

# The Placement of Conflict: The Supreme Court and Issue Attention in the National Media

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11/4/2013

*Note: This is the version of the manuscript submitted to Cambridge University Press in November 2013. Subsequent revisions were made during the publisher's copyediting process. The final version of record appears in Covering the Court in the Digital Age, Richard Davis ed. New York: Cambridge University Press, 153-172.*

In *Democracy in America* Alexis de Tocqueville famously writes that, “Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.” Indeed, the observation is famous, in part, because it is so often invoked by scholars of law and judicial politics to highlight the important role that courts, especially the Supreme Court, play in American national politics. Yet, in the past two decades, a small but important body of research in political science has shown that de Tocqueville’s observation about the judicialization of political questions is, at best, incomplete.<sup>1</sup> Though it is often the case that issues on the national political agenda involve legal or constitutional questions which are resolved by the Supreme Court,<sup>2</sup> political scientists have found convincing evidence that Supreme Court decisions can create questions of national political importance. In other words, legal and constitutional questions decided by the United States Supreme Court may resolve into national political issues.

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<sup>1</sup> Graber (2004) also convincingly argues that de Tocqueville substantially overstates the scope of courts’ engagement with important political questions in the Jacksonian Era.

<sup>2</sup> The Court’s adjudication of constitutional claims arising from the Affordable Care Act (*National Federation of Independent Business v. Sebelius* 2012) is but one recent example.

In particular, political scientists have found that Supreme Court decisions which have the effect of disrupting established policy regimes may draw the national media's attention to the issues involved in those cases (Flemming, Bohte, and Wood 1997; Flemming, Wood, and Bohte 1999; Ura 2009). In particular, these studies have found that the Supreme Court has played a significant role in raising the prominence of civil rights, civil liberties, free speech, religious liberty, and gay rights in the national media in recent decades. In turn, the prominence of these issues in the media has often been reflected in the policy agendas of Congress, the president, and the states, with significant consequences for the development of partisan and electoral politics. Most critically perhaps, the Supreme Court's decision to invalidate state mandated segregation in public education in *Brown v. Board of Education* (1954) pushed civil rights onto the national agenda (e.g. Fleming, Bohte, and Wood 1997; Klarman 2004), which resulted in the enactment of both the most important civil rights legislation since Reconstruction and the gradual exodus of Southern white from the Democratic Party to the Republican Party (e.g. Carmines and Stimson 1989; Hetherington 2009; Poole and Rosenthal 1997; Perlstein 2001; McMahon 2011). While it would be easy to overstate the role of the Supreme Court in shaping the media's issue agenda, it is fair to say that the Court has played an important role in elevating attention to a small number of historically salient issues which have had substantial political consequences. The Supreme Court's role in shaping issue attention in the national media is an important element in American political development since the middle of the last century.

To address the issues of the Supreme Court's influence on the national media's issue agenda, I begin by outlining the theoretical importance of issue attention or agenda-setting in American national politics. Second, I describe the literature which examines the conditions under which the Supreme Court can draw the national media's attention to new issues. Next, I illustrate how the Supreme Court's influence on the media's agenda can have profound effects on American politics

by discussing the role of the Supreme Court's decision against segregation in public education in *Brown v. Board of Education* (1954) in catalyzing subsequent federal civil rights legislation. I continue by describing the role of the Supreme Court in American national politics in light of the preceding discussion, and I conclude by offering some thoughts on promising directions for future research in this area.

## 1 The Importance of Issue Attention

The political science of issue attention (or agenda-setting) in American national politics has developed substantially in the half century since the critical work of Schattschneider (1960) and Bacharach and Baratz (1962) highlighted the systematic importance of defining the scope of political conflict for making political choices. Schattschneider's (1960) classic statement of the importance of agenda-setting for shaping political outcomes remains as apt today as when it was published more than a half century ago.

There are billions of potential conflicts in any modern society, but *only a few become significant*. The reduction of the number of conflicts is an essential part of politics...As a matter of fact, *the definition of alternatives is the supreme instrument of power*. (pp. 66-68).

In other words, the process of narrowing the vast space of political conflict to the relatively tiny set of issues which comprise our political discourse at any given time is the crux of political power. Issues or "problems to which government officials, and people outside of government closely associated with those officials, are paying some serious attention to at any given time" may be addressed by changes in policy; those which are excluded from government officials' "agenda" will continue to be structured by prior policy decisions (or non-decisions) (Kingdon 1985, p. 3).

As a result, individuals and groups with interests vested in some existing policy arrangement may serve those interests by attempting to exclude the relevant policy domain from the public agenda. Bacharach and Baratz (1962) describe this “second face of power”:

Of course power is exercised when A participates in the making of decisions that affect B. But, power is also exercised when A devotes his energies to creating or reinforcing social and political values and institutional practices that limit the scope of the political process to consideration of only those issues which are comparatively innocuous to A. To the extent that A succeeds in doing this, B is prevented, for all practical purposes, from bringing to force any issues that might in their resolution be seriously detrimental to A’s set of preferences” (Bacharach and Baratz 1962, p. 948).

By preventing the consideration of particular issues, current policies may be preserved against any alternative, including those that would have been adopted in place of the status quo were they considered. Conversely, moving an issue to the public agenda is a necessary condition for a new policy to be adopted in that area.

These critical theoretical observations are the foundation of a large empirical literature on issue agendas in American national politics. This body of research has addressed both the composition of issue agendas within the branches of government and various media outlets as well as the dynamic interactions between issue attention across and between governmental institutions, the media, and the mass public (e.g. Bartels 1996; Baumgartner and Jones 2009; Canes-Wrone 2010; Cohen 1995; Cook *et al* 1983; Dalton, Beck, and Huckfeldt 1998; Edwards and Wood 1999; Flemming, Wood, and Bohte 1999; Hill 1998; Iyengar and Kinder 1987; Kingdon 1984; McCombs and Shaw 1972; Ura 2009; Yates, Whitford, and Gillespie 2005). Taken as a whole, this body of research emphasizes the complexity of issue attention in the American separation-of-

powers system and, often, the important role of the press in mediating agendas across institutions and between the institutions of national government and the American people.

Despite this complexity, the literature persistently identifies the news media as an important element of the system of issue attention in the United States. A variety of studies show that the national media's agenda—the issues chosen to fill pages of print and minutes of broadcast time—have a strong effect on which proposed policy changes receive serious consideration in the elected branches of government (e.g. Cook *et al* 1983; Dalton, Beck, and Huckfeldt 1998; Kingdon 1984, 1989; Iyengar and Kinder 1987). Other research shows how the media can be a vehicle for government officials to draw public attention to particular issues (Edwards and Wood 1999; Flemming, Wood, and Bohte 1999; Hill 1998; Smith 1980). Understanding issue attention in American national government therefore requires some insight into the processes that shape issue attention in the national news media, and a thorough attempt to outline the influence of the Supreme Court on American national politics should attempt to identify when and how the Supreme Court influences issue attention in the mass media.

## **2 Does the Court Influence the News Media's Issue Agenda?**

The literature in political science specifically examining the question of whether the Supreme Court shapes the national media's issue agenda is surprisingly small.<sup>3</sup> Most research on issue agendas in American national government has tended to focus of the elected branches of

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<sup>3</sup> This essay addresses the linkages between Supreme Court decisions and the national media's issue agenda. There are other literatures on the Court and the media. One strand of this scholarship examines the way in which media cover the court, generally finding that newspapers tend focus on political responses to the Court's decisions rather than the substantive legal issues involved in its cases (Ericson 1977; Newland 1964; but see Larson 1985). Alternatively, other scholars have focussed on understanding when the media turn their attention to the Court, finding that its activities in salient issue domains tend to produce coverage of the Court (e.g. Davis 2011; Sill, Metzgar, and Rouse 2013; Slotnick and Segal 1998).

government, excluding the courts. Yet, those studies which address the problem of whether and how the Supreme Court shapes the news media's issue agendas provide a clear picture of the system's basic dynamics.

Rosenberg's (1991) broader study of the ability of Supreme Court decisions to produce social change includes the seminal analysis of the Supreme Court's influence on the national media's issue agenda, which established a basic methodology and baseline result. His method is simple: count the annual number of stories appearing in major news outlets dealing with a salient decision of the Supreme Court and determine whether there is an increase in the number of relevant stories following the Court's decision. Rosenberg counts stories indexed by the *The Reader's Guide to Periodical Literature*, which lists all stories appearing in an array of national print publications, organized by topic. Based on the resulting annual data, Rosenberg concludes that neither *Brown v. Board of Education* (1954) nor *Roe v. Wade* (1973) significantly altered the national media's attention to the issues of civil right or abortion, respectively. In part, this supports his sweeping conclusion that "U.S. Courts can almost never be effective producers of significant social reform" (Rosenberg 1991, p. 338).

While Rosenberg's analysis remains the most widely known study of the Supreme Court's influence on the mass media, subsequent research has sharply challenged his conclusion. Flemming, Bohte, and Wood (1997) investigate the role of the Court in elevating the media's attention to civil rights, free speech, and public displays of religion (See also Flemming, Wood, and Bohte 1999). Flemming and his coauthors find that a small number of the Court's salient decisions in these issue areas had a significant influence on the media's systematic attention to the underlying issues addressed in each case. These agenda-setting cases included three civil rights cases (*Brown v. Board of Education* 1954, *Cooper v. Aaron* 1958, and *Griffin v. County School Board of Prince Edward County*) 1964, one free speech case (*Texas v. Johnson*) 1989, and three Establishment

Clause cases (*Illinois ex. rel. McCollum v. Board of Education* 1948, *Engel v. Vitale* 1962, and *Lynch v. Donnelly* 1984). These key cases:

markedly rearranged the prior distribution of political benefits, either material or symbolic, for various segments of the population. The issues involved in all of these decisions were also highly affective. As a result, the decisions were extremely controversial at the time they were announced. The media participated in expanding the scope of system-wide conflict by publicizing the initial decision and its implications. In each case, the Supreme Court's decisions sparked intense national debates that drew in new participants and expanded the scope of conflict through time...The issues involved in each decision opened wide ideological cleavages among political actors that remain until this day (Flemming *et al* 1997, p. 1247).

Though other Supreme Court decisions may be legally or symbolically important, these decisions so substantially reshaped the nation's policy landscape that the national news media refocused its attention on the issue areas they addressed.

This explanation is, likewise, consistent with the literature in political science and communications showing that disruptive events are more likely to draw media attention to the events that preserve the *status quo*. The economic forces which shape editorial choices in the media provide strong incentives for media outlets to provide content that attracts as many readers or viewers as possible (Buckalew 1969; Dominick 1975; Esser 1999; Lacy 1987, 1989). Given scarce resources for reporting and limited space for publication and broadcast time, there is an implicit competition among potential news stories for print space, broadcast time, or, in the new media, prominent website placement. Successful news stories are those judged most able to generate attention in competition among various news outlets (Gartner 2004). For coverage

resulting from Supreme Court decisions, cases that have the effect of creating substantial changes in public policy are apt to draw media attention to related issue domains.

Among their many results, Flemming, Bohte, and Wood (1997) specifically find that *Brown* significantly and permanently increased media attention to civil rights. This, of course, contrasts sharply with Rosenberg's (1991) result that *Brown* did not draw the media's attention to civil rights. The differing results are principally due to the authors' measurement strategies. Rosenberg measures attention to civil rights by counting news stories indexed by *The Readers' Guide to Periodical Literature* under the heading *Negroes in America*. Flemming and his coauthors base their study on a count of stories indexed in *The Readers' Guide* under the subheadings *Negroes in America-Education*, *Negroes in American-Segregation*, and *Public Education-Desegregation*. As Flemming, Bohte, and Wood's persuasive discussion of the issue indicates, Rosenberg's count includes numerous stories unrelated to civil rights included in the full *Negroes in America* category and excludes a substantial number of relevant stories listed under *Public Education-Desegregation* (1997, p. 1229, n6). It follows that Flemming, Bohte, and Wood's conclusion that *Brown* moved civil rights onto the national media's agenda is the stronger result.

Flemming, Bohte, and Wood's (1997) position on the agenda-setting influence of disruptive Supreme Court decisions is supported by subsequent research. Ura (2009) investigates whether the Supreme Court's decisions in gay rights cases have increased media attention to issues relating to homosexuality. In particular, Ura models whether decisions in *Hurley et al v. Irish-American Gay, Lesbian, and Bisexual Group* (1995), *Romer v. Evans* (1996), *Boy Scouts of America (BSA) v. Dale* (2000), and *Lawrence v. Texas* (2003) increased the frequency of stories in *The New York Times* and *USA Today* that mention a set of key words related to homosexuality. Ura's analysis shows strong support for the idea that the Court can act as an agenda-setting institution when its decisions create substantial changes in public policy.

Ura demonstrates that both *The New York Times* and *USA Today* significantly and persistently increased publication of stories related to homosexuality by more than one third following *Lawrence v. Texas* in 2003. *Lawrence* substantially expanded the scope of gay rights in the United States. By invalidating state sodomy laws, the decision “markedly rearranged the prior distribution of political benefits, either material or symbolic, for various segments of the population” (Flemming, Bohte, and Wood 1997, p. 1247). *Lawrence* also overturned (*Bowers v. Hardwick* 1986), yielding a landmark change in the national legal status of gays—decriminalizing consensual homosexual sexual conduct and offering a symbolic validation of homosexual lifestyle choices. Moreover, the case hinted that the Supreme Court might be amenable to other claims of privacy rights by homosexuals, which have since come to fruition, in part, in the Court’s recent decision to invalidate the federal Defense of Marriage Act (*United States v. Windsor* 2013).

These rearrangements of political benefits are not only news in their own rights, they produced a diverse set of political responses including both the mobilization of political resources to further additional same-sex rights claims, such as marriage equality, to conservative countermobilization in support of state and federal action to forestall further expansions further expansions of gay rights which were the subject of media attention, as well. (Keck 2009). Indeed, *Lawrence* highlights how changes in issue attention related to Supreme Court decisions are closely linked to subsequent political mobilization around relevant issues both positive and negative.

In contrast, *Hurley et al v. Irish-American Gay, Lesbian, and Bisexual Group* (1995) and *Boy Scouts of America v. Dale* (2000) produced no such effects. these two cases, the Court merely upheld a *status quo*, affirming the right of private organizations to exclude homosexuals. Because these cases yielded no change in the distribution of political benefits, these cases yielded less news value and provoked less reallocation of political resources to the issue of homosexual’s political and social status than *Lawrence*. Likewise, *Romer* (1996), which invalidated a Colorado

constitutional amendment prohibiting identifying homosexuals as a protected class in anti-discrimination law that had never gone into effect, produced only a temporary shift in attention to homosexuality in *USA Today*, but not *The New York Times*.

Together, Flemming, Bohte, and Wood (1997) and Ura (2009) provide strong evidence that the Supreme Court can shape the media's issue agenda when its decision has the effect of significantly altering public policy. By disrupting the *status quo*, the Court creates news directly, catalyzes broader political mobilization, and ultimately draws media attention to the underlying issue involved. Though these disruptive cases may be relatively rare (e.g. Dahl 1957), they may have substantial consequences for American politics and society.

### **3 How it Matters: The Case of *Brown*, Attention to Civil Rights, and Civil Rights Legislation**

The potential for the Supreme Court to structure the national media's issue agenda and through it to influence decision-making elsewhere in the government is evident in the history of *Brown v. Board of Education*. By overturning *Plessy v. Ferguson* (1896) and rejecting its "separate but equal" doctrine in the field of public education, the Supreme Court upended a important pillar of the broader system of institutionalized racial segregation that had marked the South since the end of Reconstruction. This result generated significant new attention to the issue of civil rights in the national media and prompted a series of dynamics changes in the political behavior of white Southerners and the alignment of that national political parties. Though the decision's direct impact on the racial composition of Southern schools was negligible, *Brown's* influence on the mass media catalyzed the major civil rights legislation of the 1960s and, as I discuss below, led (indirectly) to substantial desegregation in schools in the South.

### 3.1 *Brown* and Its Effects

As the Civil War ended, the Republican-controlled Congress embarked on a radical program of constitutional and statutory change to end slavery and to protect the civil rights of former slaves. Between 1865 and 1869, Congress passed the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, which, respectively, prohibited slavery, guaranteed citizenship, due process, and equal protection of the law to former slaves and their descendants, and protected the right to vote without regard “race, color, or previous condition of servitude.” Congress also passed major civil rights legislation in 1866, 1870, 1871, and 1875 to enforce these amendments and to counter Southern whites’ efforts to intimidate and disenfranchise black voters. Despite Supreme Court decisions against the constitutionality of important parts of the Civil Rights Acts of 1871 and 1875, federal troops remained in some Southern states until 1877, in part, to protect blacks’ civil rights.

Aggressive efforts to extend and protect Southern blacks’ civil rights ended abruptly in 1877. As part of a bargain to resolve the disputed presidential election of 1876, Republican leaders agreed to abandon Reconstruction, including withdrawing federal troops from the Southern states where they remained and abandoning civil rights as a national question in favor of states’ “home rule” on questions of race (Woodward 1951). Republican Rutherford B. Hayes was inaugurated president in 1877 and ordered the last federal troops to withdraw from the South. Republicans in Congress substantially curtailed legislative efforts on civil rights (Beerman 2001; Gressman 1951), though the party preserved its symbolic support for blacks in the South (Riker 1986, Chapter 2). Southern Democrats established and preserved Jim Crow, a nearly all-encompassing system of legally enforced segregation between blacks and whites, until the late 1960s (Foner 2002; Woodward 1955).

The parties' tacit agreement to avoid the question of civil rights eroded following World War II. For example, President Truman ordered the desegregation of the armed forces in 1948, and, in the same year, the Republican Party adopted a platform calling for federal legislation against lynching and racial discrimination in employment. However, the Democratic Party backed away from support for Civil Rights after the Dixiecrat Revolt in 1948, and Republicans failed to win the White House or either house of Congress until 1952 (Frederickson 2001; Katznelson 2013).

Then, in 1954, the question of civil rights was thrust onto the national agenda. In that year, the Supreme Court handed down its unanimous decision in *Brown v. Board of Education*, announcing that racially segregated schools are "inherently unequal," that legally mandated segregation of public schools denies minority children the "equal protection of the laws guaranteed by the Fourteenth Amendment," and that "the doctrine of 'separate but equal' [announced in *Plessy v. Ferguson* (1896)] has no place" in public education. Despite the sweeping nature of the Court's decision and its subsequent order for states to desegregate their schools "with all deliberate speed" (*Brown v. Board of Education* 1955), many state and local officials in the South actively delayed or obstructed efforts to end segregation (Rosenberg 1991). As a result, the pace of racial integration in the South's public schools was painfully slow. During the 1963-1964 school year, a decade after *Brown*, only 1.3% of black school children in the South attended racially integrated schools (Rosenberg 2008, p. 94).

Despite a prolonged lack of progress in ending the practice of segregated public education in the South, the Court's decision in *Brown* exploded the exclusion of civil rights from the national agenda. *Brown* prompted a large and enduring increase in the national media's attention to civil right issues (Flemming, Bohte, and Wood 1997; but see Rosenberg 1991) and contributed to increased attention to civil rights issues in Congress and the presidency (Flemming, Wood, and Bohte 1999). These early effects culminated in the Civil Rights Act of 1957, the first national civil

rights legislation since the nineteenth century, which passed the House by a vote of 285 to 126 and the Senate with a vote 72 to 18 (Beerman 2001). This law was reinforced three years later when Congress passed the Civil Rights Act of 1960 by a vote of 311 to 109 and the Senate by a vote of 71 to 18.

*Brown* also radicalized many southern whites in defense of the larger, Jim Crow system of legal segregation in areas far beyond the school house, prompting support for more extreme candidates for public office and acceptance of violence against advocates for civil rights (Klarman 2004). The growth of southern whites' racial extremism exacerbated tensions between the Democratic Party and white Southerners, which had been growing since the New Deal era (Black and Black 2009; Patterson 1967; Rae 1994). This tension eventually peaked in the mid-1960s, when Northern Democrats in Congress made common cause with most Republicans to create the Civil Rights Act of 1964 and the Voting Rights Act of 1965, prompting the start of the mass realignment of southern whites into the Republican Party (Carmines and Stimson 1989; Hetherington 2009; Poole and Rosenthal 1997; Perlstein 2001; McMahon 2011). The passage of the Civil Rights Act ushered in a period of greatly expanded executive and judicial efforts to desegregate public schools in the South (Klarman 2004; Rosenberg 1991, 2008). As a result, in the first decade after the passage of the Civil Rights Act (and the second decade after *Brown*), the desegregation of public schools in the South accelerated dramatically. By the 1973-1974 school year, more than 90% of black school children in the South attended racially integrated schools (Rosenberg 2008, p. 94).

### **3.2 The Role of Issue Attention in Advancing Civil Rights**

The Supreme Court's decision in *Brown* catalyzed federal civil rights legislation by putting civil rights on the national agenda. The large, bipartisan majorities of Northern Democrats and Republicans that passed significant civil rights legislation in 1957, 1960, 1964, and 1965

demonstrate that there existed overwhelming operational support for providing increased federal protection for the political, social, and economic rights of Southern blacks. The primary obstacle to enacting serious civil rights legislation immediately prior to *Brown* was not, therefore, legislative opposition in the sense of a pivotal number of voters who would have opposed a proposal. Rather, civil rights legislation was blocked by the arrangement of partisan-ideological cleavages in Congress. By moving civil rights onto the national media's agenda with *Brown*, the Supreme Court injected an issue that cut against the dominant cleavage of liberal-conservative, Democratic-Republican discourse in Congress and American national politics more generally (Poole and Rosenthal 1997).

Given the historic disposition of the Republican Party on black civil rights and scattered evidence of Northern Democrats' sympathies to blacks' civil rights claims as early as the Franklin Roosevelt's New Deal programs (Katznelson 2013), it seems probable that a precursor of the national majorities that would so forcefully protect blacks' access to the ballot box, public accommodations, and public services in the mid-1960s might have done so earlier had the issue been moved onto public debate sooner. More darkly, it is at least equally probable that the pro-civil rights supermajority of the middle-1960s would have remained latent had not the judiciary moved civil rights onto the agenda.

On balance, *Brown's* principal direct influence was on the national political agenda rather than on the racial composition of schools. However, by raising the salience of the race issue and provoking a "backlash" among Southern whites, *Brown* produced a "counterbacklash" in the rest of the country that led to "landmark civil rights legislation" and "transformative racial change" which would not have "occur[red] as rapidly as it did" had the Supreme Court not invalidated legal segregation in public schools (Klarman 2004, p. 442; see also Patterson and Freehling 2001; Lau 2004; Sullivan 2009).

Klarman's (2004) backlash-counterbacklash interpretation of the effect of *Brown* is bolstered by recent research in political science. First, studies of more recent Supreme Court decisions suggest that patterns of media coverage of Supreme Court decisions and subsequent attention to related issues may prompt the sort of negative backlash among intense opponents to the Court's decisions that Klarman describes. Haider-Markel, Allen, and Johansen (2006) find that newspapers in states which legally banned sodomy prior to *Lawrence v. Texas* (2003)—and which, therefore, experienced a policy change as a result of the decision—covered the Supreme Court's decision more intensely and more negatively than newspapers in states which had no legal restrictions on sodomy—and therefore experienced no change in policy as a result of *Lawrence*. Also, Ura (2013) finds evidence that aggregate public responsiveness to salient Supreme Court decisions is characterized by short-term backlash against the Court in public mood followed by long-run movement in public opinion toward the positions taken by the Court.

#### **4 Why It Matters: The Supreme Court, Issue Attention, and Countermajoritarianism**

The political consequences of *Brown v. Board of Education* illustrates several important aspects of the Supreme Court's agenda-setting influence and its potential consequences. Perhaps most importantly, the Supreme Court is able to introduce new issues onto the national political agenda by deciding cases which substantially disrupt the established distribution of material or symbolic political benefits (Flemming, Bohte, and Wood 1997; Flemming, Wood, and Bohte 1999; Ura 2009). By introducing new issues, the Supreme Court may disrupt established authority which has been entrenched by the exclusion of some issues from political discourse (Bacharatz and Baratz 1962). This effect indicates a novel way to think about the Court as a countermajoritarian

institution. Normative theories of judicial power emphasize the role of the Supreme Court in invalidating laws enacted by Congress or the state legislatures in order to protect the rights of “discrete and insular minorities” against hostile popular and legislative majorities (*United States v. Carolene Products Co.*, n.4, 1938; see also Bickel 1962). This view, however, rests on an implicit view of majority political agency relative to the disadvantaged minority which essentially ignores the problem of agenda setting and the “second face of power.”

In classic accounts of judicial countermajoritarianism, a majority creates a law that unjustly injures a minority which requires redress from a countermajoritarian court. In contrast, agenda setting theory imagines a multitude of inactive majorities who do not and cannot influence the political process *until they are activated by the definition of political problem* (Bacharach and Baratz 1962; Schattscheider 1960; see also McKelvey 1976). The power to define problems, that is, the power to set the agenda is the power to activate these latent majorities mobilize them to effect policy change.

There were, for example, at least two relevant majorities surrounding the issue of civil rights in the mid-1950s. There was the prevailing majority who passively ignore the civil rights claims of southern blacks as a national political problem, and there was the latent majority that favored national intervention to end state-sponsored segregation *once the question was on the agenda*.

The Court’s decision in *Brown* in favor of the Equal Protection claims of black school children in the South elevated the issue of civil rights in national political discourse, putting the question of school segregation and broader issues of black civil rights on the agenda. Once on the agenda, national majorities in favor of federal action to end legal segregation in the states and to advance black civil rights more broadly were activated. Majority in support of an active civil rights agenda in Gallup Polls showing majority support for the *Brown* decision itself in 1954 and later and in large

congressional majorities that ultimately coalesced behind the Civil Rights Act of 1957 and subsequent federal civil rights legislation. In contrast, prior to *Brown*, no major national survey research organization had polled Americans' attitudes toward racial segregation in public education nor had Congress enacted significant civil rights legislation since Reconstruction.

By finding in favor of the Equal Protection claims of black school children in the South in *Brown*, the Supreme Court acted as a countermajoritarian institution in two ways. First, and most obviously, the Court worked against southern states' majorities on behalf of their black minorities. Equally as important, though, the Court's decision and its agenda setting consequences acted against a nearly century-long, bipartisan exclusion of black civil rights claims from national political discourse, replacing a passive national majority that tolerated Jim Crow with an active majority supportive of federal intervention on behalf of southern blacks.

More broadly, the alteration of the issue set in the stream of public discourse is not simply a academic curiosity. Changes in the issue agenda in the national media creates opportunities for advocates of change on excluded issues to move proposals for consideration which enjoy majority support which could not be expressed in policy proposals until the shift in issue attention (Schattschneider 1960). This impact may be greatest when these new issues may cut against and disrupt established partisan-ideological cleavages in American national government as was the case with *Brown*.<sup>5</sup>

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<sup>5</sup>Cleavages over the issue of black civil rights existed in the Democratic Party prior to *Brown*. This is perhaps most evident in the Dixiecrat walkout and presidential campaign of Strom Thurmond in 1948. However, the Democratic Party recovered its national unity by 1952, with white Southern Democrats largely backing Adlai Stevenson and his running mate, Alabama segregationist John Sparkman. The claim presented here is not that *Brown* by itself created the civil rights issue or the divisions civil rights highlighted within the Democratic Party. Rather, the claim is that *Brown* elevated the issue of civil rights in the national political discourse, allowing a latent national majority to express its support for black civil rights through federal legislation. Once civil rights was an active question on the national agenda, however, the Democratic Party could not sustain the implicit regional bargains that had previously held it together. In this

However, this more subtle dimension of judicial impact on political outcomes is potentially problematic. First, although the Supreme Court may catalyze media coverage of issues previously excluded from public discourse, the Court has little control over how those issues are ultimately manifest in the media or what policy proposals will emerge in the new issue environment. Of course, the Supreme Court and its justices may work with the press corps to control the public face of its decisions, yet the Court has substantially fewer opportunities to shape coverage of broader issues raised by its decisions (Davis 1994; Davis and Strickler 2000). As a result, the path to social change consistent with Supreme Court decisions may be indirect and uneven. Similarly, when the Supreme Court engages latent majorities, those majorities may be hostile to the Court's decisions. For example, the Supreme Court's decision to invalidate state laws against flag desecration in *Texas v. Johnson* (1989) activated a passionate majority in favor of federal action against flag burning. A Gallup Poll conducted shortly after the decision found that 71% of Americans expressed support for "a new constitutional amendment to make flag burning illegal."<sup>6</sup> Goldstein (1996, p. 113) for example, writes:

[The] *Johnson* decision touched off what *Newsday* characterized as a "firestorm of indignation" and what *Newsweek* termed "stunned outrage" across the United States. Certainly, no Supreme Court decision within recent memory, if ever, was so quickly, bitterly, and overwhelmingly denounced by the American public and political establishment.

Opposition to *Johnson* sparked credible efforts to amend the United States Constitution to empower Congress to enact a national ban on flag burning which have persisted over the

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respect, *Brown* cut against existing partisan-ideological cleavages, maximizing the disruption that followed from the case.

<sup>6</sup>Gallup Poll conducted June 23, 1989. N=500 adults.

intervening decades. As recently as 2006, a proposed flag burning amendment passed the House with the required two-thirds majority and failed in the Senate by a single vote.

Over the last half century, Supreme Court decisions on the death penalty, school prayer, campaign finance, and other issues have occasionally sparked sustained political opposition from sizeable portions of the American public. Likewise, recent public remarks by Justice Ruth Bader Ginsberg show that she believes that the Court's decision in favor of abortion rights in *Roe v. Wade* in 1973 set back the cause of reproductive rights by "moving too far, too fast" and catalyzing a backlash against the women's movement (Crary 2012). Like *Johnson*, these cases illustrate the limits of Supreme Court's inability to accurately predict or reliably control political responses to its decisions. Though social and political change may follow from Supreme Court decisions, such change is not directed by the Court.

## 5 Conclusions and Directions for Future Research

The small but important literature in political science on the Supreme Court's influence on the national media's agenda shows that the Court is able to draw the media's attention to new issues when it disrupts prior policy arrangements (Flemming, Bohte, and Wood 1997; Flemming, Wood, and Bohte 1999; Ura 2009). This influence provides the Supreme Court with a powerful but imprecise mechanism for influencing American national politics. By elevating the presence of issues in the national media which are excluded from political debate by established constellations of power, the Supreme Court creates opportunities for political change. As in the case of *Brown*, the Court's agenda-setting influence may be substantially disruptive and ultimately yield important changes in public opinion and public policy consistent with the Court's decisions (Klarman 2004).

However, the Court has essentially no control over how its decisions are portrayed or how other political actors will react to the novel issue environment and what proposals they will offer (Davis 1994; Davis and Strickler 2000). So, even to the extent that long-run public debates will tend to resolve themselves in favor of the policy positions reflected in Supreme Court decisions (Ura 2013), the intermediate process between a Supreme Court decision and a positive outcome in public opinion or policy may evolve unevenly and only over the long run. And, even if a typical agenda-setting decision of the Supreme Court ultimately catalyzes positive responses in public opinion and public policy, any given decision may fail to evoke them or, instead, produce a negative public reaction or antagonistic policy responses. Regardless, it is clear that the Supreme Court is a force for change in American politics and that its influence on the mass media is an important pathway by which the Court provokes changes in public opinion and public policy.

Ultimately, though, the literature on the Supreme Court's ability to influence the mass media poses at least as many questions than it answers. On the problem of agenda-setting itself, there are numerous opportunities to evaluate whether and how the Supreme Court's salient decisions have influenced media coverage of issues beyond those considered by existing studies, testing their generalizability. Affirmative action, the death penalty, and gun rights are obvious points of departure, but there are many others. Likewise, new agenda-setting studies may consider the Court's role in shaping issue attention in electronic media and social media and the reciprocal influence of agenda-setting in traditional media and new media.

Aside from these kinds of studies that extend prior research by examining the generalizability of previous findings of the Supreme Court's agenda-setting influence across issues and media formats, two recent studies point to valuable new directions for research in this area. First, Haider-Markel, Allen, and Johansen's (2006) analysis of heterogeneity in newspaper coverage of the Supreme Court's decision invalidating state sodomy laws in *Lawrence v. Texas* (2003) shows how

local political contexts shaped newspapers' coverage of the decision and their subsequent treatment of gay rights issues. By showing that newspapers in states which were more hostile to gay rights prior to *Lawrence* covered the decision more critically, Haier-Markel and his coauthors provide an important missing link between the literature on the Supreme Court's effects on issue attention in the mass media and the literature illustrating varied dynamics in public reactions to Supreme Court decisions (e.g. Brickman and Peterson 2006; Franklin and Kosaki 1989; Hoekstra 2000, 2003; Hoekstra and Segal 1996; Johnson and Martin 1998; Marshall 1989; Ura 2013).

Likewise, Clawson and Waltenberg's (2003) study of the effects of media frames on evaluations of Supreme Court decisions and the larger literature on the role of frames in shaping how individuals connect political information and personal values to form policy attitudes suggest a second new direction (e.g. Brewer 2003, 2008; Iyengar 1990, Jacoby 2000; Kinder and Sanders 1996; Kellstedt 2000; Koch 1998; Nelson, Clawson, and Oxley 1997; Zaller 1992). Another way that the Supreme Court may influence media attention to issues is by introducing new frames or elevating the prominence or acceptability of existing frames in public debates. These types of effects may have profound effects on public opinion that vary cross-sectionally and longitudinally, perhaps helping to account for the complex set of findings in the literature on public reactions to Supreme Court decisions (again, see e.g. Brickman and Peterson 2006; Franklin and Kosaki 1989; Hoekstra 2000, 2003; Hoekstra and Segal 1996; Johnson and Martin 1998; Marshall 1989; Ura 2013).

Finally, as the preceding pair of suggestions indicates, the separate literatures on the Supreme Court's media effects and on public reactions to Supreme Court decisions are due for a more serious integration. While members of Congress and (especially) presidents have opportunities to communicate directly with the American people and utilize an array of political allies in attempts to shape public reactions to their political and policy choices, Supreme Court justices have generally

chosen to limit direct public scrutiny of their institution and to interact with the media in much less public ways (e.g. Davis 2011). As a result, the image of the Supreme Court and its choices in the public mind is much more a product of the media than the elected branches of government. Understanding the processes by which the media filters, frames, and transforms the Supreme Court's decisions into news content is critical for understanding the mechanics of how the the Court influences public opinion and policymaking processes, which, by extension, is critical for understanding important dynamics in American national politics.

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