

Prospectus Draft 2
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In June of 2007, the United States Supreme Court ruled that the Fourteenth Amendment requires school districts to assign students “to the public schools *on a nonracial basis*” (*Parents v. Seattle* 2007). Sharon Browne, the principle attorney for the parents challenging the school’s assignment process, predicted that the Court’s ruling would have “a tremendous impact on the rest of the nation” (Lambert 2007). But several legal scholars disagreed. “School districts are going to continue to do indirectly what they tried to do directly,” said Peter H. Schuck (Rosen 2007). According to Michael Klarman, “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” (Rosen 2007).

It is unlikely that either one of these sentiments reflects the whole story of the Supreme Court’s capacity to alter public policies. Surely the Court’s rulings have significant consequences sometimes; otherwise lawyers and interests 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 between separate branches, it would be surprising to find that the Court is always completely successful at altering policy. The true nature of the Court’s power most likely lies somewhere between these extremes, which begs the question: Under what conditions is the Supreme Court successful at changing politically salient policies? 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?

If the Supreme Court were a relatively weak institution, incapable of exerting its will against the elected branches of government, it might not be especially surprising. As Robert

Dahl argues, “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). Rather than tolerate a counter-majoritarian institution overruling their decisions, Dahl suggests the elected branches 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 predicts that the Court will rarely be in disagreement with the elected branches, and, when it is, it will be incapable of implementing its own policy preferences.

More recent studies of judicial power have challenged the traditional dichotomy between a countermajoritarian institution and Dahl’s picture of a weak Court. Instead, the new paradigm in judicial power contends that the practice of judicial review is politically constructed. (Graber 2005; Peretti 1999; Hirschl 2004; Lovell 2003; McMahon 2004; Keck 2004; Whittington 2007). Judicial review is democratically legitimate because elected officials choose to place this power in the hands of judges. The foundation of judicial power on political authority does not render the courts subservient to the elected branches, because Congress and the president have delegated real, independent authority to the courts.

Rather than framing judicial power as opposed or subservient to political power, this new paradigm suggests that political coalitions of elected officials and judges work together against opposing coalitions. At any given time one particular coalition may be stronger in the courts and use that power to exert its will on its political opponents. Elected majorities accept defeat on particular policy issues rather than challenge judicial authority itself because the coalition hopes to one day take advantage of the institutional mechanism.

The new paradigm in judicial power suggests several implications for the functioning of judicial politics. First of all, in contrast to Dahl's first expectation, if control of the Supreme Court fluctuates between different political coalitions vying for power, then the Court will frequently be in disagreement with the elected branches. Rather than a single, dominant "lawmaking majority" staffing the Court with its political allies, the political allegiances of the justices will vary as the political influence of different coalitions ebb and flow. Secondly, if this new paradigm of judicial power is accurate, then the Supreme Court should have a significant impact on public policy change in a clearly identifiable and measurable way.

Rather than elected officials delegating power to the judiciary, William Eskridge and John Ferejohn claim that courts exercise independent political power by exploiting gridlock in the legislative process in order to impose their own policy preferences (Eskridge 1991a; Eskridge 1991b; Eskridge and Ferejohn 1992; Ferejohn 2002). This view asserts that the Court can successfully exert influence over policy when its political opposition lacks the power to overturn its decisions. The Court may act strategically by only attempting to change policy when success appears possible; however, according to Eskridge and Ferejohn, the judiciary is nonetheless capable of having a significant impact on policy change when it does act.

Surprisingly, the empirical expectations offered by both of these theories are in tension with most of the literature on judicial capacity (Sheingold 1974; Horowitz 1977; Rosenberg 1991; Nagel 2001; Baum 2003; Abel and Hacker 2006). The emergence of these two persuasive theoretical arguments for the foundation of judicial power calls for a reexamination of this literature. Ideally, this reexamination would test the Court's capacity to change policy; however, it is impossible to measure what level of success the Court might have had in instances when it

did not try to change a policy. Accordingly, this study will test the capacity of the Supreme Court to alter public policy once it decides to take action by striking down a law.

Testing the capacity of the Court to implement policy change will require a clear definition of when and how courts change policy. I propose five potential responses to judicial action: (1) no consequences, (2) unintended consequences, (3) intended consequences, (4) aspired goals, and (5) altering public opinion. Each of these responses indicates a different degree of judicial capacity to implement policy change.

(1) The lack of any consequences following a judicial order indicates a very weak judiciary. If the courts clearly intend to change policy with a ruling, but policies remain unchanged after the ruling, then politicians, administrators, or bureaucrats must be either reversing, undermining, or ignoring the judicial mandate. Many authors claim that this was the result of the Supreme Court's ruling in *Brown v. Board of Education* as southern politicians, judges and school officials worked to subvert desegregation orders (Bartley 1969; Peltason; Rosenberg 1991).

(2) A new judicial ruling may result in alterations to policy practices and social patterns that the Court did not intend. A change in policy practices that are either inconsistent with or peripheral to the judicial order suggests that the courts are neither completely impotent political institutions, nor are they dynamic policy innovators. Instead, the appearance of numerous unintended consequences following a court ruling suggests a strong, but imprecise instrument of policy change, like a guerrilla swinging a hammer on a construction site—capable of altering the structure, but unlikely to do so productively. Judicial efforts to reform prison conditions are often cited as examples of unintended consequences following judicial rulings.

(3) The most direct test of judicial power is an evaluation of whether the intended consequences of the Court's order came to fruition. When judicial power is employed, policy changes should occur consistent with the specific order issued by the court. Many scholars cite the Court's reapportionment orders during the 1960s as an example of the Court achieving its intended consequences because both Congress and the state legislatures quickly complied with the one man, one vote ruling.

(4) However, when crafting a judicial opinion, Supreme Court justices may aspire to accomplish goals that extend beyond the direct purview of the Court's order. The manifestation of the Court's aspired goals, suggests that the Court is not only capable of implementing policy changes, but is also capable of successfully altering social patterns. For example, some scholars claim that reformers who brought reapportionment cases into the courts were hoping for much more than simply balancing the population in legislative districts; they aspired to promote progressive policies on a wide range of issues and hoped that reapportionment rulings would enhance the influence of underrepresented interests which could then win these progressive policy changes in the political arena. (Rosenberg 1991, 297-298). A test of judicial efficacy is an extremely high bar to set for evaluating the influence of courts on policymaking. In fact, the bar is so high that Congress and the president may often fails such a test (Baum 2003).

(5) Although the Court likely has a significant effect on policy and social patterns, some scholars believe the Court's greatest asset is its ability to shape public opinion. The court may be able to raise awareness of a particular issue and reframe the public's understanding of particular social practices. Under this theory, the Court leads rather than follows public opinion; it informs and educates the public as well as acting as a moral guide (Funston 1975; Casper 1976). The

Court's rulings in race relations during the 1950s and 60s are sometimes cited as an example of the Court guiding social progress.

The most challenging test of judicial power is whether or not courts can successfully implement policy when opposed by other political actors. Therefore, this study will examine only cases in which the Supreme Court has invalidated a federal, state or local law on constitutional grounds. The focus on constitutional issues limits the study to cases in which elected officials are incapable of reversing the Court's decision without amending the Constitution. I also limit my study to those federal cases in which the Court strikes down a law less than four years after its enactment and state cases in which a national public opinion poll was conducted about the Court's action. Both of these limitations focus attention on those cases in which Court is attempting a politically salient and controversial policy change. Finally, I limit my study to cases after 1945 because some scholarship suggests that the role of the Court changed significantly during the 1940s and because better data is available for more recent cases.

I propose two conditions which may influence the Supreme Court's ability to implement policy change when it chooses to take action: (1) whether the ruling is an immunity conferral or a policy order; and (2) the strength of the Court's political opposition.

(1) The Court's dependence on non-court actors to implement policy may influence its chances for success. Many judicial rulings can be implemented directly by lower courts. For example, if the Court rules that certain types of evidence are inadmissible in criminal trials, lower court judges can directly implement this ruling by not allowing the evidence to be used. If the lower court does not, the Supreme Court can overturn its decision. The distinguishing feature of these cases is the Court's decision to confer immunity from criminal prosecution on a certain class of defendants. Therefore, I will refer to these cases as *immunity conferrals*.

In other cases, courts cannot simply rely on lower judges to not convict defendants charged with particular crimes or charged under particular circumstances. Instead, the Court depends on Congress, the president, state or local officials, bureaucrats, or police officers to carry out their orders. I will refer to these cases as *policy orders*. In these cases we might expect a lower probability of success because these non-court actors might resist judicial orders; ensuring that no one is convicted based on inadmissible evidence may prove to be a easy task compared to ordering thousands of local officials across the country to alter a policy.

(2) The political strength of the Court's opposition may also affect the Court's chances for success. Although I am focusing my study on cases that are particularly controversial and politically salient, within these cases there remains a great deal of variation in the resistance the Court faces. This variation in resistance may explain a great deal of variation in the Court's level of success; the Court may enjoy greater success when the political opposition is weaker. For federal cases I will measure the level of political resistance based on changes in the composition of the House, Senate and presidency between the time the law was passed and the time the Court acted. For state cases I will use the public opinion data as a measure of political opposition. I will also use instances in which attempts were made to reverse the Court by passing a constitutional amendment as a sign of strong political opposition for both federal and state cases.

Between 1945 and 2002, the Supreme Court invalidated twenty-three statutes less than four years after their enactment (fifteen policy orders and eight immunity conferrals). These cases are listed in Table 1. National opinion polls have measured public support for 47 different Supreme Court cases. Of these, only eighteen involve the invalidation of a state law or practice (seven policy orders and eleven immunity conferrals).¹ These cases are listed in Table 2.

¹ Two cases, *Kerrigan v. Morgan* and *Tanigipahoa Parish Board of Education v. Freiler*, were not included because in these cases a lower court invalidated a law and the Supreme Court simply declined to hear the case.

**Table 1. Supreme Court Cases in which the Supreme Court
Invalidated a Federal Law less than Four Years after its Enactment, 1950-2002**

Case	Ruling	Case date
<i>Policy Orders</i>		
Lamont v. Postmaster General	Free speech protects material “communist political propaganda”	1965
Oregon v. Mitchell	Congress does not have power to set voting age	1970
Califano v. Westcott	Social Security Act discriminates on the basis of sex	1972
Department of Agriculture v. Moreno	Food Stamp Act violates due process	1973
Department of Agriculture v. Murry	Food Stamp Act violates due process	1973
Buckley v. Valeo	Election law violates separation of powers	1976
United States v. Will	Automatic pay increases are protected by security of compensation for judges	1980
Northern Pipeline Const. Co. v. Marathon Pipe Line Co.	Judges appointed under bankruptcy act must have Article III protection	1982
Railroad Labor Executives Ass’n v. Gibbons	Acts of Congress regulating bankruptcy reorganization for one railroad is invalid	1982
United States Senate v. FTC	Legislative veto (even concurrent resolutions) violates separation of powers	1983
Hodel v. Irving	Indian Land Consolidation Act violates takings clause	1987
Bowsher v. Synar	Comptroller general is subject to congressional control and cannot have executive power	1986
Printz v. United States	Handgun law exceeds congressional power	1997
Clinton v. New York	Line item veto violates separation of powers	1998
<i>Immunity Conferrals</i>		
Buckley v. Valeo	Election law violates free speech	1976
Sable Communications of California v. FCC	Ban on “indecent” but not obscene messages violates freedom of speech	1989
United States v. Eichman	Flag burning is protected expression under the First Amendment	1990
Plaut v. Spendthrift Farm Inc.	Securities and Exchange Act requiring reopening of federal civil actions violates separation of powers	1995
Denver Area Educ. Tel. Consortium v. FCC	Special requirements for the treatment of indecent programming for cable operators violates free speech	1996
City of Boerne v. Flores	RFRA exceeds 14 th Amend. enforcement power	1997
Reno v. ACLU	Prohibiting knowing transmission of indecent material to people under age of 18 violates free speech	1997
United States v. Playboy Entertainment Group, Inc.	Special requirements for sexual explicit cable channels violates freedom of speech	2000

Table 2. Supreme Court Cases in which the Court Invalidated a State Law or Practice and a National Public Opinion Poll was Conducted about the Court's Decision

Case	Issue	Case date	Poll date	Right/ agree	Wrong/ disagree
<i>Policy Orders</i>					
Brown v. Board	Desegregation	1954	1966	57.6	33.0
Baker v. Carr	Reapportionment	1962	1966	57.0	18.6
Engel v. Vitale	No prayer in school	1962	1966	24.9	65.5
Alexander v. Holmes Cty.;	No more delay for desegregation	1969	1970	55.7	32.4
Northcross v. Bd. of Educ.		1970			
Lee v. Weisman	No organized school prayer	1992	1992	33	66
Miller v. Johnson	Harder for states to create majority-minority House districts	1995	1995	31	61
Santa Fe v. Doe	No prayer before high school football game	2000	2000	21	68
--	--	--	2000	29	68
--	--	--	2000	22	66
McCreary County v. ACLU	Ten commandments display in courthouse violates 1 st Amend	2005	2005	23	75
Parents v. Seattle Sch. Dist.	Race conscious school assignment plan violates equal protection	2007	2007	32	36
<i>Immunity Conferrals</i>					
Escobedo v. Illinois	No questioning without lawyer	1964	1966	35	65
Miranda v. Arizona	Must read rights to arrestee	1966	1966	30.0	56.6
Furman v. Georgia	Capitol punishment violates 8 th Amendment	1972	1972	32	56
Roe. Wade	Abortion	1973	1973	52.7	40.2
Nebraska Press Assoc. v. Stuart	Judges cannot bar media from reporting on trial	1976	1976	71.4	19.0
Bellotti v. Baird	Abortion protected without parental or spousal consent	1976	1976	59.7	32.1
Texas v. Johnson	Flag burning	1989	1989	23.9	74.6
Planned Parenthood v. Casey	Abortion	1992	1992	41.1	52.9
Boy Scouts of America v. Dale	State can't stop scouts from banning gays	2000	2000	61	29
--	--	--	2000	56	36
Stenberg v. Carhart	Partial birth abortion ban not ok	2000	2000	42	44
--	--	--	2000	41	49
Dickerson v. United States	Upheld Miranda	2000	2000	78	13
--	--	--	2000	86	11
Troxel v. Granville	State cannot protect grandparents' rights to see kids	2000	2000	49	41
Lawrence v. Texas	Sodomy	2003	2003	40	44

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