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The Effect of Social Media on Public Awareness and Extra-Judicial Effects: The Gay Marriage Cases and Litigating for New Rights

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The Effect of Social Media on Public Awareness and Extra-Judicial Effects:
The Gay Marriage Cases and Litigating for New Rights

by
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A thesis submitted in partial fulfillment of the
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Abstract

When the Supreme Court grants new rights, public awareness is a crucial part of enforcement. Gerald N. Rosenberg and Michael J. Klarman famously criticized minority rights organizations for attempting to gain new rights through the judiciary. The crux of their argument relied heavily on the American media's scanty coverage of Court issues and subsequent low public awareness of Court cases. Using the 2013 *United States v. Windsor* and *Hollingsworth v. Perry* rulings as a case study, I suggest that the media environment has changed so much since Rosenberg and Klarman were writing that their theories warrant reconsideration. Minority rights groups now have access to social media, a potentially powerful tool with which to educate the public about the Supreme Court and new rights granted by the Court.

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Introduction

The Supreme Court has few enforcement powers. When the Court grants new rights (for instance, the right of women to choose abortion, the right of black Americans to attend the school of their choosing, or the right of same-sex couples to be recognized by certain federal laws) they must rely on elected officials to enforce those rights through policy. They must rely on the public to recognize these rights and assimilate them into a changed culture. Only then is social change possible. The extensive resources that interest groups spend on litigation for new rights cannot be explained unless advocates believe that the Court is able to bestow benefits outside of immediate and direct policy change – legitimacy, press coverage, influence over elected officials, etc. These extra-judicial effects are a substantial part of the benefits advocacy groups are seeking.

Nearly all of these extra-judicial effects are abetted by press coverage of Supreme Court decisions. Unfortunately, Court news has traditionally been scarce, facile and often inaccurate. The media remains, however, one of the only publically accessible sources of information on the Court. If the resources advocates spend on litigation are to bestow the benefits they're seeking, public awareness of Court cases must be a priority. The rise of new media may present a unique opportunity for advocates to educate the public about cases before the bar and increase public awareness.

The two most prominent critics of litigation strategies for new rights are Gerald Rosenberg and Michael J. Klarman. Rosenberg and Klarman both famously argued that the resources spent on litigation strategies to secure new rights are, at best, ineffectual and at worst, counterproductive. Klarman focused his scholarship on the counterproductive aspects of litigation for new rights, first using *Brown v. Board of Education of Topeka* (1954) as an exemplar of his “backlash” thesis (Klarman 1994). He argues that instead of integrating schools as it was meant to, *Brown I* and *II* “propelled southern politics dramatically to the right on racial issues” (Klarman 1994, p. 11).

In Rosenberg’s book, *The Hollow Hope: Can Courts Bring About Social Change?* the answer to the eponymous question is “Not really”. Rosenberg expanded on the idea of the inefficacy of new rights litigation, concerned less with backlash than with the idea that these kinds of cases just don’t accomplish much and that advocacy groups would be better off spending their resources on legislative strategies. Focusing on a number of landmark Supreme Court cases, Rosenberg began his analysis with an examination of the effects of *Brown*. His work became well known, in part, because a portion of his thesis was nearly unassailable - *Brown* did not increase the number of integrated schools. If the goal of *Brown* was proximal social change, Klarman and Rosenberg show that its failure is significant and measurable.

There are, of course, more complicated effects of Court decisions – those beyond immediate, direct and numerical outcomes. Klarman and Rosenberg had a more difficult time measuring these effects, and a significant body of criticism exists taking one or both of them to task for their poor methodology and easy dismissal of these phenomena (See, for instance, Garrow 1994 & Meyer & Boutcher 2007 & most famously, McCann 1992). Particularly at issue is whether Supreme Court rulings provide important symbolic utility: causing movements to cohere, creating legitimacy for new rights causes, expanding public conversation, influencing public officials and accelerating the timeline for policy gains at the legislative and executive levels. In the context of *Brown*, Klarman and Rosenberg both aver that there is no evidence that the decision did anything other than to align the conservative South more vehemently in favor of segregation and delay integration until 1964 when the Civil Rights Act was passed through the legislature, all the while wasting the limited resources of advocacy groups like the National Association for the Advancement of Colored People (NAACP).

Though a commonly accepted interpretation of *Brown* is that it was an enormous symbolic victory for civil rights activists and subsequently motivated them to adopt a more aggressive equal-rights strategy, Klarman writes that *Brown* “...was a relatively unimportant motivating factor for the civil rights movement” (1994, p. 82). For his part, Rosenberg writes of the ruling “While it must be the case that Court action influenced some people, I have found no

evidence that this influence was widespread or of much importance to the battle for civil rights” (2008, p. 156). It’s all well and good, they want to say, to presume that the Court influences policy in the ephemeral sphere of extra-judicial effects but where those effects can actually be measured, proof of their existence is lackluster.

Klarman and Rosenberg’s work has affected much subsequent scholarship on the Court. Even the most theoretical work discussing the Supreme Court and social change must at least acknowledge the arguments made by Klarman and Rosenberg, even if their theses are eventually rebutted or dismissed. Crucial to both authors’ argument is that the public learns from the media. If the media do not report substantially on Supreme Court opinions, the public cannot be counted on to know about or understand Court decisions and the issues surrounding them. Therefore, Rosenberg and Klarman argue, media coverage of Supreme Court cases is necessary to achieve symbolic or extra-judicial effects. The bottom line: the media teaches the public about the Supreme Court and the awareness they create is essential to the ability of the Court to effect social change.

Rosenberg attributes a large portion of *Brown’s* purported failure to a lack of media attention. “There is no evidence of...an increase or major change in reporting in the years immediately following *Brown*. In general, newspaper coverage of civil rights was poor until the massive demonstrations of the 1960s” (Rosenberg 1995, p. 111). Klarman attributes progress in black civil rights to the

Montgomery bus boycotts and related violence in the South rather than the *Brown* decisions, largely due to the fact that the media covered the boycotts and not the Supreme Court rulings. He wrote,

“analyses of print media coverage of civil rights ‘events’ suggest that court decisions, including *Brown*, attracted relatively little attention as compared with demonstrations producing confrontation and violence, such as the Montgomery bus boycott...*The New York Times* actually provided greater coverage to civil rights issues in 1952 than in 1954 or 1955 [when *Brown I* and *II* were decided]” (Klarman 1994, p. 78).

It was not until the early nineties that circumstances arose that would again test Klarman and Rosenberg’s hypotheses on litigating for new rights. First, the Hawaii Supreme Court ruled in favor of same-sex marriage (SSM) in *Baehr v. Miike* (1993), which ruling prompted the passing of the federal Defense of Marriage Act and a state constitutional amendment against SSM in Hawaii. Ten years later, the Supreme Court outlawed anti-sodomy statutes in *Lawrence v. Texas* (2003), an ultimately controversial ruling despite the fact that sodomy laws were rarely enforced. These events compelled both authors to address the litigation strategy again, this time with regard to the new rights petitioned for by gay advocates.

To differing degrees, both authors maintained the veracity of their theses and both continued to stress the importance of the media with regard to achieving desirable social effects from new rights litigation. While more recently Klarman has refined his view in light of the enormous progress made by gay-rights reformers (see his 2012 book *From the Closet to the Altar* where he attributes

this progress to positive depictions of gays in the media and of more gay people “coming out”) Rosenberg averred in his update to *The Hollow Hope* that news coverage of SSM – where it existed – had been largely negative, especially during election years. This negative coverage, he writes, is hindering the gay rights movement and might have been avoided through a more careful, legislative-based strategy by gay advocacy groups.

In 2008, Rosenberg reiterated his thesis thusly: State and Supreme Court decisions on gay rights failed in two important ways: the first is that state court decisions failed to bring about gay marriage in more than a few states; in some states litigation only managed to bring about civil unions, an arrangement Lambda Legal and other advocate groups called a “farce”. The second is that state court decisions on marriage and the Supreme Court decision on gay sexual relations did not act as symbolic beacons to move public opinion, influence public officials or mobilize advocates. If anything, Rosenberg writes, the litigation is responsible for a “one step forward, two steps back” phenomena wherein even though same-sex couples can count their litigation a success in states where they now have the right to marry, they must consider that the number of states where gays can marry are few and significantly *more* states adopted constitutional amendments banning SSM in response to those gains.

Klarman simply lamented the backlash caused by SSM decisions at the state court level and the Supreme Court decision in *Lawrence*. “One might have expected a fairly mild reaction to a ruling that invalidated criminal prohibitions

on same-sex sodomy, given that such statutes were almost never enforced anyway. Yet the response to *Lawrence* quickly became acrimonious” (Klarman 2005, p. 459). Klarman goes on to say that *Lawrence* certainly negatively affected the gay rights movement in the short term. Justice Scalia’s vociferous dissent in *Lawrence* argued that the majority’s reasoning would create the legal groundwork for SSM in the future. According to Klarman, conservatives rallied around this idea, popularizing a negative conception of SSM in the media, collecting record donations, and mobilizing the Republican Party going into the 2004 election in an effort reject civil rights for gays and lesbians.

Rosenberg and Klarman sought to establish a type of pattern at work with new rights rulings. In *Brown*, the Court failed to increase the number of integrated schools. The common impression, then, was that *Brown* had at least mobilized activists and increased the salience of civil rights issues with the American public. This widely accepted idea of the effect of the ruling was highly dependent upon media reports of the decision since the public has few other tools with which to learn about Court proceedings.

Rosenberg argued that the pattern of Court inefficacy continued with *Roe*, which did not increase the number of legal abortions performed in its temporal wake. Furthermore, Rosenberg found a decrease in coverage of women’s issues in the media that year, just as Klarman had found a decrease in reporting on segregation. “There was actually less coverage in 1973, the year of the Court’s decision, than in the years 1972, 1971 or 1970!” (Rosenberg 2008, p. 229).

Before 2013, the most well publicized, wide-ranging ruling dealing with gay rights at the Supreme Court level was *Lawrence*, and both authors again found that the Court was not effecting any real change and that much of this failure could be attributed to the media. If Klarman and Rosenberg are right, litigation strategies for new rights do not make strategic sense. They waste resources and seem to repel public attention. An assessment of that premise in today's new media environment is best considered in the context of two recent Supreme Court cases *Hollingsworth v. Perry* (2013) and *U.S. v. Windsor* (2013).

Perry allowed a 2010 California state court ruling against the voter-approved Proposition Eight (which law prohibited SSM) to stand, paving the way for the largest state in the union to recognize SSM. In a more substantial decision, *Windsor* overturned Section III of the federal Defense of Marriage Act (DOMA), a clause that was written as follows:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife. (DOMA, §3:1996)

If the fallout from these cases mirrored that of previous landmark cases, there are several indicators that we would want to look for. First, we would expect to see little increase in positive media coverage, especially given that the decisions were not handed down in an election year. If there were little media coverage, research should consequently show relatively low awareness and

comprehensive understanding of *Windsor* and *Perry* among the general public. If there was negative attention paid to the case, we might have expected public opinion on the issue of same-sex marriage to become more negative as well. But the evidence available defies each of these predictions in the particular instance of the *Windsor* and *Perry* cases. .

In the gay-marriage cases, as I will illustrate in Chapter II, polling indicates that awareness is considerable and substantive. Media attention was prodigious and sustained. Public approval of the Lesbian, Gay, Bi-Sexual and Transsexual (LGBT) community went down after the *Lawrence* decision. But it has gone up in some demographics and remained steady in others since the 2013 SSM rulings. What could account for the exceptional social outcomes of these cases? I believe that in the decade between *Lawrence* and the *Windsor* and *Perry* rulings, the largest single change in the relationship between the Court and the public has been the rise of social media and its influence on how the public consumes news about the Court.

Social media or social networking sites (SNS) allow users to generate or share their own content among the public or a loose network of friends, family, coworkers and acquaintances. Facebook, Twitter, YouTube and Instagram are some of the most popular SNS websites, each having increased its number of users every year since their inception. Social media creates unprecedented opportunities for people to reach one another and for different methods of activism to be implemented while expending relatively few resources. If public

awareness of judicial policymaking is important to our democracy and to the functioning and legitimacy of the Court - or, if we are simply interested in the Court's ability to enact and enforce social change - we should be empirically enticed by SNS as a wholly new vector for Court-public interaction.

If it is true that social media can positively impact public awareness of new rights Court cases, then advocacy groups will be benefited in a number of ways. On the one hand, social media allows advocacy groups to push their messages to a much broader audience than traditional media allow and its use is typically free or inexpensive. Social media also allows organizations to frame their own efforts and disputes, allowing gains in public opinion. Lastly, it may help mitigate the critiques Rosenberg and Klarman put forth with regard to litigation strategies. Though Facebook this year celebrated its tenth anniversary and Twitter was launched eight years ago, research into whether social media can increase public awareness of Court decisions is currently scarce.

Media, Court Awareness & Why It Matters

Rosenberg, writing originally in 1991, could of course not be expected to take into account the rise of new media. Even in 2008, when his update was published, social media was still in its infancy. In the update, Rosenberg renewed

his objection to court-based strategies for new rights with regard to gay advocates and their attempt to gain the right to marry through judicial means. He wrote that litigation was a bad strategy in 1954 and it remained so in 2008; the Court's decisions created no measurable, positive extra-judicial effects for blacks in the 50s, women in the 70s or homosexuals in the late 90s and early 2000s.

There are a few components to this argument but the basis of nearly all of them resides in the media's presentation and discussion of Court decisions. Whether scholars measure if news outlets made any mention of Court decisions and the issues surrounding them, or what the tenor of that coverage was, media plays a powerful role in the creation and calculation of the extra-judicial effects of Court decisions.

Plainly, a Court opinion cannot change or legitimize your view of the issue at hand, educate elites about changes in the law or act as a potent symbol of change if you are unaware of the existence and content of the decision. This quite logical understanding forms the basis of much of Rosenberg's dismissal of extra-judicial, symbolic effects. Political scientists "know" that awareness of Supreme Court proceedings is low. While brushing off Court efficacy based on this lack of public awareness, Rosenberg wrote, "...it seems likely that if more than half the American public didn't know about *Roe [v. Wade]*, then at least that percentage wouldn't know about other, less famous, Court decisions" (1991, p. 236).

This reasoning is in line with most studies on Supreme Court influence and public opinion, which regularly presuppose that the public simply does not

find the Court very noteworthy and that awareness of Court rulings is usually meager (Casey 1977).

“One of the old chestnuts of political science is that the American mass public is remarkably ignorant of courts, including the U.S. Supreme Court. For instance, an oft-cited survey in 1989 reported that 71% of the respondents could not name a single member of the Supreme Court; in contrast, 54% of the same sample was able to name the judge on the television show ‘The People’s Court’” (Gibson & Caldeira 2009, p. 429).

Another poll conducted in 2006 showed that more Americans could name the Seven Dwarves than the nine sitting Supreme Court justices (Zogby International). The idea that the public lives their lives largely unaware of even major Supreme Court decisions is overwhelmingly popular. “In general, surveys have shown that only about 40 percent of the American public, at best, follows Supreme Court actions, *as measured by respondents having either read or heard something about the Court*” (Rosenberg 1991, p. 236 emphasis added). The implication, of course, is that having heard or read something about the Court is a fairly low threshold to meet and can only be termed “awareness” in the very loosest sense.

Some scholars object to this characterization of the public, offering that polls on public awareness of the Courts are poorly conducted, asking questions out of context, scoring mostly correct answers nil, and generally failing to accurately capture what people really know about the Court (Gibson & Caldeira 2009). Other critics contend that national polling does not give an accurate representation of local pockets of interest.

“If citizens learn about different Court decisions based on information available and salient to them, then looking for uniform national effect is misguided. This does not mean that Court decisions are without national effect. If the Court’s effect is more localized – either in terms of geography or some other process – we might still see the effect of Court decisions on public opinion...the process is just more subtle and possibly more gradual” (Hoekstra 2003, p. 105).

But Supreme Court proceedings are relatively clandestine, at least compared to the legislative and executive branches of government. Proceedings remain untelevised and unphotographed. Justices typically stay out of the press once they’ve been confirmed. Ordinarily, only landmark cases on controversial issues are covered by the media (and then only cursorily) – this compared with the almost obsessive attention paid to the executive and certain personalities in the legislature. If the general public are uninformed about the Court as a majority of scholars take them to be, the public can be forgiven to a certain extent inasmuch as information on the judicial branch is relatively less available.

It should be noted that scholarly distress over whether the public is aware of the Court and its decisions originates from a few different places. The first is discomfort with the Courts as a branch of our representative democracy (Hall & McGuire 2005; Mondak & Smithey 1997; Slotnick & Segal 1998). Some argue that because the Court has the power to overturn democratically arrived-at conclusions about public policy, they ought not to operate in the shadows of public awareness (Gibson & Caldiera 2009).

“In democratic political systems, the interaction and communication between political elites and institutions and the mass public are considered of primary importance. Because democratic governments are established to serve their citizens, the flow of information between elites and masses is critical to the

functioning of these governments and to their perceived legitimacy” (Slotnick & Segal 1998, p. 1).

A second concern has to do with constitutional interpretation. Proponents of judicial supremacy concern themselves with which branch of government ought to bear the ultimate responsibility for deciphering constitutional meaning. They believe that the Court, shielded from the vicissitudes of electoral politics and peopled with experts in law, should have the “final say” in constitutional matters. For the Court to have the final say – or any say at all – requires a certain attention to Court decisions on the part of the public and their elected officials. Enforcement, outside of court settings, requires awareness. A third concern also pertains to enforcement. It is the misgiving voiced by Klarman and Rosenberg; how can the Court influence public policy or create social change if the public is unaware of its rulings? “...Court decisions cannot be viewed as legitimate or be effectively enforced if the public and policy makers are uninformed or misinformed” (Haider-Markel et. al. 2006, p. 65).

Though these concerns originate from different scholarly positions and belief systems, all revolve in some way around matters of legitimacy. Democratic legitimacy, the legitimacy granted by the executive and legislative branches of government (who have equal claim to constitutional interpretation), and legitimacy in the body public. Simple awareness of the Court as an institution can breed legitimacy and public support for the Court (Gibson, Caldeira, & Baird 1998; Ramirez 2008; Farganis 2012). Awareness of Court decisions makes

enforcement of those decisions more likely and may even move public opinion towards that of the Court's (Mondak 1994; Grosskopf & Mondak 1998; Hoekstra 1995). Legitimacy is the currency of the Supreme Court; without it the Court cannot function and groups seeking social justice through the judiciary are effectively hobbled.

Given this understanding, it is somewhat alarming that we've entrusted the media to educate the public about the Court for so long. The media have not borne this responsibility particularly well (Heatherington & Smith 2007; Slotnick & Segal 1998; Davis 1994). Mainstream press coverage of the Court is episodic, overwhelmingly focused on civil liberties and First Amendment issues and, worst, often just plain wrong (Graber 1993; Franklin & Kosaki 1993; Slotnick & Segal 1998). Unfortunately, critiques of court coverage have "...not translated into effective study of the impact of that media coverage, leaving scholars to do little more than speculate on the relationship between media coverage and diffuse support for the Supreme Court" (Scott & Saunders 2006, p. 7). So, despite the media's unwieldy control of such an important aspect of democracy and government, studies on media coverage of the Court are rare.

Traditionally, advocates attempting to subvert the mainstream media's hold over their stories have relied on boycotts, protests and other civil resistance. Efforts in mainstream newspapers or television were relegated to op-eds or paid ads. In fact, gay rights advocates have long been hamstrung by mainstream media's portrayal of homosexuals and their ostensive agenda. Now, however,

with the advent of user-directed social media, supporters and proponents have a new media venue to disseminate information about the influence of adverse laws on their lives, potential means of changing those laws and subsequent legal decisions. New media has begun to change the way the Court and the public interact.

Like nearly every scholar conducting media studies before social media came to dominate how we access news, Rosenberg clearly regarded media as a hierarchical phenomenon - elites create media and then people consume it. In describing why he based the media analysis in his update on the *New York Times*, he wrote,

“The *Times* is a good choice for several reasons. First, it is known as an agenda-setter for other newspapers and media outlets around the country. If the *Times* carries a story or covers a topic, it signals that the topic is worthy of attention. Second, the *Times* is read by elites and opinion-setters...” (Rosenberg 2008, p. 385)

Rosenberg (rightly) expects that information about the Court will trickle downward to the public. However, agenda-setting (discussed below) is now a more complex interaction between mainstream media and social media activity. New media is, by its definition, not necessarily hierarchical but rather user-generated. People participate in making the news, annotating the links they forward, adding personal observations, commenting on news websites and often “breaking” stories on the web, scooping the mainstream press who are then motivated to seize the story and expand on it.

Social media is now the number one driver of news stories on the web.

The *New York Times* now funnels its stories almost exclusively through social media, just like most other media outlets.

“In the last twelve months, traffic from home pages has dropped significantly across many websites while social media's share of clicks has more than doubled, according to a 2013 review of the BuzzFeed Partner Network, a conglomeration of popular sites including BuzzFeed, the *New York Times*, and Thought Catalog. Facebook, in particular, has opened the spigot, with its outbound links to publishers growing from 62 million to 161 million in 2013” (Thompson 2014, p. 1).

As a result of this (and other technological happenstance), journalists rarely create search engine optimized (SEO) stories any longer. This indicates a reduction in the number of people who use Google or other search engines to search for news items of interest to them. Search engine traffic generated by social media posts is a new part of the information cycle, the breadth of which is difficult to know. The local newspaper, or even newspaper home websites are no longer responsible for the bulk of the news that people consume. Instead, people often subscribe to newsfeeds and they share stories among their family, friends and coworkers.

The impact of this change in terms of what news and opinion people access is potentially important for social scientists. Some scholars assert that the newsfeed structure of social media increases the range of opinions and information one is exposed to, even given a person's tendency to subscribe only to those media that support the user's worldview (An et. al. 2011). Even those who get the bulk of their information from traditional news sources often

supplement that material with forays onto social websites (Pew Research Center 2013). The relationship between traditional news elites and the public has changed. The media are still powerful providers of information and spin but the relatively more democratic and accessible aspects of social media must be considered.

Extra-Judicial Effects & Their Measurement

As stated above, public awareness of Court decisions is crucial in order for rights groups to gain the benefits of extra-judicial effects. What are we measuring when we measure Court efficacy? If it were simply the number of desegregated schools or legal abortions or states where SSM is permitted, the Court would often look undisputedly ineffectual. But new rights Court cases are responsible for a number of complex cultural and political effects, which I will simplify a great deal and summarize below.

According to Rosenberg there are two main competing theories about the function of the Court. He calls these the Constrained Court and Dynamic Court theories. Constrained Court theorists take their cue from Alexander Hamilton's famous assertion that the Court is the "least dangerous" branch of government, controlling neither "the sword nor the purse". In their view, courts cannot bring about social change because they are too constrained by their connections to and reliance on the other branches of government to do so.

Conversely, Dynamic Court theorists believe that the courts are uniquely situated to bring about social change. In their view the accessibility of the litigation process combined with the relative shelter the courts maintain from the vicissitudes of politics make courts ideal for protecting minorities from majorities. Though Rosenberg coined these terms, the Constrained and Dynamic Court theories do represent two common schools of thought in legal literature and they are helpful for my purposes inasmuch as they employ a simple reference to otherwise large and unwieldy bodies of scholarly work.

Important to understanding the Constrained and Dynamic Court theories is the recognition that these theories, as employed by Rosenberg, are used first and foremost to explain the Court's ability to *directly* effect change. The constraints that inhibit Court efficacy according to Rosenberg's summation of the work in this field are the following: (1) The narrow nature of what may be considered a constitutional question able to be resolved by law. Standing doctrine and other hurdles to Court access are said to greatly confine which issues the Court will address. (2) That the Court lacks the independence necessary to achieve effective change. The political debts of appointed judges and the amount of deference the judiciary is required to lend to the legislature in order to maintain their legitimacy make truly revolutionary rulings extremely unlikely. (3) That the Court cannot implement proper incentives or costs to truly change policy.

According to Rosenberg's summation of Dynamic Court theory, the above constraints can be overcome when other political or market actors are able to fashion appropriate incentives to implement Court policy or when the Court can provide cover for political actors who wish to implement policy but lack the political capital to do so. Rosenberg sets up a complicated rubric whereby a certain combination of the above constraints can be overcome by a balancing environment of favorable conditions. Only under very narrow conditions, he wants to say, may the Court implement direct, proximal social change.

However, whether these conditions have been met is beyond the scope of my argument here. As Rosenberg notes, these conditions bear mostly on the direct effects of Supreme Court rulings. *Brown*, he argues, could not meet these conditions – could not provide proper incentives to propel reluctant officials to act, was not aided by politicians who were willing to carry out the Court's direction under the shelter of their political cover. But the failure of *Brown* to meet the conditional requirements Rosenberg sets out for change, or even if they were able to immediately achieve integration, does not close the question of whether *Brown* was crucial to the civil rights movement, whether it brought black civil rights to the attention of the white public, etc. The constraints and conditions rubric he sets up do not address extra-judicial effects.

My interest is in the extra-judicial effects the Supreme Court can bring about by virtue of its status, institutional situation and legitimacy – specifically when granting new rights. According to Rosenberg, the Constrained Court

theory, even if it can explain why schools did not desegregate immediately after *Brown* or why legal abortions did not increase after *Roe* is almost always countered with the Dynamic Court theory's stock response – that the Court has indirect influence. “The judicial path to influence is not the only way an institution can take in contributing to civil rights. As the Dynamic Court view suggest, by bringing an issue to light courts may put pressure on others to act, sparking change” (Rosenberg 1991, p. 107).

Even granting the most favorable interpretation of the Constrained Court theory, the Dynamic Court argument of the existence of extra-judicial effects is left hanging, unanswered unless one undertakes a thorough measurement of the processes and outcomes of extra-judicial influence. It is these extra-judicial phenomena that I will attempt to measure below.

Though Rosenberg does not find evidence to support the Dynamic Court view, he does offer a fairly comprehensive list of what, beyond jurisprudence, proponents of social change through the courts want to see when the Court grants new rights. Importantly, he also suggests objective ways to measure these effects and how we might attribute them directly to Court decisions rather than to societal evolution alone.

The first of these extra-judicial effects Rosenberg calls *salience*. The Court can bring attention to an issue through the press, making the issue more noticeable or important. Again using *Brown* as an example, Rosenberg wrote that from the Dynamic viewpoint “...one important way in which the Court may

have given salience to civil rights is through inducing increased press coverage of it and balanced treatment of blacks” (Rosenberg 1991, p. 111).

In literature on the Court, the term “salience” is used frequently and carries different implied connotations. It may mean the importance of the issue to the public before the justices ruled on it (Epstein & Segal 2000), the importance of the Court and its rulings in general (Murphey & Tanenhouse 1969) or the perceived gravity of the problem before the Court by the public (Iyengar & Kinder 1986; Franklin & Kosaki 1989). Rosenberg is using the word “salience” to refer to the relevance of the dispute to the public and, specifically, to the Court’s ability to make the problem more trenchant to the public by drawing attention to it. That is the definition I will use as well. The press is an important intermediary in the process of creating this type of salience. Put succinctly, “media coverage increases salience” (Franklin & Kosaki 1989, p. 767). To argue that the Court has increased the salience of a problem among those who may not have considered it very carefully prior to the Court’s involvement one must be able to measure an increased focus on the dispute in the press. In this manner, salience is fairly simple to measure and it presupposes that the more a topic is in the media, the more important the public will think it is.

The second of these effects is *elite influence*. The stature of the Supreme Court brings their influence to bear on the elected branches of government, forcing them to act and thereby generating social change. In general, elites are more attuned to Supreme Court decisions than the general public (Mondak &

Smithey 1997). If Rosenberg is correct and the media did not focus on *Brown*, Dynamic Court theorists expect that elected officials must have. In their view, the Civil Rights Act of 1964 would not have been passed if *Brown* had not preceded it. Rosenberg believes that one should be able to measure this type of influence by the legislative records, hearings and statements of lawmakers, or what he calls "attribution". He claims that no legislators attributed their support of the 1964 Civil Rights Act to the decade-old *Brown* decision. Instead, politicians argued that it was necessary to stem violence in the South, that it should be passed in tribute to John F. Kennedy who had supported the bill and who had recently been assassinated, and various other reasons. The lawmakers' own words, Rosenberg argues, are the best and really only way that we can objectively measure the influence of Court cases on future legislation.

Next, there is the influence the Court has on *public opinion*. There is a substantial literature on the Supreme Court's ability to sway public opinion, but briefly, the Dynamic theory holds that the courts play an "...important role in alerting Americans to social and political grievances" (Rosenberg 1991, p. 125). There are four essential theories as to how the Court may affect public opinion. The first of these is the *legitimation hypothesis* or what is sometimes called the *positive response hypothesis*. This theory states that the Supreme Court is held in high esteem, thus public opinion will shift in the direction of the Court's as people respond to their leadership. "[T]hrough their opinions, the courts can instruct the public..." (Franklin & Kosaki 1989, p. 751).

The second model of the Court's influence on public opinion is the *structural response hypothesis*. Under this rubric, some citizens will respond in keeping with the legitimization hypothesis, but others won't. Those that don't are likely to become more entrenched in their own opinions, opinions that war with the Court's decision (Franklin & Kosaki 1989).

Thirdly, the *thermostatic model* has traditionally been applied to policy issued from elected branches of government. It states that as liberal policy accumulates, the public's demand for liberal policy is sated and eventually preferences change. The public subsequently prefers conservative policy choices until those accumulate and so forth. When applied to Court-made policy, the thermostatic model substantiates Klarman's backlash theory since it predicts a "negative relationship between the ideological direction of the Court's decisions and changes in public mood" (Ura 2012, p. 1).

Lastly, there exists the *conditional response hypothesis*, which suggests that the Court can influence public opinion but only given certain conditions (Stoutenborough et. al. 2006). Valerie Hoekstra (2003) has made further refinements to the conditional response hypothesis. Her thesis mostly recapitulates the conditional response hypothesis but with the important added dimension of locality (i.e. the *local importance hypothesis*). She argues that certain issues are important to certain localities and that those localities will respond differently to Court decisions than the general public. The geographical area most affected by the case or where the primaries in the case originate from

should, she argues, have more intense interest in the debate and – crucially – will be exposed to more media coverage thereof.

Rosenberg seems to have supposed that Dynamic Court theorists would be most likely to advance the legitimation hypothesis. Therefore, he suggests measuring public opinion after a decision is handed down. After *Brown*, he argues, public opinion towards blacks did not substantially improve. Legitimation, he avers, did not take place. Even given a belief in one of the other theories of SCOTUS influence on the public, each requires a comparison of existing public opinion on an issue before and after a Court ruling.

The last extra-judicial effect that I will mention is what I call *coherence*. The Supreme Court, by legitimizing the grievances of minorities, causes their movements to cohere (Meyer & Boutcher 2007). By this logic, one effect of *Brown* was the Montgomery bus boycott and the belief among blacks that they could expect more from their government, something beyond “separate but equal” (Coleman et. al. 2005; Garrow 1994; Keck 2009). A win at the Supreme Court level can allow advocacy groups to collect money, it can lead a fractured minority populace to come together in order to fight for a newly achievable goal and win advocates from non-minority populations. Cohesion can be measured by increased fundraising earmarked for particular new rights issues, new coalitions formed to fight for the new right, or civic protests attributed to the ruling by the activists involved.

Rosenberg and Klarman both claimed to have found no evidence of either salience or coherence effects from the *Brown* decision.

“The Dynamic Court view’s claim that a major contribution of the courts in civil rights was to give the issue salience, press political elites to act, prick the consciences of whites, legitimate the grievances of blacks, and fire blacks up to act is not substantiated. In all the places examined, where evidence supportive of the claim should exist, it does not” (Rosenberg 1991, p. 156).

Klarman wrote, “the conventional view is that *Brown* instigated racial change either by pricking the conscience of northern whites or by raising the hopes and expectations of southern blacks. I shall suggest...that surprisingly little evidence supports either of these claims...” (Klarman 1994, p. 11). Of course, their conclusions have been disputed.

Those who disagree with Rosenberg and Klarman have suggested a number of reasons and ways in which their methodology was flawed or incomplete. One writer contended that Rosenberg’s “wholly unpersuasive” claim that *Brown* had little to no impact on black civil rights was “disproved by a credible and copious scholarly literature” so much so that “no further rejoinder is required” (Garrow 1994, p. 152). Others are more moderate, suggesting that some combination of extra-judicial effects from *Brown* combined with protests in the South sparked the civil rights movement (Coleman et. al. 2005).

At any given point on the spectrum between the assertion that extra-judicial effects do not exist in any measurable way or that they not only exist but that we can assess them and credit them with our country’s civil rights advances, the effects listed above are what scholars are looking to evaluate. It’s fair to say

that at least one of them need be present in order for the Supreme Court to influence social change. Tellingly, each effect requires some measure of awareness, which in turn requires the participation of the media in publicizing the Court's actions.

My interest is in beginning to piece together how social media may impact public awareness of the Court and therefore the Court's ability to create social change through extra-judicial effects. To illustrate the relationship between the Court, the media and the public, I will use the recent *Windsor* and *Perry* decisions as a case study. This preliminary effort will proceed in three parts. In the first chapter, I will examine the relationship between media and public awareness. Partially out of necessity and partially to lay a solid groundwork, much of this discussion will revolve around accepted theories about the relationship between traditional media and the public. I will show that, though research regarding the effects of new media on the public are scarcer and less robust, we should expect the fundamental relationship between the public and the media to remain the same in certain important respects, however the media is consumed.

In the second chapter I will examine the *Windsor* and *Perry* decisions and their impact on public awareness, which I contend is the result of a focused and lengthy social media campaign. Briefly, I examined social media activity on several sites during the 2013 Supreme Court term and compared the amount of activity with subsequent polls on public knowledge and opinion.

In chapter three, I will discuss what I believe new media means in relation to the larger issues of Court awareness, legitimacy and deployment of extra-judicial effects. I will conclude by outlining questions for future research.

Chapter I. The Relationship Between Media & Public Awareness

Distilled to its essence, and in general terms, scholars should expect to see a few effects from increased media coverage of any given topic: 1. That the public will become more aware of the topic through exposure (Curran & Iyengar et. al. 2009; Holder & Treno 1997; Iyengar et. al. 1982; McCombs & Shaw 1972; Tichenor et. al. 1970) 2. That the public should be relatively more informed about the covered topic than about other, less-covered topics (Curran et. al. 2009; McCombs & Shaw 1972) and 3. That the tenor of the coverage, how the issue is framed, will induce effects that can be measured in terms of public opinion (Druckman 2001; Cappella & Jamieson 1996; Chong & Druckman 2007; Gamson & Modigliani 1989; Nelson & Kinder 1996).

There are all sorts of potential caveats and addenda to be made about the causal patterns at work, the type and depth of the information the public receives, etc. But for my purposes here, I want to cover the basic relationship between media coverage and public awareness and opinion. As I will demonstrate, increased media coverage of Supreme Court cases can be linked with increased knowledge about those decisions. Increased knowledge can lead to the extra-judicial effects that Rosenberg dismissed with regard to litigating for new rights: legitimizing the issue at bar, providing momentum for activists and inspiring public officials to act. I am looking to highlight one mechanism that

may explain why the *Windsor* and *Perry* cases seem to have successfully avoided the pitfalls Klarman and Rosenberg worried would be the result of a litigation strategy. The importance of media in creating awareness and, subsequently, extra-judicial effects is paramount. We consume media differently in 2014 and therefore we must revisit the ability of the Court to stimulate social change.

How Media Influences the Public

Traditionally, the media are thought to perform three basic functions in affecting public opinion. These are agenda-setting, priming and framing (Iyengar, Peters & Kinder 1982; Iyengar & Kinder 1987; Iyengar & Simon 1993; Behr & Iyengar 1985). The premise of *agenda-setting* is supported by a vast and methodologically diverse body of literature but its crux is that media concentration on certain topics causes the public to perceive those matters as more consequential. Coined by Maxwell McCombs and Donald Shaw, agenda-setting turns on how people access information about the political sphere. They wrote, “the information in the mass media becomes the only contact many have with politics” (McCombs & Shaw 1972, p. 176). In other words, and to paraphrase Bernard Cohen (1963), the media does not necessarily tell people *what* to think but it does tell people what to think *about*.

Regularly conducted surveys on what issues the American public feels are most pressing show that the answers change relatively swiftly over time, that no

one topic remains at the forefront of the public's agenda for long. Agenda-setting theory judges that the most plausible explanation for the ebb and flow of salient matters in the public realm is the attention accorded to them by the media. It is vital to the theory that scholars suss out the cause and effect of this relationship. To that end, researchers have focused on whether it can be shown that the media follow the public's lead, reporting on those topics favored by the public or whether it is the reverse.

Studies on traditional media sources (television news, newspapers and news magazines) have shown relatively conclusively that the relationship between the media's agenda and the public's is unidirectional. Laboratory experiments conducted by Iyengar and Kinder (1987) offer some of the best evidence of this directionality. In their experiment, they manipulated the content of news broadcasts and found that relatively small exposure to news coverage of a particular issue was sufficient to create significant shifts in viewers' beliefs about the relative importance of various subjects (Iyengar & Simon 1993). Real-world situations offer further evidence for the unidirectional orientation. For example, in the 1990s, reporting on crime increased at a time when crime statistics were decreasing significantly (Ghanem 1996). Consequently, the public reported that crime was a more worrying problem for the country than crime statistics would actually indicate.

The amount of emphasis the press placed on a subject also affected the public's interest in that subject. Lead stories and front page news items have been

found to influence the public's perception of what is important much more so than less-emphasized news items (Iyengar & Simon 1993; McCombs & Shaw 1972). "One should not necessarily conclude, however, that nonlead stories do not affect the public agenda. A more plausible interpretation is that the audience's attention span dissipates rapidly and that the impact of news stories diminishes with their placement in the newscast" (Behr & Iyengar 1985, p. 49).

The second function media performs with regard to public opinion is *priming*. Priming describes a phenomena where the media help create the criteria upon which public officials are judged. There is some debate within social and cognitive science as to whether priming (and also framing, see below) is its own phenomena or whether it is a subset of agenda-setting (Iyengar & Kinder 1993; Scheufele 2000; Scheufele & Tewksbury 2007). This matters for my purposes only insofar as certain research into priming has been subsumed into the larger body of research into agenda-setting and to the extent that the ideas are intertwined or inseparable.

Priming as a concept stems from seminal studies into heuristics (Kahneman & Tversky 1973). Heuristics allow people to substitute convenient reasoning for actual reasoning. For instance, a person who has flipped a coin and landed on heads three times in a row may believe it is more probable that they will land on tails the next time the coin is flipped, though of course the odds are fifty-fifty for each toss. This type of reasoning, associated with recency, is called the availability heuristic. "A person is said to employ the availability heuristic

whenever he estimates frequency or probability by the ease with which instances or associations could be brought to mind” (Kahneman & Tversky 1973, p. 208).

Priming, like heuristics, has its root in availability. Human reasoning requires cognitive shortcuts that access the most recent stimuli or whatever comes to mind most readily. In this manner, media can affect the criteria on which public officials or institutions are judged. “For example, individuals exposed to news stories about defense policy tend to base their overall approval of the president on their assessment of the president's performance on defense” (Druckman & Holmes 2004, p. 757). It is easy to see why many scholars believe framing to be a subset of agenda-setting research. Exposure to media stories not only influences which matters the public believe are important but also which information will be most accessible when they form judgments about the actors involved in the matter. An upsurge in war coverage will move the public not only to adjudge that the war in question is of increased importance to the nation but it will also cause the public to judge its elected officials weighted more heavily with regard to their performance in the realm of foreign policy.

Lastly, the media affect public opinion through *framing*. “For nearly half of a century, social scientists have shown that citizens' political judgments often depend on how an issue or problem is framed” (Druckman 2001, p. 225).

Framing is quite powerful in that it essentially creates mental perceptions through psychological, neurobiological and sociological functions. Like priming, it is often viewed as a subset of agenda-setting. Most simply, framing refers to

the processes by which people conceptualize an idea. Humans, of course, hold differing opinions on different dimensions of any given problem. How the problem is framed – meaning which dimension of the problem is emphasized – produces significant outcomes in opinion (Tversky & Kahneman 1981). For instance, one researcher found that when asked if America was spending too little on “welfare”, about 20% responded affirmatively. However, when asked whether America was spending too little on “assistance to the poor”, 65% responded affirmatively (Rasinski 1989).

Framing has roots in both psychology and sociology and within these fields there are numerous controversies, classes and orders. It is easiest, however, to think of psychological framing as dealing more with the cognitive systems involved in thought processing and sociological framing as dealing more often with the symbols and storylines involved in the tales we tell to each other and through the media. Both fields deal with language, which is one reason why both contribute to media analysis and opinion formation.

Psychological and sociological framing research both show that language is instrumental to opinion formation. The media are responsible for publicizing the frames we deal with every day through the language they use and the mental images that language provokes. The “War on Terror”, “pro-life”, and “welfare reform” are all politically constructed and media-abetted turns of phrase that emphasize a specific dimension of the issues they represent. Activists engaged in a fight for new rights may find themselves alternately assisted or thwarted with

regard to public opinion by how the media frames their organizations and their missions. “Elites wage a war of frames because they know that if their frame becomes the dominant way of thinking about a particular problem, then the battle for public opinion has been won” (Nelson & Kinder 1996, p. 1058). In the case of same-sex marriage, the media moved from reporting on the topic as a moral controversy to framing the debate as one of civil rights. The “rights” frame is clearly more congenial to gay activists’ causes than the “morals” frame. One could even hypothesize that this change-of-frame has been partially responsible for helping to increase positive public opinion on same-sex marriage.

Frames are said to most strongly affect those whose political opinions are flexible or uninformed (Chong & Druckman 2007; Tversky & Kahneman 1981). But awareness of framing is not necessarily prophylactic. Some theories, for instance ironic processing theory, hold that mere exposure to a frame can cause a person to frame that issue in the same way in their own mind, whether they are aware of doing so or not. Attempts to avoid thinking of the frame may only make the frame more entrenched (Wegner 1994). Cognitive linguist George Lakoff named his popular handbook on political framing *Don’t Think of an Elephant* after a joke he used in his class meant to illustrate ironic process theory. The joke, of course, is that once the word is spoken or read, an elephant comes to mind whether you want it to or not.

Agenda-setting, priming and framing are all powerful mechanisms that allow the media to influence public opinion and even mold one’s worldview.

Each effect works in congress with the others and operates on variegated elements of our cognitive capacities for political thought and reasoning. To deliberate on public awareness, public opinion and an electorate's ability to learn from the media, one must reckon with these processes.

The Supreme Court, Lawrence & Media Effects

The media is the primary custodian of information about the Supreme Court (Franklin & Kosaki 1995; Leighley 2003). For this reason, media effects (which term I'm using to describe the aggregate results of agenda-setting, priming and framing) are thought to be particularly potent in influencing public opinion about the Court. Recall that agenda-setting, priming and framing, are most effective when the listener has not formed a strong opinion about the topic before the exposure. Mainstream reporting on the Supreme Court is typically short-lived, episodic and shallow in depth. "Unlike other policymakers, the Court largely leaves the framing of its decisions to others. Consequently, the press and television play an especially pronounced role in influencing public knowledge about the Court's articulation of policy" (Clawson et. al. 2003, p. 785).

The power of media effects can be illuminated by an inspection of the reporting on the Court's decision in *Lawrence v. Texas* (2003). *Lawrence* challenged the constitutionality of a Texas anti-sodomy statute – the type of law that had

been declared as constitutional by the Court in 1986.¹ Until the decisions in *Windsor* and *Perry*, *Lawrence* had been the most significant victory for gay rights activists ever at the Supreme Court level. Sodomy laws were consistently used to “...obstruct the passage of civil rights and liberties protections for LGBT citizens, rule against LGBT parents in custody cases, and block LGBT officials from public office, among other things” (Haider-Markel et. al. 2006, p. 66).

Justice Kennedy, writing for the majority in *Lawrence*, attempted to be circumspect about what implications the case might hold in the future for the advancement of same-sex marriage. He wrote “the [anti-sodomy] statutes do seek to control a personal relationship that, *whether or not entitled to formal recognition in the law*, is within the liberty of persons to choose without being punished as criminals” (*Lawrence et. al. v. Texas*, 539 U.S. 558, 6 [2003], emphasis added). However, Justice Scalia, who did not vote with the majority, made the connection in his dissent between the rationale for *Lawrence* and a potential, future rationale for legalizing same-sex marriage. He wrote, “State laws against bigamy, *same-sex marriage*, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*’ validation of laws based on moral choices. Every single one of these laws is called into question by today’s decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding” (*Lawrence et. al. v. Texas*, 539 U.S. 558, 35 [2003], emphasis added).

Although future recognition of same-sex marriages was arguably a miniscule aspect of the decision overall, the media were engrossed in this storyline. They

¹ See *Bowers v. Hardwick* (1986)

reported frequently that controversy over same-sex marriage and whether it could now be legalized was sure to help anti-SSM politicians to overwhelming victory in 2004 (Hillygus & Shields 2005). This media-perpetuated frame helps to explain why a relatively non-revolutionary ruling created so much discussion around SSM, a subject only tenuously related to the *Lawrence* decision.²

In 2004, George W. Bush (who had strongly supported a constitutional amendment banning SSM) was re-elected and 11 states passed ballot measures banning gay marriage. Thanks to a widely-reported, nationwide exit poll that stated “moral issues” were the number one issue of importance to voters, the media adopted the position that concern over SSM drove Bush to victory.³

Subsequent scholarship on this issue has cast serious doubts on this assessment. In a classic example of the availability heuristic, the contemporaneousness of the *Lawrence* decision to the “moral issues” poll seems to have convinced media elites and reporters that “moral issues” was simply a euphemism for gay marriage. Unlike the other items listed in the poll (Iraq war, jobs, etc.), “moral issues” are not an objectively identifiable category. Further polling, conducted by Pew Research Center in 2004, followed up with these “moral issues” voters, asking them what the term meant to them. While 29% of

² *Goodridge v. Department of Public Health* (2003), the Massachusetts Supreme Court decision that allowed SSM in the state also contributed to this discussion, but much of the controversy over a constitutional amendment was driven by, and later attributed to, Scalia’s dissent in *Lawrence*.

³ Thanks to this poll, conducted by Pew Research, pundits began referring to SSM as “Issue One”.

those voters did answer “same-sex marriage”, nearly the same percentage, 28% answered “abortion”. Other answers included honesty and integrity, religious belief and “other policy issues”. Democratic candidate John Kerry’s lack of popularity in key states was found to be attributable to a number of reasons (foremost among them, the election basics: party identification and the economy) but evidence for a SSM backlash having driven his success is very weak (Hillygus & Shields 2005; Jacobs 2004).

The availability heuristic seems responsible for another popular storyline of the 2004 election, that support for SSM-banning amendments drove more conservative and Republican voters to the polls. During the 2004 election, 11 states passed amendments banning same-sex marriage. However, actual analysis shows that voting on these amendments did not increase voter turnout in 2004 compared to 2000 (Smith et. al. 2006). “Further, while gay marriage was generally cited in the media as the most likely issue behind the comparatively ambiguous category of ‘morals/values,’ the same exit polls indicate that a majority of voters (59%) favored either civil unions (34%) or legal marriage (25%) for same-sex couples” (Hillygus & Shields 2005, p. 202). That *Lawrence* and the state bans on SSM abutted Bush’s election temporally seems to have primed the media to accept that they were consequently the *cause* of his win. Media then passed that frame onto the public.

Nearly every piece of scholarship rebutting the presumption that *Lawrence* and the specter of gay marriage drove Bush to victory blames media framing for

perpetuating this storyline (see Hillygus & Shields 2005, Persily et. al. 2006, Smith et. al. 2006, Langer & Cohen 2005). In reference to the crucial swing state, Ohio, and their passage of an amendment banning same-sex marriage, one scholar wrote,

“After the election, reporters for many national and local papers, including the venerable *New York Times*, reported matter-of-factly that Issue 1 ‘helped turn out thousands of conservative voters on Election Day’ and that support for the measure was ‘widely viewed as having been crucial to President Bush's narrow victory in that swing state’” (Smith et. al. 2006, p. 79).

Media framing not only shaped public perception of *Lawrence* but even subsequent scholarship on the case by popularizing the notion that SSM was *the* “moral” issue that pushed the Republicans to victory in 2004. As Klarman reassessed his thesis in light of the *Lawrence* decision, he seems to have taken the media frame at face value. Subsequently, much of his backlash argument focuses on it. He wrote that “...opposition to same-sex marriage mobilized conservative Christians to turn out at the polls in 2004 in unprecedented numbers” (Klarman 2005, p. 467). Reasoning, as others did, that Bush could not have won the presidency without Ohio’s electoral votes, Klarman stated, “In closely divided states such as Ohio, the issue of same-sex marriage may well have determined the outcome of the presidential election” (Klarman 2005, p. 467).

This is not to indicate that no backlash to the *Lawrence* decision was present in 2004. In some respect, the 11 state amendments banning gay marriage speak for themselves. Public opinion on homosexuals declined after the decision

for the first time since pollsters began tracking attitudes towards homosexuality. But this decline is likely not traceable to the *Lawrence* decision directly but to the insistence by the media that the ruling constituted a pitch down the slippery slope towards gay marriage (Scott & Saunders 2006). It illustrates how the emphasis on one dimension of a story can have a considerable effect on public opinion. Had the decision been framed in a different manner – say, as an issue of privacy or smaller government – the subsequent opinion polling results might have been different.

Given the *Lawrence* example, it's easy to get the impression that media effects are always normatively undesirable. One might think – if the media gets it so wrong, why should we desire an increase in Court news? It's because the Supreme Court's ability to effect social change requires awareness of its rulings, especially on the refinement or expansion of new rights. In other words, awareness in new rights cases is a goal to be striven for in and of itself, as advocacy groups cannot advance meaningful social change through the Court without it. In the *Lawrence* case, media effects worked in opposition to LGBT rights. But framing can also work to advance normatively desirable policies. And in any event, media effects are entirely unavoidable, intertwined, as they are, with how humans think about complex issues. The goal should not be to relegate the Court to its relatively silent position in our democracy but rather to increase awareness and try to get it right. The relatively unrestricted access to media

production provided by social networking sites at least gives rights proponents better ability to frame their own struggle in a way that might benefit them.

The triad of agenda-setting, priming and framing along with the dearth of access to information about the Court from other sources creates a culture where the media are almost totally responsible for nurturing or inhibiting nearly all of the extra-judicial effects activists hope that SCOTUS decisions on new rights will provoke. The media decide which cases to discuss, which components of the issue are most important to publicize (meaning, usually, which aspects of the case are most controversial, that evoke feelings likely to make viewers tune in) and which dimensions of the different sides of the matter to emphasize. As long as the media operate as the custodians for public understanding of the Court, more coverage can be viewed as an end in itself – one that is likely to increase public awareness of cases before the bar.

Media Coverage & Increased Awareness

Research on media effects found that frames were most effective when they were at the forefront of traditional news reports (top news stories and front-page news) and when they had been repeated over time (Iyengar & Simon 1993; McCombs & Shaw 1972). A 2009 study analyzed the content of television news and newspaper stories, then made a comparison to surveys on public knowledge in a number of different countries. The researchers found a connection between

the length of time a topic remained in the press and increased knowledge of the story and its facts. Their analysis suggested "...a clear statistical relationship between extended press visibility and public knowledge" (Curran, et. al. 2009, p. 17). This demonstrates that frequent exposure to a storyline or an idea makes that idea more accessible and therefore more prominent in people's minds.

This "exposure equals accessibility" idea is a basic component of how people learn. If repeated, media-mediated exposure to information did not make a person more aware of said information, the entire advertising industry would be in shambles. However, "unlike a great deal of contemporary advertising...public affairs news ordinarily lacks the constant repetition which facilitates learning and familiarity..." (Tichenor, et. al. 1970, p. 162). If one is getting the bulk of their information about the world from public affairs news then frequent and focused exposure is required.

"[T]here is evidence that exposure to one story presented a single time may not necessarily lead to learning of any significance. Important events and issues often receive extensive coverage over time and across news outlets, however. This repetition may be central to audience retention of the information. When the media present the same or similar stories over a period of time, they are giving the audience a chance to mentally rehearse the information...Such rehearsal allows individuals to retain the information, even in cases of passive learning" (Tewksbury et. al. 2001, p. 534).

Frequent exposure engenders availability, fact recall and, subsequently, awareness. This is how we learn from media. But there are different kinds of political learning. Neuman (1981) called these *differentiation* and *integration*. Differentiation is basically fact retention while integration refers to the way

political information is organized in terms of “abstract or ideological constructs” (Neuman 1981, p. 1237). Graber’s (2001) delineation of political learning is similar but she distinguishes between *connotative* and *denotative* learning. Denotative information is similar to differentiation in that it is basically factual knowledge. Connotative knowledge makes connections between new information and stored information, that information which is incorporated into a structural belief system.

Although the bulk of political science research – especially that on the Supreme Court – measures fact retention (Gibson & Caldeira 2009), integrated information seems an important aspect of political belief and behavior. For instance, the frequent inability of the surveyed public to remember the names of the sitting Supreme Court justices may not be as important as whether their feelings translate into political beliefs about the Court that support the institution’s legitimacy or political behavior that allows support for social change. “Scholars who measure political knowledge routinely ignore the importance of connotative thinking. They prize people’s ability to remember the facts and denotations, without testing whether they understand the significance of the information” (Graber 2001, p. 22).

Differentiated or denotative thinking about the Court and its individual decisions may lag, but the structural significance of the Court is not necessarily lost on the public. This is evidenced in part by the relatively high and steady level of approval the Supreme Court enjoys (Baird & Gangl 2006; Caldeira 1986;

Gibson & Caldeira 2009). While public information about individual cases before the Court and Court personalities is often low, the Court as an institution seems to occupy a symbolically meaningful presence in American life. Beliefs about the Court as an institution are typically inculcated in early education and culture, producing structural awareness of the Court as symbolically important to our democracy.

Awareness of individual cases before the Court is poorer because knowledge about this dimension of the Court is customarily gained through the media, likely producing a more differentiated aspect of awareness. As Gibson and Caldeira (2009) suggest, it would be difficult to imagine a situation where some kind of normatively desirable social policy was inhibited by the public's inability to recall - on-the-spot - the names of each sitting Supreme Court justice. Social policy *is*, however, inhibited by public ignorance of Supreme Court rulings on new rights.

Research has shown that while awareness of important Court cases often rose in the wake of the decision, memory retention of the facts and themes of the cases in the weeks following were typically minimal (Mondak & Smithey 1997). It may be that emotional framing of Court cases helps to create more structured understanding, facilitating the kind of awareness that is more lasting. In Court cases dealing with new rights, the amount of awareness required to facilitate social change is likely abetted by frames that emphasize the personal nature of

the case and its connection to every day life along with frequent and relatively lasting exposure to the issue.

Successful public awareness campaigns bolster this idea. In communications literature, public information campaigns or PICs, provide insight into how framing and exposure work to change public policy. Government-sponsored PICs are of interest because they seek to obtain a policy goal (e.g. reduce forest fires, increase condom usage, reduce drunk driving, increase recycling, etc.) “without altering incentives or public authority systems”, but simply by increasing awareness through media exposure (Weiss & Tschirhart 1994). Furthermore, since these types of operations have measureable success or failure (i.e. forest fires are either reduced after the campaign or they are not) they offer useful insight into what aspects of media exposure increase substantive awareness of an issue. Unsurprisingly, research on PICs shows that frequent exposure and framing that increases personal salience are both components of fruitful PICs (Knight 1999; Holder & Treno 1997; Weiss & Tschirhart 1994). The authors of one study called creating an emotional connection between one’s personal behavior and larger societal impacts “triggering norms” (Weiss & Tschirhart 1994). The respect accorded to the Supreme Court as an institution may allow their rulings to trigger norms, altering the behavior people exhibit towards minority communities recognized in Court rulings.

Research also found that establishing middle-range goals was important for PICs (Mendelsohn 1973). The objectives for what informing the public

through the media can achieve must be narrowly construed and reasonably achievable. Applied to the Supreme Court, goals for public awareness must adhere to this idea. It's implausible that Court cases on new rights will make a substantial emotional impact on every member of the public, converting large majorities to the justices' way of thinking, nor is something like that necessarily desirable. It is enough that public awareness of Court decisions be sizable and fairly accurate among political elites and the public. This is the basic, minimum requirement for the enforcement of policies concerning social change. More media exposure and congenial framing should advance this important yet middle-range goal.

The Internet & Public Awareness: Learning from the Web

Not every person is equally likely to absorb political information from the media. People's interest in politics, the type and amount of media they seek out, education levels, age and political pre-dispositions all impact knowledge-seeking behavior and knowledge absorption (Tichenor et. al. 1970; Holder & Treno 1997; Hoekstra 2003; Iyengar et. al. 1982). When the internet began to change how people accessed media, a great deal of theoretical research focused on how the overwhelming proliferation of hyper-specific news and entertainment sources might create more a more ignorant populace. As the web evolved, narrowcasting (or the ability of users to access only those narrow aspects of politics and culture

that are of interest) was proffered as an explanation for political polarization, a widening information gap between educated news-seekers and the rest of the public, and the further entrenchment of political opinions (Parsell 2008; Prior 2005; Sunstein 2001). Discussing the results of Jones' (2000) work, one researcher offered a concise description of this apprehension. "[A]s opportunities for narrowcast media expand through the Internet, people will have a greater ability to shelter themselves from perspectives different from their own and this is likely to lead to the polarisation of opinions between various audiences" (Parsell 2008, p. 45).

Concerns about learning ability, access and narrowcasting amount to the same thing when it comes to political news – certain people are simply not interested. Be it due to an intensely focused narrowcasting of news sources, inability to comprehend the political sphere or plain disinterest, political news has to contend with a significant amount of apathy and the unwillingness of the public to pay attention. For this reason it's been postulated that what matters most in terms of making gains in public awareness is the number of people that can be informed "inadvertently" or "incidentally" (Curran & Iyengar et. al. 2009; Macoby & Markel 1973; Mendehilson 1973; Prior 2005; Schulz 1982; Tewksbury et. al. 2001). Inadvertent audiences are those who were not intending to seek information from the media but came across it incidentally.

Studies on traditional media models have shown that public models (those that require a certain amount of educational and news programming), like

those in certain parts of Europe, lead to better understanding of news and events than the market model that exists in the United States (Curran & Iyengar et. al. 2009). The authors of this study are quick to point out that this is not solely a function of increased exposure to educational news but that, combined with the public model's ability to inform the inadvertent viewer.

"Indeed, we suspect that a critical difference between the public service and market models is the greater ability of the former to engage an 'inadvertent' audience: people who might be generally disinclined to follow the course of public affairs, but who cannot help encountering news while awaiting delivery of their favourite entertainment programmes. The fact that public service television intersperses news with entertainment increases the size of the inadvertent audience" (Curran & Iyengar et. al. 2009, p. 22).

Some scholars have demonstrated that print media is better at expanding public awareness than television news owing to the fact that printed publications are able to give more detail and depth than television news programs (Allen & Izcaray 1988; Boulianne 2011; Culbertson, et. al. 1994; Guo & Moy 1998; McLeod, et. al. 1999). Online printed news seems to have enhanced this effect, given that the Web allows readers to come across information that they were not specifically looking for or which their interests do not necessarily incline them towards (An et. al., 2011; Boulianne, 2011; de Waal & Shoenbach 2008; Tewksbury et. al. 2001).

"Audiences can quite easily turn on television, for example, without coming across news stories. In contrast, many of the most popular sites on the World Wide Web have integrated quite diverse areas of content on centralized services and pages. The Web may be unique in its ability to provide a typical user with an array of information choices that extend far beyond what he or she intentionally seeks" (Tewksbury et. al. 2001, p. 534).

This is one reason why social media is such a promising outlet for information about the Court. Social media, or social networking sites (SNS) allow users to generate content and share it online with the public or a select group of friends and family. Before social networking, news on the Internet was presented in much the same format as that of a newspaper. Now, social media has normalized “newsfeeds”. Information is presented in a scroll formation and entertainment and public affairs media is intermingled to a large degree. The introduction of social networking has therefore likely expanded the modest but potentially important section of the public who are exposed to news that they were not pursuing.

Many Americans access these news feeds on their cell phones, which are internet-connected, and constantly on their person. This perpetual digital access has apparently increased the number of people who consume news. In 2012, total traffic to the top 25 news sites increased 7.2%, thanks in large part to the proliferation of smartphones and tablets (Pew Research Center’s Project for Excellence in Journalism 2013).

A Pew Research Center poll published in 2013 reported that 73% of the online public uses social media websites. Facebook and Twitter are two of the most-used sites with Facebook being far and away the most popular – utilized by 71% of those online in 2013. Twitter was used by about 18% of people the same year. Facebook and Twitter news feeds have been found to increase inadvertent

exposure, broadcasting news to those who would not otherwise follow current events (Pew Research 4 February 2013).

Even though most US adults do not visit Facebook with the intent of getting news, 78% of users access news there incidentally (Pew Research 4 February 2013). Of those respondents who categorized themselves as “less engaged” with news and politics, 47% say Facebook is an important source for news and that they would not be aware of current events were it not for the inadvertent exposure to news they experienced there (Mitchell et. al. 2013). Half of Twitter users use the site specifically to access news, amounting to 8% of US adult users (Holcomb et. al. 2013).

Incidental news exposure online is one way SNS could be expanding the scope of the information the electorate receives on public affairs. Social networking is also likely increasing the number of news sources users receive news from, despite the tendency to narrowcast. “Indirect exposure also increases the diversity of media sources from which an audience gets its information; we found that with indirect exposure, users receive information from six to ten times more media sources than from direct exposure alone” (An et. al 2011, p. 19).

The agenda-setting power of the mainstream press is also likely affected by social networking. In the study referenced above, the authors tracked Twitter users who subscribed to news sources representing only one ideological position. These they coded “left”, “right” and “center”. They found that Twitter increased exposure to a range of opinions outside of each ideological group’s own

preferences. Between 60 and 98% of coded users were exposed to differing political opinions in their news feed (An et. al. 2011). The news feed construct appears to make it more difficult to narrowcast in the isolating way that some scholars feared during the advent of the internet.

The most interesting aspect of social media's potential to affect the agenda-setting power of mainstream political news is also the least studied. Namely, it is the complex multi-directional relationship that mainstream news has developed with social media-generated stories. Before the rise of social media, Wallsten (2007) wrote of political blogs,

"The emergence and growth of the political blogosphere may force those interested in policy making to reconceptualize how issues arrive on the political agenda. Indeed, because political blogs provide easily accessible and frequently updated information about the attitudes of politically active citizens, journalists are increasingly relying on them as a shortcut for determining whether an emerging political issue is worth discussing" (p. 567).

In his subsequent study of the effects of political blogs on mainstream news, Wallen found that on some topics, the blogs drove coverage of the story to the mainstream media. On some topics, mainstream media determined the coverage on political blogs. On still other topics, the topic was sparked by blog coverage, picked up briefly by mainstream news but then sustained over time by persistent bloggers.

This exchange of agenda-setting powers has been enhanced greatly by the real-time nature of social networking sites like Twitter. Journalists cannot ignore the power of social media users to break huge news stories. In 2011 Newt

Gingrich's run for president and the raid on Osama Bin Laden's lair both broke on Twitter as did news of the Boston marathon bombing in 2013. News of the Egyptian uprising broke on Facebook while news of protesters being killed in Bahrain broke on YouTube. Social networking has become a staple of the news cycle "...and now plays a role in the way stories are sourced, broken and distributed" (Newman 2011, p. 6).

Mainstream news is still that, mainstream. The bulk of the public who access news, inadvertently or intentionally, will get that news from a mainstream news source. But now, social media users have an opportunity to add to the agenda, to participate in framing the news by emphasizing certain dimensions of the topic and to sustain reporting on a subject over time. Until social scientists research the complex relationship between user-directed media and mainstream news, we cannot know the extent to which SNS users are able to influence public learning.

Chapter II. Media & Public Awareness: The Gay Marriage Cases

The awareness campaign surrounding the *Windsor* and *Perry* cases has been one of the most successful ever accomplished. But the Respect for Marriage Coalition's (RMC) campaign was the result of decades of work by various LGBT rights organizations and a great deal of strategic compromise in the fight for equality. Most gay rights proponent organizations are all too aware of the principles of Klarman's and Rosenberg's critiques of litigation strategies. How to avoid moving "too far too fast" ahead of public opinion and evade a backlash was and is a very real concern for LGBT organizations. Sodomy laws were not outlawed until 2003 and public opinion in favor of gay marriage has only just passed the 50% mark - a significant accomplishment but not an overwhelming vote of confidence. Many gays and lesbians felt dubious about the prospect of either case to succeed in the ideologically divided Court they were argued before (Arana 2011). A loss at the Supreme Court level might be catastrophic to future litigation and some feared that a favorable decision in *Perry* would provoke a nation-wide backlash like that that occurred after *Lawrence*.

The Campaign(s)

The American Federation for Equal Rights (AFER) began pursuing the *Perry* litigation in 2008 when California became the twenty-ninth state to pass a constitutional amendment banning same-sex marriage. AFER (which organization exclusively uses litigation strategies) was the sole partner in the court-side fight against *Perry* and would advance the first case to challenge opposition to same-sex marriage at the federal level. The federal filing was a surprise to many advocacy groups whose strategy at the federal level was mostly incremental (Arana 2009).

Concern over the *Perry* strategy led nine organizations, including Lambda Legal, the HRC and the American Civil Liberties Union (ACLU) to author a joint memo warning that popular backlash might lead to defeat in the Supreme Court. The memo title could have been a chapter heading in Rosenberg's book: "Why the Ballot Box and Not the Courts Should Be the Next Step on Marriage in California" (Garofoli 2009). While advocacy groups agreed with the goal of achieving same-sex marriage on a national level, it seems they also believed that resources were not well spent on a litigation strategy that would push for rights the American public did not seem ready to give.

AFER's lawyers were not members of any LGBT advancement organizations; they had made their name fighting the tobacco industry and Wall Street. They argued that it was not right to ask their clients to wait five or ten

years to be recognized by the government as legally married (Garofoli 2009). Similarly, Edith Windsor, the plaintiff in *Windsor* was unable to find a gay rights organization to take her case. She ended up with a private firm who had previously (and unsuccessfully) challenged the inability of same-sex couples to marry in New York State in 2006 (Applebome 2012).

Once the *Perry* case was filed federally, the ALCU and Lambda Legal reluctantly lent their support to the AFER lawyers, although they were barred from joining the case. Two years after *Perry* was filed in federal court, the ACLU agreed to represent the *Windsor* plaintiff along with a New York chapter of the ALCU and Windsor's law firm, Paul, Weiss, Rifkind, Wharton & Garrison LLP. In 2011, the Obama administration announced that they would not defend the constitutionality of DOMA in further challenges to the law. By 2012, when the Court granted *certiorari* to both the *Windsor* and *Perry* cases, LGBT rights organizations had decided to throw their collective weight behind the lawsuits and the Respect for Marriage Coalition (RMC) was formed.

The Human Rights Campaign (HRC) and Freedom to Marry co-chaired the RMC, a group of 170 activist and legal organizations including the ACLU and various labor groups. The RMC used the traditional media outlets available to them and like many activist groups before them placed prominent op-eds in America's newspapers, paid for television and print advertisements and enlisted support from a diverse roster of public figures (including various representatives from the White House) in the form of *amicus* briefs. They also staged rallies

outside of the Supreme Court building on the days oral arguments in the cases were heard. But the RMC campaign was innovative for what it accomplished through social media.

Lead Stories, Emotional Framing & Informing the Uninterested

In the weeks before oral arguments began, HRC released a video to social networking website YouTube which featured former Secretary of State Hilary Clinton discussing the case for marriage rights and the evolution of her own opinion on the subject. The video has since been viewed by nearly half a million people on HRC's YouTube channel alone and HRC estimates that it was seen by nearly 24 million people at the time it was released. Because of its online popularity and the prominence of Mrs. Clinton, the video was featured as a lead news story on national news broadcasts including NBC, CBS, ABC, MSNBC, Fox News and local newscasts in 44 states. In the final days before oral arguments in the *Perry* case, Republican Senator Rob Portman, from Ohio, and five other Democratic Senators announced their support for marriage equality and the RMC created a sharable social media image for each, rating millions of views and mentions on Facebook and Twitter and a number of stories on local television newscasts (Human Rights Campaign 2013).

On 25 March 2013, the HRC made a Facebook post, with a shareable image of their marriage equality symbol and asked supporters to make this their

profile picture on their favorite social media platforms. This initial post was shared 71,000 times and “liked” 19,000 times. Each time a post is “liked” or shared by a Facebook user, that post becomes visible in the newsfeeds of that user’s friends list. A post is also generated in friends’ and subscribers’ feeds when a profile picture is changed. This organic sharing approach combined with the newsfeed structure of social networking allows sharable images like these to be viewed by an audience that is orders of magnitude larger than traditional media might have provided.⁴

According to Facebook Analytics and Data Science, upwards of 2.7 million people changed their profile pictures immediately after HRC’s request.^{5,6} While denounced by many online as “slacktivism” (a portmanteau meaning activism that is essentially meaningless because of the ease with which people can

⁴ There are a significant number of ways for users to tweak what appears in their newsfeed. Currently in 2014, according to Facebook Data Science, the average Facebook user has the potential of seeing 1500 posts in their newsfeed per day but they will typically only see about 20% of these. Facebook’s algorithms determines what users will see, placing an emphasis on pictures, videos and posts that have a large number of “likes” or comments. In 2013, Facebook introduced an algorithm that would re-post popular stories at the top of a users’ news feed at several points during the day, making it more difficult for users to miss stories that their friends “liked” or commented on. The image-attached aspect of HRC’s posts and the high number of likes and re-posts allotted to each suggests that these are posts likely to have been seen in most users’ newsfeeds.

⁵ Facebook analytics is not currently able to detect images, so it cannot state definitively whether the huge increase in profile picture changes made after HRC’s request were made in response to the request. Their webpage indicated that 120% more people changed their profile picture the day after HRC’s request than had changed it the same day one week previously.

⁶ Of course, many Facebook users’ networks overlap. The median number of friends each Facebook user has is 200, the average number is 338.

accomplish it), the profile picture campaign allowed some LGBT members and supporters to “come out” to their social networks, a meaningful and sometimes dangerous symbolic action for those in conservative or religious networks of friends. In an interview conducted in September of 2013, an HRC spokesperson related one story connected to the ad campaign.

“[Anastasia] Khoo said one of her favorite stories spurred by the HRC campaign came from a gay soldier from Arkansas. Before the Supreme Court hearings, the soldier had not spoken to his mother since he came out to her – and ‘it didn't go so well.’ But when HRC launched the campaign, the soldier's mom changed her profile picture to the red logo with the following caption: ‘As Justin's mom I may not like his lifestyle choice, but he knows he has my support in whatever he does. We may not agree on his choices, but he is still my baby and you don't mess with one of my cubs. Love you so much Justin and I am proud of who you are’” (Wagner 2013).

The HRC directors believed that seeing the idea of support for SSM attached to a person would help give the idea emotional heft (Buchanan 2013). Thirteen members of Congress changed their profile pictures to the equality symbol. By 26 March 2013, when oral arguments began, the image had been viewed more than ten million times around the world. HRC's posts alone appeared over 18 million times in users' news feeds (HRC 2013).

Corporate and celebrity accounts changed their profile photos, exposing untold millions of followers to the marriage equality symbol and potentially alerting them to the cases before the Court and their particulars. During oral arguments, the Budweiser Beer account changed its profile photos on Facebook and Twitter to the HRC logo, broadcasting the image to its 5.6 million followers. Dozens of state governors and other state elected officials changed their profile

pictures to HRC's logo within 72 hours of the campaign's request. The social media frenzy fed into the mainstream press. Television and print media picked up the story of the spread of the red HRC logo, further publicizing the campaign.

The millions of impressions made by RMC's social media campaign translated into measurable information-seeking action by some of the public. On the first day of the profile picture campaign (25 March 2013), traffic to the HRC website increased 600% (Wagner 2013). On 26 March 2013, the day oral arguments began, HRC's website received 700,000 unique visitors. The site directed people to information about the Supreme Court cases, the issues surrounding them and the cases' potential outcomes. In the first two days of the profile picture campaign, 100,000 new people signed RMC's petition pledging support for same-sex marriage.

The RMC worked hard to frame the LGBT struggle as that of the average person rather than that of a specialized interest group. They were working to win, as they called it, "hearts and minds" (Brillhart 2014). HRC and Freedom to Marry emphasized personal stories on their website and in their posts to social media. These were stories of families barred from seeing their loved ones in hospital, couples who had been together decades and had never been able to marry and families torn apart by custody arrangements that were biased. The *amicus* brief submitted by Lambda Legal and the Gay and Lesbian Advocates and Defenders (GLAD) focused significant portions of its text not on legal

arguments but on stories of the personal injuries suffered by gay families that had been discriminated against.

The RMC campaign accomplished the goals of successful PICs and laid the foundation for increasing public awareness. The complex relationship between new media and traditional media allowed the campaign to be featured as a lead story on television, in newspapers and web news – a crucial component of successful agenda-setting. That the campaign began in March during oral arguments and did not end until the Court handed down its decision in June allowed lengthy exposure, sustained over time by social media. The emotional framing that the profile picture campaign provided, connecting personal profiles to symbols that pledged support, is a feat that could only have been accomplished through social media. Further framing was carefully devised to emphasize the emotional dimension of the same-sex marriage issue rather than the legal aspects. Most importantly, the elaborate web of social media connections and newsfeeds pushed information outwards, far beyond the audience traditional media might have informed.

A different decision made the same term that *Perry* and *Windsor* were decided throws the social activity surrounding the gay marriage cases into sharper relief. *Shelby County v. Holder* (2013) was handed down one day prior to *Windsor* and *Perry*. In it, the Court made another landmark ruling, striking down important provisions of the 1965 Voting Rights Act (VRA). The VRA was enacted

to prevent states from instituting a “test or device” to systematically prevent minorities from voting or having their votes counted. These voting restrictions were a part of what were commonly known as Jim Crow laws. Section Five of the VRA required covered areas to obtain approval from the federal government for any changes to their voting requirement laws. Striking down this section of the law effectively gutted the legislation, kicking the responsibility for equitable treatment of minorities at the polls back to state legislators who would now lack the oversight that the VRA had provided.

The fight against the overturn of Section Five was aided by social organization. On 27 February 2013, when oral arguments were heard in the case, the NAACP – who were also responsible for litigating the case – staged a rally on the steps of the Court, just as organizers would for the *Windsor* and *Perry* arguments. The NAACP also joined with digital public relations group Fission to create a shareable infographic illustrating the importance of Section Five. Before oral arguments, in an online conference, NAACP’s Jotaka Eaddy asked supporters to publicize the hashtag⁷ “#protectVRA” (Walker 2013). The Advancement Project joined with the NAACP and 8 other social justice organizations for a Twitter Townhall meeting intended to help educate people about Section Five and the threat to voting rights.

⁷ A hashtag is a word or phrase followed by the “#” sign. The “#” sign acts to categorize the phrase for metadata purposes. It also allows the topic to be grouped so that the topics they denote are more easily accessible.

In the mainstream press, coverage of the VRA decision fared well. Most major newspapers reported the decision on their front page, just as they did one day later with the gay marriage decisions. But the civil rights stalwarts, undeniably skilled at grassroots organizing, did not or could not, compete with RMC in the realm of social media. The RMC simply had more of everything. They had more followers on Twitter (HRC and Freedom to Marry have a combined 406,000 followers compared to the NAACP's 68, 000⁸. Even adding member organization ACLU's followers to the NAACP's total only increases the number to 268,000, still half of the number of RMC-founding organization's followers). The RMC had more mainstream media coverage generated by their social media campaign (I was unable to find any mainstream news stories regarding the social media campaign surrounding the *Shelby Co.* case, although there were several stories on social media users' response to the ruling). There were mainstream press announcements when HRC pledged one million dollars to the awareness campaign, local mainstream press announcements when state legislators or governors changed their profile photos or posted to social media in support of gay marriage. Subsequent awards for the RMC's social media

⁸ These numbers are publically available on Twitter and they are reported as of June 2014. Fisson, who paired with the NAACP for their online campaign reportedly quadrupled (according to the "campaigns" page on their website) the number of followers the organization had in the days leading up the *Shelby Co.* decision. So the number of followers the NAACP had on Twitter during oral arguments in their case were likely much lower.

campaign received coverage in the mainstream news as well.⁹ In the twelve hours after the *Windsor* decision became public, the hashtag “#VRA” was tweeted 948 times. This compared to the 33, 988 mentions of the hashtag “#DOMA” on the same site.¹⁰

The RMC had more public figures speaking out in support of their cases and more organizations in their coalition (According to press releases from the respective organizations, the RMC had 170 member organizations including the NAACP. In contrast, the NAACP had only a handful of supporting organizations listed on their website as members of their VRA campaign. Of these, only the ACLU has a significant web presence). Each of RMC’s member associations created their own social media posts, pushing their message farther each time. The RMC’s profile photo campaign alone generated a huge amount of mainstream media attention, an aspect of the publicity cycle that the NAACP did not attempt. Which is all to say that if sustained exposure and reaching an inadvertent audience creates awareness then public knowledge with regard to the gay marriage cases would be expected to exceed, by far, that of the VRA case – or any other Court case from that term.

⁹ According to HRC’s website, they won nine awards for their online campaign including a Mashie for Best Social Media Campaign of the Year.

¹⁰ The total number of tweets during RMC’s social media campaign were published by a number of marketing agencies that collected information on the success of their campaign. The number of times “#VRA” and “#DOMA” were tweeted was recorded by two marketing companies: Meltwater Social Analytics and Lexalytics (which markets lexical analysis software). Twitter does not allow access to historical data except through third-party providers, so I was unable to complete my own analysis of tweets regarding SSM or the VRA.

The Results

Polls taken when the decision was handed down confirmed that awareness of *Perry* and *Windsor* was, relatively, quite high. “Two-thirds (66%) know that the court ruled in favor of same-sex marriage supporters, while about the same share (67%) knows that it is up to individual states to determine whether gay couples can get married” (Pew Research 1 July 2013). To recognize that the *Perry* decision allowed individual states to retain the right to decide issues of SSM shows a substantive understanding of the ruling. Awareness surrounding the decision in *Shelby Co.* again puts this relative awareness into context. Knowledge about the VRA decision was much more in keeping with political scientists’ typically gloomy view of public cognizance. According to polls,

“Just 34% know that the court overturned parts of the Voting Rights Act; 23% say incorrectly it kept the law intact and 43% have no opinion. Opinions about the court’s decision in the case also reflect some confusion: A plurality (43%) has no opinion on the ruling, while 33% approve and 25% disapprove” (Pew Research Center 1 July 2013).

Remarkably, polling found that interest in the cases, before either decision was published, was nearly the same. About one-third (33%) of Americans expressed an interest in the outcome of *Shelby Co.* while the same number

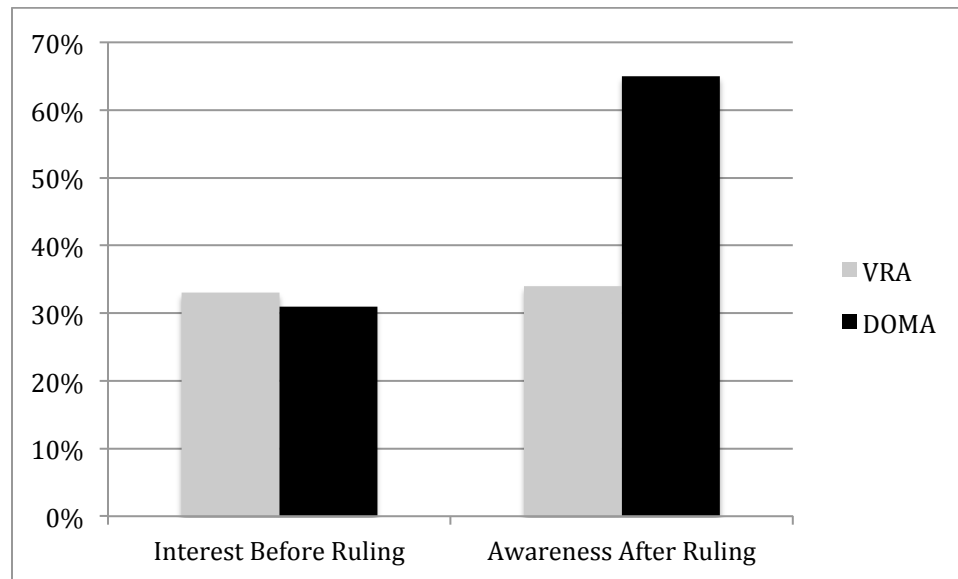
expressed an interest in the outcomes of *Windsor* and *Perry* (Pew Research 24 June 2013). In keeping with the pre-decision polling on case interest, gay-marriage was the largest news story of the week, with 30% of Americans reporting that they watched the story “closely”. In contrast to that polling, only 19% reported that they followed the VRA case closely (Pew Research 1 July 2013).

Until the 2013 term, the most closely watched case – according to polls – was the ruling on the Affordable Care Act. Forty-five percent of Americans reported that they would watch that case closely. However, even given the large interest before the case, polling after the decision showed that only 55% of Americans could accurately describe the outcome of the case, 45% stated incorrectly that nearly all of the provisions of the act had been stricken (Pew Research 1 July 2012). As for another recent landmark case, only 54% said that they had *heard* of *Citizens United*. Of these, only 18% had watched coverage of the case or knew more than the name (Pew Research 17 January 2012).

Polling conducted after the decisions were handed down underscores the benefits of informing the inadvertent audience. *Shelby Co.* had a strong correlation between those that stated an interest in the outcome of the case and the number of people who eventually were able to correctly answer questions about the ruling. Thirty-three percent of Americans expressed interest in the case and 34% of Americans were subsequently aware of the outcome. It does not appear that any disinterested Americans were made aware of the ruling. In

contrast, the 33% of Americans who stated interest in the SSM cases one day before the rulings were joined by a significant number of self-reportedly disinterested Americans the following day when fully 65% could answer substantive questions about the decisions.

Figure 1: Relative Interest, VRA vs. DOMA



Young people aged 18 to 29 were more likely than those 65 and older to know that the *Windsor* and *Perry* decisions favored same-sex marriage proponents - 75% versus 57% (Pew Research 1 July 2013). Interestingly, this more-informed age demographic makes up the largest population of Twitter users. "Close to half, 45%, of Twitter news consumers are 18-29 years old. That is more than twice that of the population overall (21%)... Further, just 2% of Twitter news consumers are 65 or older, compared with 18% of the total population" (Mitchell 2013).

This is, of course, only an intriguing correlation. That young people were more aware of the SSM rulings and are also more likely to use social media is compelling but could also be explained by other factors. Pew did not find any partisan difference in awareness of *Windsor* and *Perry*. Democrats were as likely as Republicans to know about the rulings. But the young are, overall, more supportive of gay rights (Pew Research 10 March 2014). It may be that the SSM cases were simply more salient with a younger population that is also more connected. Perhaps, for whatever reason, people simply care more about gay marriage than about racial politics in the South or campaign contributions or health care. If this is the case, the personal framing of the SSM issue by the RMC may still have contributed, helping to create an emotional storyline that appealed to a normally disinterested public.

Based on the limited information available, it appears that the RMC's awareness campaign was very effective. It resulted in substantive awareness and a number of measurable indicators of the extra-judicial benefits Dynamic Court theorists look for. There are indications that the SCOTUS decisions and the RMC's awareness campaign increased salience, appropriated elite influence, positively effected public opinion and caused a movement to cohere.

Rosenberg asked that when researchers look for salience they should be able to measure not only an increase in reporting on an issue but also increased *positive* attention to the issue. The week of the rulings, gay marriage was the most reported and most followed news story (Pew Research 1 July 2013). The year of

the Court decisions, mainstream media news stories that were favorable to SSM advocates predominated five to one over negatively framed stories (Desilver 2013). According to Lexalytics' sentiment analysis conducted on the day of the SSM rulings, of 179, 884 tweets on the subject of gay marriage, positive sentiment tweets were counted two to one over negatively worded tweets.

Rosenberg also warned that we could not attribute lawmaking action to elite influence provided by Supreme Court leadership without evidence of attribution. Unlike the 11 state bans on SSM that passed after the *Lawrence* ruling, 19 states including Texas, Utah, Delaware, Kentucky and Michigan have adopted same-sex marriage either through their courts or through their legislatures since the June 2013 decisions. Many judges and lawmakers have attributed their decisions to the *Windsor* and *Perry* rulings (Botellho 2014). In the 20 cases dealing with SSM brought before a court since June of 2013, all 20 have been decided in favor of the LGBT plaintiffs (Freedom to Marry n.d.). The United States Census Bureau announced this year that, for the first time, it would begin counting same-sex couples with a marriage certificate as married partners rather than as cohabiting partners (Cohn 2014).

Public opinion remains divided on same-sex marriage, but support for SSM reached its highest peak in history after the Supreme Court decisions were announced. Fifty-three percent said that they approved of allowing gays and lesbians to marry while only 41% disapproved (Pew Research 10 March 2014). In religious communities, where opposition to same-sex marriage has been

strongest, opinion appears to have changed a great deal since SCOTUS's decisions. For instance, among black Protestants, support for SSM grew from 32% in 2013 to 43% in 2014. Only white Evangelicals' opinions did not change after the ruling, remaining flat (Lipka & Sciupac 2014). This offers some support for the legitimation theory of Supreme Court influence on public opinion.

The coherence caused by the cases was literal in some ways, bringing 170 disparate organizations together under the RMC. Further coherence was sparked, not by the Court decision, but certainly by the Court's granting of *certiorari* to the *Windsor* and *Perry* plaintiffs. Most LGBT advocacy groups were content to work slowly through state legislatures, only fully accepting a fight at the federal court level once the Court had agreed to hear the SSM cases. The fight for marriage equality has now become one of the defining goals for the LGBT movement; they were working to overturn sodomy laws only a decade ago.

While these findings are far from definitive, all objective indicia point towards a positive impact of the gay marriage rulings, the absence of a backlash and the importance of social media in creating awareness. The cases appear to support the Dynamic Court assertion that Supreme Court rulings can increase the salience of an issue to the American public, influence elites, cause movements to cohere and positively influence public opinion given enough public awareness.

These results also beg a question: If the RMC's campaign with regard to increasing the attention paid to gay rights was so successful, why involve the

Court at all? Can't advocacy organizations simply organize these campaigns in order to change public opinion and succeed at the legislative level? This question is more complicated than it first appears. In some ways it is simply too early to know if social media campaigns, organized and implemented properly, can create social change independent of the courts. If it were possible, it could represent a polar shift in the democratic process, indicating that well organized groups could essentially avoid or conquer the disenfranchisement that has plagued minority groups since the establishment of the country. For this reason, it seems unlikely. Politicians will still require (or at the very least, desire) political cover in order to legislate in favor of an unpopular minority and the legislative branch will in all probability remain difficult to access for these same minorities.

It is more likely that the Court will continue to work in tandem with the media, however that media is formatted. If said media is more effective at increasing awareness of new rights decisions, as social media seems to be, all the better. Court decisions create precedent, which even beyond its direct effect creates an enormous amount of symbolic utility. Even narrowly construed decisions, which *Perry* (simply a refusal to review a lower court judge's decision) and *Windsor* (the striking of one section from a federal statute) arguably were, can have large legal repercussions given the right circumstances. Though the Court did not legalize gay marriage in any official sense, the cascade of states granting the right since the decision came down demonstrates the importance of the symbolic aspects of precedent in the realm of civil rights.

Court decisions also provide a focal point for a civil rights campaign. They provide a timeline, a narrative structure or frame and an outcome - a measurable loss or achievement. Most importantly, the Court provides legitimacy to a minority group by virtue of its grant of *certiorari*. None of these symbolic gains could be achieved by media influence alone. The Court is uniquely situated to provide a type of authority not easily achieved through the legislative branch, nor even the executive.

Chapter III. Conclusions & Future Study

Awareness of Supreme Court decisions is, ultimately, a public good. It can allow oppressed minorities access to new rights. It can allow the Court to create social change. Even for those inclined to distrust the Court's place in our democracy, awareness is a benefit as it helps create a more able electorate and brings Court-made policy out from behind closed doors. This holds true when the Court makes rulings that we do not agree are normatively desirable. Awareness is especially essential to the litigation strategy pursued by a number of advocacy groups in their struggle for equal rights.

The media have been, for better or worse, the primary instrument through which the public access information on the Court. Their record of educating the public on this important aspect of public affairs has traditionally been fairly dismal. The disinterest of the public combines with the market forces our traditional media operate under to create a sort of void where information about the Court might exist. Even given all of the powerful cognitive tools the media have at their disposal - agenda-setting, priming, framing - we have a public that is renowned for their ignorance of the country's high Court and, more troublingly, even its most groundbreaking decisions.

Flawed methodology is responsible for a portion of this renown. Research on the public's awareness of the Court has been obsessed with differentiated learning, or the public's ability to recall facts about the Court. Who is the Chief

Justice? Who are the sitting judges? Polling agencies seem to expect a certain obliviousness from the public on these subjects - after all, what could be the reason for following questions on the names of the sitting Court justices with questions about the names of the Seven Dwarves or Judge Wapner except to create a humorous juxtaposition? Many social scientists seem eager to reference these polls as conclusive evidence that the public simply lacks the inclination or intelligence to attend to the judicial branch and its functions. However, the public's ability to rattle off the names of the Supreme Court justices or facts about their tenure seems less important from a policy-implementation perspective than more substantive information about specific cases before the Court, especially those dealing with new rights. The measurement of public awareness should be focused more narrowly on familiarity with specific cases than with simple recall of legal procedures or sitting justices. Given enough access to information, the public has the ability to learn, the response to the same-sex marriage cases make this evident.

However, while the distinction between factual recall and substantive awareness is an important one for social scientists to make, available evidence shows that in most cases, both are deficient. Without substantive public awareness, the Court's decisions - regardless of their legal impact - can have little power in terms of public policy and culture. Developing integrated learning about Court cases in a public that seems largely disinterested in the particulars of the judicial system is a challenge. Yet, advocates that pursue litigation strategies

and those concerned with social change through the judicial branch must involve themselves with public awareness. Without it, the effects of their legal strategies will be diminished.

The traditional media environment has made the development of public awareness a formidable task. That this difficulty exists lends a lot of credence to Rosenberg and Klarman's claims – whatever else their methodological weaknesses may be. Klarman and Rosenberg, both legal scholars themselves, suggest bypassing the Court altogether – at least for minorities attempting to gain new rights. They advise a more incremental approach through the legislature, offering that where a litigation strategy has been pursued in order to gain new rights, the disadvantages are apparent while the advantages are more esoteric, harder to measure or wholly non-existent.

The most obvious problem with advising advocates to avoid litigation is this: for many minority groups, working through the legislature is simply not possible. For the disenfranchised, the courts offer comparatively easy access and therefore afford, in many cases, the best chance for their group to create social change. A win at the Court level not only changes the law but combined with public awareness, it can in fact generate a number of social effects: salience, elite influence, positive changes in public opinion and movement coherence. The steady indifference of the public to issues in front of the Court combined with the media's episodic and lackadaisical coverage of same has hampered advocates' ability to nourish social change.

Before the advent of social media, traditional mainstream media controlled the framing of minority issues and had the power to either place their issue on or dislodge it from the national public agenda. Research on how the public learns from the media finds that frequent and focused exposure to a news story helps people to access the information from that story more readily. This means that even if, in the past, traditional media have paid a certain amount of attention to Court issues – public education on those issues was likely inadequate if the stories were not lead stories, repeated and emphasized over time. Emotional framing has also been shown to help people integrate their feelings about the story into their belief systems, aiding learning rather than simply fact retention.

Long-term, frequent exposure and emotional framing have been used efficaciously by public information campaigns (PICs) to achieve policy goals through public learning. Social media allows advocacy groups to treat their issues before the Court more like a PIC. The RMC's campaign surrounding the gay marriage cases used the tactics of a PIC, aided by freely accessible social media platforms. The RMC focused on personal stories, families kept apart because of unjust laws. The group began their campaign when the Court granted *certiorari* and continued it until the ruling was handed down many months later, ensuring frequent and focused exposure to their efforts. Social media also

abetted another important aspect of any effort to educate the public: engaging the disinterested audience.

The evidence available makes it seem as though educating the disinterested as to the cases before the Court in the past constituted a nearly impossible task. There is a finite amount of space in one's local newspaper and a finite amount of time on one's local newscast. And even given a perfect world where print and television news paid an appropriate amount of attention to the Court, if one weren't interested they could quite easily avoid ever even hearing of a case. Only a personal conversation with an interested party or inadvertent exposure to some kind of protest or event in the physical world would expose a reluctant person to the issue.

The purpose of this work, in part, was to demonstrate that the newsfeed structure and democratic access of social media exposes a much larger number of disinterested people to news that they would not otherwise access. It affords advocacy groups a chance to frame their story and have it seen widely and for a significantly longer period of time than the average news item would be accorded in traditional media formats. Social media's ability to inform the uninterested is the best explanation for the discontinuity between the public's stated interest in the outcomes of *Windsor* and *Perry* and the larger than average level of awareness achieved after the rulings were handed down.

There are a number of impediments to developing a solid theory about how social media impacts the public-Court relationship. In the research I conducted, I could find only one organization that consistently measured public awareness of Supreme Court rulings. Significant polling exists on public opinion towards controversial issues before the Court and the aftereffect of decisions on support for the Court. Unless better research is conducted on public awareness of individual cases – especially those granting new rights – it is impossible to isolate the impact of awareness campaigns like the RMC's and subsequently difficult to assess the ability of the Supreme Court to effect social change in this new media environment. Awareness is such an important part of an advocacy groups' ability to benefit from the social change they are litigating for. Consequently, it is disconcerting to see such limited and inadequate data collection on public awareness of Court decisions.

Because it is difficult to process cause and effect due to a lack of data, the attribution of progress in LGBT rights to the Court's decisions combined with the RMC's awareness campaign is more difficult than it might be otherwise. One might argue that the relative advantage that the gay marriage cases maintained with regard to public awareness and understanding may have been the result, not of Court action, but of what Klarman and Rosenberg would call "culture". Klarman and Rosenberg both employed the perplexing argument that gay marriage was inevitable but that courts would or could not be responsible for making this so, that instead, cultural changes would lead to more favorable laws

passed through the legislature. Rosenberg (2008) wrote that public opinion had been trending towards acceptance of homosexuals but this was, "...not primarily the result of litigation. Rather, [it is] the result of a changing culture" (p. 415). Klarman noted that, on the whole, American tolerance for gays and lesbians was quite high and had been getting better at a relatively quick pace. "The shift in public opinion on this issue within just a few years has been truly astonishing and it may suggest that the growing power and pervasiveness of popular culture is likely to cause public attitudes on sexual orientation to shift faster than racial and gender attitudes changed in preceding generations" (Klarman 2005, pg. 484). Klarman cited television programs like *Will and Grace* as a part of the pop-culture trend making gay rights more likely.

It's hard to credit the idea that new rights accorded to an oppressed minority are ever inevitable. But, more unpersuasive is the idea that law and culture are separate entities that exist apart and do not influence one another in a meaningful way. It is more likely that law and culture influence one another in an endless and iterative process that changes over time. Opinion on gay marriage has, in fact, shifted. If it is true that the Court follows the election returns, as the saying goes, the litigation strategy is no less important. Keck (2009) emphasized this point in his critique of Rosenberg and Klarman's culture/inevitability argument. He wrote, "Rosenberg and Klarman are right that courts usually will not act until some progress has been made in the culture at large, but...they may still act before any other lawmaking institution is willing to do so" (p. 182).

Which is to say that even if the simple changing of the cultural tide is responsible for some of the effects attributed to the Court decisions, separating the law from the culture is a faulty enterprise. Culture cannot move forward without the progress of law just as law cannot change without the progress of culture.

Despite strong evidence that *Brown* was not the watershed moment that Americans learned it was in elementary school, it is unlikely that litigation was ever the useless, resource-destroying and counterproductive strategy that Rosenberg and Klarman have maintained it is – at least not in the long-term. But even granting their view of this strategy – accepting their best evidence and dismissing relevant critiques – a reassessment of the litigation strategy is still due, if only because the media environment has changed so much. Despite limited data, I found evidence that the SSM cases produced extra-judicial effects. I also measured those effects in precisely the ways advised by Rosenberg. I found that salience existed in the SSM case by showing that positive news stories about the case increased. I found elite influence existed in the attribution of judges and legislators from 19 different states who created SSM law after the *Windsor* and *Perry* decisions came down. I found that public opinion remained steady or improved with regard to SSM after the decisions, depending on one's demographic. No backlash could be measured by public opinion towards the LGBT community. Lastly, coherence was easily demonstrable in the RMC itself, composed as it was, by 170 disparate political organizations united in one purpose. The evidence available lends credence to the idea that the public-Court

relationship can be made better and that public awareness of Court cases is possible given the proper efforts and conditions.

The RMC's large cohort of member organizations allowed their social media posts to be pushed quickly far and wide – to go viral - into the newsfeeds of the unaware and disinterested. The RMC benefited doubly with their viral campaign when the mainstream media picked up the story of the online movement, broadcasting it further still. In contrast, the NAACP had a much smaller number of cooperating organizations, none of which have a large online presence. Though they did contract with an online marketing company to create a shareable image, the online effort did not appear to be the cornerstone of their operation, which tended more towards traditional means of publicity like rallies and traditional media interviews.

The RMC honed in on emotional frames, enlisting people like Hilary Clinton to discuss her change of heart with regard to SSM and then posting that video to YouTube. Part of this emotional framing was meant to make people feel that their own personal opinions and actions were important to the movement. People felt that they could help not only by signing online petitions but also by simply changing their profile pictures and alerting their communities of their support for SSM. According to Mendelsohn (1970), a belief that one's own personal efforts matter to a cause is crucial in creating the learning and awareness that PICs use to succeed. If this is true, it explains a small portion of why the RMC's campaign was successful where the movement behind *Shelby Co.*

was not. Emotional framing seemed to make people feel that they could help make gay marriage happen, even if it was by expressing their own opinion on the matter to their friends. Though the NAACP discussed emotionally-framed stories of the importance of Section Five to the progress of black Americans, it is easy to feel that one's own personal efforts cannot help resolve the seemingly intractable problem of racial tensions in the South. Perhaps the idea of same-sex marriage was also, cognitively, a more straightforward concept to envision than the more troublesome and inscrutable topic of voting rights. Likely, all of these conditions play some part in explaining why the RMC's campaign was more successful than that of the NAACP's. But, put simply, less frequent and visible online support correlated with less awareness of *Shelby Co.* and vice versa with regard to *Windsor* and *Perry*.

Future research opportunities are plentiful. Personal interviews and survey research done with the public would shed light on precisely where they are getting their information about the Court. The next Court case to define new rights may help establish whether the SSM cases were truly an outlier or whether a public information-oriented campaign can help bring about the extra-judicial effects needed to undergird social change. It is worth noting that social media is still relatively new and as it becomes more entrenched in the media landscape new restrictions, for instance algorithms that favor certain content in a disadvantageous way, or paywalls that make content more expensive to

produce, may present themselves. Facebook has already begun limiting content publishing to public newsfeeds unless the owners of group pages pay a fee. So it's possible that social media campaigns will become more resource intensive than they are currently.

Even given this imaginable trend, social media is a relatively more democratic medium than the mainstream press. Our traditional media has been the custodian of public awareness for so long that a new, more accessible and incredibly popular vector like SNS has the potential to change the Court-public relationship in ways we cannot yet anticipate. A reassessment of this interconnection may thoroughly alter the costs and benefits advocacy groups perceive when they assess litigation strategies. It may also re-shape some of the assumptions at the core of Court-public study. That the public cannot be made aware of the Court due to overwhelming disinterest, that new rights should not be granted through the Court for fear of backlash, that the Court is unable to produce social change – all of these suppositions may need to be refined in the wake of the mass adoption of new media.

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