1

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.