionment – and possibly the justices themselves – intended to indirectly alter the behavior of future state legislatures, then the behavior of these future legislatures may be a more relevant and interesting behavior outcome to examine.

On the other hand, placing too much emphasis on indirect consequences may set the bar too high for evaluating Supreme Court power. Just because some proponents of a ruling hoped it would produce particular downstream consequences does not mean that the Court's power depends on the manifestation of those consequences. As it turns out, the *Baker* and *Reynolds* decisions did cause the reapportionment of legislative districts, and this reapportionment appears to have produced substantially different legislation in state legislatures, but it may not have been the "liberal social legislation" for which some had hoped.[4] This finding does not indicate that the Court failed to implement its preferences; it suggests that those who supported the reapportionment rulings in hopes of such legislation miscalculated the likely behavior of the new legislators.

Behavior outcomes should not be confused with attitude outcomes. Attitude outcomes are the attitudes in the general public or among specific subsets of the population regarding the topic of a Supreme Court ruling. The Supreme Court may have the power to alter these attitudes in various ways. This role for the Court is sometimes described as education (Bickel [1962] 1986, 26; Funston 1975, 810; Rostow 1952, 208), legitimation (Black 1960; Dahl 1957, 293; Wasby 1970, 14), persuasion (Feeley 1973), or "appealing to men's better nature" (Bickel [1962] 1986, 26). Other scholars have subdivided the concept of attitude outcomes into "acceptance decisions," changes in "intensity of a person's attitude," and changes in "people's regard for the court making the decision" (Canon and Johnson 1999, 24), but at its core this function

[4] See *infra* Chapter 6, Reapportionment section.

involves the Court causing a change in attitudes as a result of its ruling (Wasby 1970, 15).

For example, much of the Court's opinion in *Reynolds* reads like a persuasive essay on the merits of equal apportionment designed to persuade readers without enlisting legal principles. In his opinion for the Court, Chief Justice Warren appeals to history, fairness, and common sense as much as precedent, text, and original intent:

> A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause. This is an essential part of the concept of a government of laws, and not men. This is at the heart of Lincoln's vision of 'government of the people, by the people, [and] for the people.' The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races. (*Reynolds v. Sims* 1964, 568)

It is at least plausible that the Court may intend to alter public attitudes as well as behavior through rulings such as this one; if it is successful at doing so, then its rulings may have indirect effects on behavior as these changed attitudes begin to alter policy through the normal political process.

A reliable examination of the effects of Supreme Court rulings on attitude outcomes would face numerous methodological problems. Such a study would require survey data on topics directly related to Court rulings in each issue area under consideration. Because these rulings may have different effects on different demographic, geographic, or ideological groups, these surveys would need to be sensitive to "the structure of opinion regarding a ruling" among these different groups (Franklin and Kosaki 1989, 753). Moreover, given the complexity of public opinion toward the Supreme Court and its rulings, persuasive opinion data would need to describe enduring levels of "diffuse support" for the Court itself, "specific support" for actions taken by the Court, and the relative intensity of support (see Caldeira and Gibson 1992; Hoekstra 2000; Marshall 1989; Mondak 1992). The issue of intensity is particularly important when investigating Court rulings, because the Court probably exercises its power over attitude outcomes by employing its diffuse support to enlist specific support or by discouraging opposition to a law by conferring legitimacy on it. An evaluation of whether these dynamics occur would require a measure of public opinion sensitive enough to distinguish between a respondent's agreement with a ruling, support for a ruling, and acceptance of a ruling. Finally, because attitude outcomes inherently involve attitude change, such a study would require time series surveys with all of these components.[5]

By pointing out the difficulties involved in measuring the effects of Court rulings on attitude outcomes, I do not mean to imply that such an investigation would be impossible. In fact, many studies persuasively argue that the Court does possess the power to alter attitude outcomes (see Hoekstra 2000;

[5] I am indebted to Professor Paul Brace for his thoughtful analysis of the many methodological issues involved in studying attitude outcomes.

Mondak 1990; 1991; 1992). I only wish to emphasize that the many complications involved in such a study would require different methodological strategies than those required for a study of behavior outcomes.

Perhaps more importantly, there is no theoretical reason to believe that the Court's power over attitude outcomes would operate in the same (or even a similar) manner as its power over behavior outcomes. The Court may have different levels of power over these two types of outcomes in different situations, and the factors influencing whether the Court is able to exercise power in a particular case may be different depending on which type of outcome is considered. Although an examination of the Court's power to alter attitude outcomes would be an interesting and valuable project, the dynamics governing this type of power are probably fundamentally different than those governing the Court's power to alter behavior outcomes; therefore, such an examination would best be conducted in a separate study. For these reasons, I will explore only those factors that influence whether the Supreme Court is successful at altering behavior outcomes.

COMPETING THEORIES OF SUPREME COURT POWER

Despite a broad consensus among legal experts, politicians, the media, and the public that the Supreme Court is extremely powerful, most political scientists who study the Court's capacity to implement policy change emphasize its relative limitations. If the Court were a relatively weak institution, incapable of exerting its will against the elected branches of government, it would not be especially surprising. As Robert Dahl argued in his seminal article on the Court, "if the Court did in fact uphold minorities against national majorities, as both its supporters and critics often seem to believe, it would be an extremely anomalous institution from a democratic point of view" (Dahl 1957, 291). Why would the legislative and executive branches tolerate a countermajoritarian institution overruling their decisions? It seems much more likely that the elected branches would use the Court as an instrument of their own power by staffing it with political allies, reaping the benefits of enhanced legitimacy when the Court is in agreement, and simply ignoring or subverting the Court when it is not. Dahl's view of the Court suggests two expectations for Court behavior: The Court will rarely disagree with the elected branches, and, when it does, it will be incapable of implementing its own preferences.

Dahl describes the first expectation as a natural by-product of the judicial appointment process. Because Supreme Court justices have what Dahl describes as a high turnover rate and must be appointed by the president and confirmed by the Senate, "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States" (Dahl 1957, 285). Although the Court may resist change when its policy preferences lag behind those of the lawmaking majority, as was the case in the New Deal, the Court will eventually be the loser in these confrontations (Funston 1975). In addition, the legislative

and executive branches can constrain judicial power by overriding judicial interpretation of statutory law, threatening to "pack the Court," removing federal court jurisdiction, or influencing the Court through the solicitor general (Rosenberg 2008, 14). These factors led Robert McCloskey and Gerald Rosenberg, writing three decades apart, to agree: "Supreme Court decisions, historically, have seldom strayed far from what was politically acceptable" (McCloskey 1960, 224; Rosenberg 2008, 13). Consequently, judicial power is usually used to legitimize the "lawmaking majority" and enforce a national consensus against policy outliers (Dahl 1957, 294–5; Funston 1975, 810; Whittington 2007, 105, 152).

Despite the many tools at the disposal of Congress and the president to influence the Court, once in a while the justices will disagree with the "lawmaking majority." When this occurs, Dahl's second expectation suggests that elected officials will simply ignore or undermine the Court's ruling. Because, according to this view, the legislative and executive branches hold all true power (both "the purse" and "the sword"), their policy choices will ultimately prevail. After reviewing situations in which the Court has invalidated legislation less than four years after it was enacted, Dahl concludes that Congress and the president are almost always successful at overruling the Court's decisions. Fears that judicial review contradicts principles of democratic self-government are irrelevant because "lawmaking majorities generally have had their way" (Dahl 1957, 291).

This view, sometimes called the "Constrained Court" view, is joined by a chorus of other judicial scholars. Stuart Scheingold argues that "direct deployment of legal rights in the implementation of public policy will not work very well, given any significant opposition" (1974, 117). Courts can "be of some use in implementing policies that apply principally to government agencies"; however, "[w]ithout the support of the real power holders … litigation is ineffectual and at times counterproductive. With that support, litigation is unnecessary" (Scheingold 1974, 130). Although Robert McCloskey believes that the Supreme Court can have a significant impact on policy change, he cautions that "[t]he Court's greatest successes have been achieved when it has operated near the margins rather than in the center of political controversy, when it has nudged and gently tugged the nation rather than trying to rule it" (McCloskey 1960, 229). Others doubt the Court's ability to produce substantial changes without support from non-judicial actors when issuing decisions regarding federalism (Nagel 2001) and religious expression in public schools (Abel and Hacker 2006).

Gerald Rosenberg echoes the view of a "Constrained Court" in his book, *The Hollow Hope*. Studying the outcomes of the Supreme Court's decisions in *Brown v. Board of Education* and *Roe v. Wade*, Rosenberg finds that "U.S. courts can almost never be effective producers of significant social reform. At best, they can second the social reform acts of the other branches of government" (Rosenberg 2008, 422). Instead, courts tend to "act as 'fly-paper,'" drawing resources away from direct political action, while "providing only an illusion

of change" (Rosenberg 2008, 427). Like Dahl, Rosenberg identifies two major constraints that limit the ability of courts to influence social policy: a lack of judicial independence and the judiciary's "lack of implementation powers" (Rosenberg 2008, 420).[6]

Similarly, Donald Horowitz notes "the impotence of the courts" and contends that the Court is ill-advised to attempt social policy engineering because "[t]he new burdens assumed by the courts seem to raise questions of capacity whatever the issue area or the target environment, or at least they raise these questions in ways that crosscut issue areas and target environments" (Horowitz 1977, 264, 273). In a review of the Supreme Court's influence on policy and social change, Lawrence Baum summarizes the literature as follows: "Implementation of the Court's policies is far from perfect; judges and administrators often balk at carrying out its rulings. The available evidence also indicates that the Court is quite constrained in its ability to secure social change" (Baum 2003, 177).

Not all scholars depict the Supreme Court as powerless to alter social outcomes, and some have fervently attacked this view (see Schultz 1998).[7] Many judicial politics scholars claim that the Court is a powerful institution, capable of producing significant social and political reform. Although these studies offer valuable insights into the nature and scope of judicial power, none of them attempt a comprehensive, scientific examination of the Court's ability to influence behavior. For example, Jonathan Casper (1976) simply extends Dahl's analysis of the number of federal laws declared unconstitutional by the Court, and Roger Handberg and Harold Hill (1980) build on this study by incorporating statistics on the Court's use of statutory interpretation. Michael McCann (1999) and William Lasser (1988) both utilize theory building and interpretive historical analysis to support their arguments, but they do not conduct rigorous empirical analyses of particular cases.[8] In his book, *Rights at Work*, McCann (1994) offers a persuasive empirical examination of judicial power, but he limits his study to judicial action in pay equity cases. Similarly, Douglas Reed (2001) describes the significant effects of judicial action on financing public education and Thomas Keck (2009) provides a persuasive rejoinder to Rosenberg's account of same-sex marriage lawsuits, but these studies are limited to these particular issue areas.

[6] Rosenberg originally suggests three potential constraints on judicial power: the limited nature of constitutional rights, the lack of judicial independence, and the judiciary's lack of implementation powers. However, after conducting his case studies, Rosenberg concludes that the first constraint, "the lack of established legal precedents, was weak" (Rosenberg 2008, 337).

[7] Rosenberg has created a Web site with an extensive list of reviews of *The Hollow Hope*, as well as a thoughtful response to the most common criticisms of his work. http://www.press.uchicago.edu/books/rosenberg/. Although my work is in large part an attack on his central thesis, I agree with several of his points in this response.

[8] Even McCann is willing to "concede the central insight … that federal courts alone rarely 'cause' significant social change in predetermined directions" (1999, 67).

Most observers of the Supreme Court either implicitly assume or explicitly state that the institution is either very powerful or very weak. This dichotomy is problematic for several reasons. First, any absolute claim about the Court's power – that it is omnipotent or impotent – is undoubtedly inaccurate. Second, any relative statement about the Court's power – that it is more or less powerful than previously thought – depends on a consensus of conventional thought, and, as I discussed in Chapter 1, no such consensus exists. Conflicting claims about judicial power extend back to the Founding; therefore, almost any description of the Court's power could be portrayed as surprisingly strong or surprisingly weak when compared to one of these conflicting claims. Third, most studies of judicial power ignore the difference between failures in judicial implementation and failures in implementation in general (Baum 2003, 176). Consequently, some deficiencies in the Court's power may be unrelated to the nature of judicial politics. Fourth, emphasizing a black-and-white depiction of the Court as either dynamic or constrained obscures more interesting and practical puzzles of judicial power. Once the extreme claims have been eliminated from consideration, the critical question is not "How powerful is the Court?" but rather, "Under what conditions is the Court powerful?"

An extensive literature on judicial implementation and impact addresses this question, but these studies have failed to generate a consensus on factors related to the successful exercise of Court power. For example, Stephen Wasby's seminal work, *The Impact of the United States Supreme Court: Some Perspectives*, concludes that "We are not ready, it seems, for a broad 'theory of impact.' We can only move *toward* such a theory" (1970, 245–6). Wasby then lists 136 hypotheses related to the impact of court rulings, including compliance, political reaction, public opinion, interest group actions, and subsequent judicial, legislative, and executive behavior.

Despite a lack of consensus, this literature proposes several factors that might affect whether Supreme Court rulings successfully alter behavior. Frequently suggested factors include the closeness of the vote on the Court (Wasby 1970, 245), the clarity or ambiguity of the Court's opinion (Bradley 1993; Canon and Johnson 1999, 72–4; Wasby 1970, 245), and the attitudes of society, local communities, or particular officials toward the policy or the Court (Birkby 1966; Canon and Johnson 1999, 75–8, 83–6; Nagel 2001; Reich 1968; Skolnick 1966, 227; Wasby 1976, 217–8). Others claim that the Court exercises power by exploiting gridlock in the legislative process in order to impose its own policy preferences when its political opposition lacks the power to overturn its decisions (Eskridge 1991a; 1991b; Eskridge and Ferejohn 1992; Ferejohn 2002). Although these studies certainly do not claim that Court rulings are always implemented, they generally suggest that the Court can successfully alter behavior under certain circumstances (see Johnson 1967).

Many recent studies of judicial power have refined Dahl's depiction of a weak Court by claiming that judicial power – and specifically judicial review – is politically constructed (Clayton and Pickerill 2006; Frymer 2003; Gillman 2002; Graber 1993; 2005; Lovell 2003; McMahon 2004; Peretti 1999;

Pickerill and Clayton 2004; Whittington 2007; see Keck 2007). Following Dahl, these studies argue that "the Supreme Court is integral to, rather than distinct from, the national political regime" (Pickerill and Clayton 2004, 236). Therefore, "when a justice decides in accordance with her personal values, she is vindicating those values deliberately 'planted' on the Court by a recently elected president and Senate" (Peretti 1999, 5). These studies claim that lawmakers often invite courts to create policy in situations when judicial action will advance the interests of the governing regime. As a result, some judicial rulings may be implemented because the governing regime supports the Court's policy.

Specifically, elected officials may welcome the exercise of judicial power in five situations: (1) "regime enforcement," in which the Court brings outlier states into line with a national consensus (Graber 1993, 39; 2005; Whittington 2005, 586; 2007, 105–20; see Funston 1975; Klarman 1996; Rosen 2006); (2) "division of labor," in which the Court addresses issues unworthy of attention from Congress or the president (Whittington 2007, 121; see Dahl 1957; Johnson and Canon 1984); (3) "overcoming gridlock," in which the Court resolves issues about which the other branches cannot agree (Eskridge 1991a; 1991b; Eskridge and Ferejohn 1992; Ferejohn 2002; McCloskey 1960; Whittington 2007, 124–34); (4) "blame avoidance," in which the Court orders a policy that elected officials want but cannot endorse without losing popular support (Graber 1993, 43; Lovell 2003; Whittington 2007, 136–7); and (5) "legitimation," in which the Court lends its institutional legitimacy to policies enacted by other government actors (Dahl 1957, 294; Murphy 1964, 17; Whittington 2007, 152–7; see Black 1960; Funston 1975; Miller 1968).

Taken together, the last half-century of scholarship on judicial power suggests that the Court is highly constrained. Based on this work, the Supreme Court appears incapable of exercising power over behavior outcomes in most situations (Dahl 1957; Horowitz 1977; Nagel 2001; Rosenberg 2008; Scheingold 1974). The exceptions to this finding generally fall into one of the five categories summarized in the previous paragraph. Only a few studies argue for a more expansive view of judicial power, and these have been limited in scope or empirical rigor. A tougher test of Supreme Court power would consciously avoid those circumstances in which the Court might wield marginal influence, and instead evaluate the Court's power on a broader scale.

FORMING A NEW THEORY OF SUPREME COURT POWER

I base my theory of Supreme Court power on the rather modest suggestion that the Court is an *implementer-dependent* institution. By that, I mean that the Court, like most political authorities, must rely on other political actors to implement its decisions. In addition, also like other authorities, the likelihood of its decisions being implemented will depend on the institutional and social context of the decision. In some contexts the relevant political actors charged with implementation will tend to follow the Court's instructions; in

other contexts they will not. The same could be said of Congress and the president. For example, presidential decisions that must be implemented by military actors will almost always be followed, whereas those decisions that require the cooperation of Congress or independent agencies tend to face more resistance. In this section, I consider well-established findings related to the behavior of judges and elected officials in order to identify institutional and social conditions under which the relevant political actors tend to implement the Court's decisions.

Despite the paucity of comprehensive studies of judicial power, there have been numerous studies of lower-court compliance with Supreme Court rulings. The dominant view in this literature contends that federal district courts and courts of appeals are highly responsive to Supreme Court rulings (Gruhl 1980; Johnson 1987; Songer 1987; Songer et al. 1994; Songer and Sheehan 1990; Spriggs 1997), as are state courts (Benesh and Reddick 2002; Hoekstra 2005; Songer 1988). These findings are consistent with common understandings of a lower-court judge's motivations. Such judges do not like to see their rulings overturned, hope to be promoted to a higher court, have been socialized into the legal culture, and are under strong pressure from their professional community to adhere to the judicial hierarchy.

The finding that lower courts are highly responsive to Supreme Court rulings suggests that the Court may be especially successful at implementing policy changes through these courts. Consequently, the probability of the Court exercising judicial power should be greater in issue areas in which lower courts can directly implement policy change. Issue areas in which lower courts control policy implementation constitute a significant portion of the Court's work. These issue areas are distinct because the Supreme Court's orders can be implemented by political actors located directly below the Court in the judicial hierarchy; therefore, I will call issue areas in which lower courts can implement policy change *vertical issues*.

Vertical issues usually involve the Court identifying a group of potential criminal defendants as constitutionally immune from criminal prosecution. For example, the Court has declared that abortionists and online pornographers cannot be convicted in lower courts.[9] The lower courts can directly implement this ruling by simply not convicting defendants charged with these crimes. In addition, the Court may rule that all criminal defendants are immune from a certain type of criminal prosecution. For example, the Court ruled at one point that no person could be sentenced to the death penalty.[10] Or the Court may combine these methods by, for example, ruling that no minor can be sentenced to the death penalty.[11] Vertical issues also include cases in which the Court announces new rules regarding civil law or the administration of lower courts. For example, in *Plaut v. Spendthrift Farm, Inc.* (1995), the Court struck down

[9] *Roe v. Wade* (1973), *Ashcroft v. ACLU* (2004).
[10] *Furman v. Georgia* (1973).
[11] *Roper v. Simmons* (2005).

part of the Securities and Exchange Act that required lower courts to reopen federal civil actions.

The critical commonality among these cases is that the Court's direct instructions can be implemented by lower-court judges without the aid of non-court actors. This distinction may be difficult to see in some cases, but it is vital for understanding the implementation of Supreme Court decisions. Consider *Miranda v. Arizona* (1966; hereafter *Miranda*), in which the Court ruled that statements arising from custodial interrogation of a criminal defendant could not be admitted into evidence unless the police had informed the defendant of his constitutional rights. Although some might interpret this ruling as a directive to the police, it was not. Instead, it was an order for lower-court judges to exclude any statements from the defendant obtained by the police unless the police first read the warnings. Undoubtedly, the Court hoped and anticipated that as an indirect consequence of the ruling the police would start reading Miranda warnings. The justices did not need the willing cooperation of police officers in order to implement the decision; they only needed the cooperation of lower-court judges. The police, in an effort to obtain more convictions, would then respond to this new situation and start reading the warnings. As long as rulings in vertical issues are implemented by the lower courts, their impact should extend well outside the courtroom.

On the other hand, in numerous Supreme Court cases implementation is controlled by non-court government actors, such as lawmakers, administrative agencies, individual bureaucrats, city councils, school boards, and law enforcement officials.[12] Because policy changes in these issue areas must be implemented by officials outside the judicial hierarchy, I call these issue areas *lateral issues*. It is important to emphasize that lateral issues do not merely refer to cases in which Congress or the president must implement policy. Usually, these instructions are directed to state or federal agencies, such as the Social Security Administration and the U.S. Postal Service, or local officials, such as public school boards and school administrators.[13] However, sometimes the orders are aimed directly at the president, Congress, and state legislators.[14] The critical commonality among these cases is that in each of these rulings the Supreme Court is dependent on non-court actors to implement policy change.

[12] I divide all Supreme Court rulings into orders directed at lower courts and orders directed at other non-court, government actors. One might claim that the Court also issues orders to non-government, private actors. For example, the Court might order a business monopoly to break up, certain defendants to go to jail, or black and white school children to go to school together. However, for each order the Court issues, it relies on a government actor to implement the decision: The police and administrative agencies must oversee and enforce the monopoly breakup; the lower court must sentence the defendant to jail; the school officials must assign black and white children to the same school. Therefore, as I divide the universe of Supreme Court cases, every case falls into one of these two categories.

[13] See *Lamont v. Postmaster General* (1965), *Califano v. Westcott* (1972), *Brown v. Board of Education* (1954), and *Engel v. Vitale* (1962).

[14] See *Baker v. Carr* (1962), *Immigration and Naturalization Service v. Chadha* (1983), and *Clinton v. New York* (1998).

Sometimes the Court will attempt to utilize lower courts to implement rulings in lateral issue areas; for example, the Court used federal district judges to supervise the desegregation of schools in the South following its ruling in *Brown v. Board of Education*. Ultimately, however, the Court was dependent on the school officials to implement the ruling because the schools did not rely on the lower courts for action the way a prosecutor does.

Non-court government officials are relatively insulated from the Court's influence and may not share the same professional norms that judges do. Consequently, they may be in a position to pursue their own policy preferences (Johnson and Canon 1984, 83). These other government actors may also be under strong political pressure from superiors or electoral constituents to ignore the Court (Johnson and Canon 1984, 89–92). If elected officials are primarily concerned with reelection, they will probably defy the Court in these situations (Mayhew 2004). In addition, attacking the Court as an anti-democratic institution may, in and of itself, offer electoral benefits (Engel 2009). Finally, if there were a total consensus against the Court's ruling, there may simply be no one to bring a complaint to court protesting violation of the Supreme Court's ruling. These factors suggest that the Court may face more difficult obstacles when issuing orders to non-court actors.

These factors also imply that elected officials may be unwilling or unable to resist the Court when it is supported by strong public opinion. If the ruling is popular, there may be numerous sympathetic officials eager to implement the decision regardless of how isolated they are from the Court's influence; if the ruling is supported by public opinion, there will be little political cost to comply and little electoral incentive to resist.

These generalizations about the nature of judicial power and electoral incentives suggest that whether the Supreme Court is successful at exercising power is influenced by the institutional context of the issue at stake and the popularity of the Court's ruling. The probability of the Court altering behavior outcomes increases when the Court issues a ruling in a vertical issue area or when the Court issues a ruling that does not face strong public opposition in a lateral issue area. Conversely, the probability of the Court altering behavior outcomes decreases when the Court issues a ruling that does face strong public opposition in a lateral issue area. In the next chapter, I develop methodologies to evaluate this theory.