



THE SOCIAL IMPACT OF COURTS IN MODERN POLITICS

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Abstract

The Supreme Court and its subsidiary courts are often viewed in the general media and pedagogical environments as another pillar that drives social change. But a thorough look into the activities, history, and procedures of the judicial branch would call into question the legitimacy of its influence in politics and society. There appears to be a gap in whether the courts play a more dynamic or supportive role when it comes to reshaping society. This paper argues that the Supreme Court's influence to bring about social change is more constrained and often relies on the executive and legislative branches to carry out its "influence" in society. The instances in which the courts do initiate change are countermajoritarian, protecting constitutional principles and minority rights against the majority ideology at the time. Drawing on Stephen L. Carter's review of Gerald Rosenberg's *The Hollow Hope* in which the court's ruling has limited effects for three reasons. First, the courts are bound by constitutional text and precedent; therefore, they can only address social, political, and economic issues by connecting them to previously established rights. Second, the judiciary is not as independent as it was intended to be with the justices' life tenure. Political parties play a heavy influence in the nomination and confirmation process of appointing justices. Let alone the justices' own personal beliefs based on the attitudinal model, as argued by Harold J. Spaeth in *The Attitudinal Model*. Third, the courts cannot enforce their own decisions in cases. Often relying on the executive's power of the sword and the legislative's power of the purse to do so, a weakness that Alexander Hamilton mentions in *Federalist* No.78. These limitations mentioned can be seen throughout the paper's analysis of abortion rights. This paper recognizes that the courts are an important pillar in American government by their merits, but their role as the societal changemaker it's portrayed to be is not the whole story.

Keywords : Judiciary branch, The Supreme Court, judicial review, majoritarian view, countermajoritarian view, constitutional principles, the attitudinal model, limitations, abortion rights, societal change, precedents

The courts hold an important role in government, as they are the only branch that can review laws through judicial review.¹ These courts uphold the Constitution and its values from influences that can undermine the rights and liberties of the people. The courts have therefore been subject to criticism by individuals from across the political spectrum about the influence of politics on the decisions of the courts. It's argued that such influences on the court's decisions can lead to extreme changes to the social fabric of the nation. While others argue that the courts do not have such influence to start social changes, as they do not hold any power to enforce these decisions. The legislative

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and executive branches hold the power of the purse and sword that can uphold the decisions of the court. So while the courts could make influential rulings, it is dependent on other branches of government in order to become an institution that brings about social changes. It is for the reasons mentioned above that the courts do not bring about social change, as they are often credited on their own, and even when the courts do initiate social change it is of a countermajoritarian change that uphold constitution principles and protects minority rights. As this can be witnessed through previous and modern cases in American history, the courts do not bring about social change within years of their decisions, such as the landmark case of *Brown v. Board of Education*, as it took intervention from the Civil Rights Act of 1964 to truly end segregation years after the case.

Stephen L. Carter's review of Gerald Rosenberg's 1991 book *The Hollow Hope* addresses three factors as to why the idea of the dynamic court, where the courts do bring about active social changes through their decisions, is an unrealistic view, and a more realistic one sees the Supreme Court as a constrained one. The courts have very little influence over social change whenever the courts rule on a decision. The reasons include the limitation of constitutional rights based on previous legal precedents established, the lack of judicial independence from political parties, and the lack of enforcement of decisions.

The limitations of constitutional rights focus on the idea that courts can solely rule on an issue that is based on concrete, established constitutional rights and cannot create rulings on what is morally right. For instance, many issues face society, such as housing, poverty, inequalities, education, etc, and the court can not make rulings on those decisions based on the ability to mobilize social changes (Carter, 1992, p.1217). The way that courts do rule on issues that can lead to social changes is to relate the topic back to constitutional rights, similarly to how the elastic clause of Article 1, Section 8 of the Constitution gives Congress the ability to increase its range of power that relates to duties mentioned in the same article. This is how abortion is not a constitutional right mentioned in the Constitution or its amendments. Yet, the 14th Amendment was used to justify abortion rights under the Due Process Clause to create the right to privacy that expands to include abortion rights. It is cases such as these that make it difficult for the Supreme Court to rule on topics that can lead to social changes because of the limitations of constitutional rights. The courts mainly rely on previous precedent and the interpretation of the Constitution. And even when cases of similar issues are brought to the Supreme Court, the courts have the power to reject cases from being heard and further show how the courts aren't the best mobilizers of social change. The *Dobbs v. Jackson* case that overturned abortion rights used previous precedents under *Roe's* dissenting opinion to justify the overturning, stating that abortion rights are not a constitutional right mentioned in the Constitution and therefore should be left to the state to decide. Even with these decisions, abortion cases still occurred both when abortion rights were affirmed in *Roe* and when abortion rights were sent back to the states in *Dobbs*; there was little social change that the court had brought with these rulings (Carter, 1992, p.1219).

The lack of judicial independence from political entities refers to the judicial selection process where the President nominates a candidate, and then the Senate later votes to approve that nomination. Usually, the Senate majority holds political views similar to those of the President to speed up the confirmation process. This means that the Supreme Court Justice holds political views similar to those of the President and Senate, who confirmed them. Rosenberg and Carter both don't see a judge as a fitting word to describe the relationship that the judiciary has with the other two branches, opting that a "servant" isn't too far off (Carter, 1992, p.1218). This is because confirming a Supreme Court Justice is almost the equivalent of "bought-out votes in advance," so the word judge isn't a fitting word. This relates back to the attitudinal model of judges' decision-making by Jeffrey A. Segal and Harold J. Spaeth, which suggests that the justices' attitudes and ideology, rather than their views on the law, were the strongest predictor of their votes. It was also concluded that there was a correlation of 0.8, a strong relationship, between conservatives and liberals voting a certain way based on their ideology (Spaeth, 1995, p. 296). So, topics such as abortion rights are predictable as a liberal would vote in favor of protecting abortion while conservatives would be in favor of sending it back to the states to decide. The political party system does not allow the judiciary to be independent and strays away from the current political party in charge (Carter, 1992, p.1223). Therefore, when looking at the current Supreme Court with a 6-3 conservative majority, it is reasonable to see that the rulings on controversial issues, such as abortion rights, should be overturned and sent back to the states to determine their abortion rights. Further, it shows that the Supreme Court isn't a catalyst for social change, as the rulings based on the majority conservative court do not go against or stray away from the mainstream of the political party in charge. Dahl explains that the majoritarian view of the court represents the majority of the people as the people are the ones who elect government officials to then confirm justices to the Supreme Court. (Dahl, 1957, p. 282-83). As this decision allows for conservative states to place abortion restrictions and liberal states to uphold abortion rights, abortions will continue to happen in the United States once again, regardless of the decision made by the Supreme Court on this salient issue. Only if the judiciary were independent from political influence then the court could rule on issues that go against the mainstream and create noticeable social changes.

The lack of enforcement of the judiciary refers to the lack of power for the courts to enforce their decisions in society. The executive branch has the power of the sword to implement legislation, and the military and the legislative branch have the power of the purse to determine the allocations of federal funds; these two powers are interconnected. However, the judicial branch doesn't have access to these powers and, therefore, only has the ability

to rule on the constitutionality of cases and legislation. Therefore, both the executive and legislative branches can ignore the judiciary's rulings (Carter, 1992, p.1218). This is even supported in Alexander Hamilton's Federalist Paper #78, where he discusses why the judicial branch is the weakest of the three branches, mainly due to its reliance on the other branches to enforce their decisions (Carter, 1992, p.1217). Hamilton also discusses judicial independence so that the judges can interpret the Constitution based on the law without fear of repercussions from political enemies, which in the modern day shows why the judiciary has little influence on social changes, as it is heavily influenced by political parties (Federalist 78, 1788). In connection with *Roe v. Wade*, after the nationwide recognition of abortion rights, there weren't immediate effects as the courts did not create abortion clinics as the court didn't have the power to do so. It is only with the legislative branch to allocate funds to the states and the executive branch to enforce abortion rights. As a result of this, access to abortions was different in various states as there was already access to abortions in more liberal states and limitations in conservative states. There were setbacks in conservative states with the pro-life movement to place restrictions on abortions; the courts had no way to prevent these state restrictions. The *Roe v. Wade* ruling once showed social change but not to the degree that many people believe that the courts would have as liberal states continued to have abortion rights as they already did before the ruling, while conservative states gave in to limited abortion rights. There was little effect in liberal states and a little more in conservative states.

It has been discussed previously that a major reason as to why the courts do not bring about social changes is because of the current 6-3 conservative majority on the court to rule in decisions that are more closely linked to the Republican party and their ideology; this is a majoritarian view of the court (Dahl, 1957, p. 282-83). Also, the public does not seek interest in the court's decision-making unless it is of salient issues such as abortion, equal protection, affirmative action, or any other high-profile cases, based on the public condition response theory by Johnson (Johnson 1998, p. 299- 300), once these cases of "importance" are ruled, then the supreme court vanishes back into irrelevance as the court hears about 100 cases yet only a few cases catch the attention of the public. And even if the public is interested in such cases of salient issues, it has been shown that the decisions made by the Supreme Court do not bring about enough social change as the public might think.

However, the court can mobilize social change by ruling against the political party in charge of upholding and protecting the minority rights of majoritarian parties. This can be done with the counter-majoritarian view of the court, which is the only way that courts can bring about the start of social change. The counter-majoritarian view of the court is elaborated by Jonathan D. Casper, who states that the courts are protectors of the system to safeguard minority rights from the majoritarian view (Casper, 1976, p.50). There are instances where the courts in a majoritarian nation have ruled against the majority beliefs to uphold and protect minority rights. Examples include *Brown v. Board of Education* (1954), which declared segregation in schools unconstitutional, which was an unpopular decision at the time given the previous precedent of "separate but equal." Once again, although the court was a mobilizer of social change, immediate change in the country was not visible for years after the ruling in *Brown* because of the setback from the South through legislation to push back on desegregation and other discriminatory laws. This again shows the weaknesses of the courts in their inability to enforce their decisions and truly be a bringer of social change.

The courts are an important part of the American government as they are the only branch that can declare legislative and executive actions as unconstitutional and therefore revoked. These courts have ruled on landmark cases that protect individual freedoms. Still, it is important to note that these social changes are not brought about by the Supreme Court alone, as the courts are limited in enforcing their decisions across a nation. It is, therefore, reliant on the other branches to aid in their decisions that the court's inability to be a bringer of social change comes in. For these reasons, the courts lack enforcement power, political independence, limitations of constitutional rights, and a majoritarian view that the courts aren't the social change that the public makes them out to be.

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