

## **Correlation, Causality, Courts, Culture, and Continuity: Does the U.S. Judiciary Instigate Social Change?**

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All systems have both inputs and outputs. Systems also may receive feedback and be limited by both institutional and extra-institutional constraints. Among other qualities and characteristics, systems also have consumers. The judicial system is no different. The reasons for or causes of judicial decisions correspond to the inputs of the system while the decisions and policies, along with their impact and consequences, correspond to the outputs of the system. Some of the constraints which restrict those decisions, on both the input and output sides, include ideology, the nature and structure of the courts within a hierarchical and federal system, the other branches of government, public opinion, tradition, the cost of implementation, etc. Dworkin (1985, 70) contends that “if we give up the idea that there is a canonical form of democracy, then we must also surrender the idea that judicial review is wrong because it inevitably compromises democracy”. Judicial decisions, though, are of less relevance altogether if the policies they proclaim are not implemented.

Gerald Rosenberg, in *The Hollow Hope: Can Courts Bring About Social Change?* (1991), answers his subtitle with an emphatically resounding “No”. Rosenberg (1991, 4) defines social change as “policy change with nationwide impact”, with the implication that it is progressive. If there is any qualification to Rosenberg’s answer, it is that under certain specific and very infrequent circumstances, courts can effectively produce social change. Rosenberg contends that for the courts to be able to produce social change three “constraints” must be overcome and at least one of four “conditions” must be met. The three constraints are the need for an edifice of legal precedent, the support of the President and many members of Congress, and either citizen support from part of the population or minimal opposition from the entire population. The four conditions, which focus on implementation, are the existence of positive incentives, the reality of imposed costs, the possibility of market implementation, and the use of court decisions as a political tool to either extract additional resources or deflect political attacks (Rosenberg 1991, ch. 1). Considering the constraints and the conditions, on those relatively rare occasions when the courts are able to bring about social change, they are not acting alone. When the courts do act alone, they do not produce social change. Indeed, Rosenberg argues that “court decisions are neither necessary nor sufficient for producing significant social reform” (*ibid.*, 35).

Rosenberg carefully examines five areas of law — civil rights, abortion and women’s rights, the environment, reapportionment, and criminal law — to illuminate his argument. In addition to his conclusions regarding courts and social change, Rosenberg’s findings “also suggest that a great deal of writing about courts is fundamentally flawed” (*ibid.*, 342).

If we accept Rosenberg's argument, then a large volume of the literature on judicial politics, especially judicial review, must be seen in a different light. For if courts are effectively unable to produce positive and meaningful change, especially as opposed to the blocking of reform, then the study of how judicial decisions are made and what impact they have, aside from on the litigants themselves, becomes less meaningful to the social scientist. The U.S. judiciary is a locus of intense research because it is a co-equal branch of government. In a dictatorship, the judiciary, if it exists, may be merely a "rubber stamp" or "kangaroo court" and therefore unworthy of serious scholarly concern in terms of judicial decision making; both the inputs and the outputs of such a court system would directly correspond to those of the regime itself. Although the U.S. judiciary is considered legitimate and does not operate within a dictatorship, Rosenberg finds little evidence of its real power as a co-equal branch of government vis-à-vis social change. In fact, he states that the "U.S. courts can almost never be effective producers of significant social reform. At best, they can second the social reform acts of the other branches of government. Problems that are unsolvable in the political context can rarely be solved in the courts" (ibid., 338, original emphasis). On the other hand, Rosenberg has demonstrated the possibility that the President, the Congress, and/or popular mobilization have produced social change. For example, Rosenberg argues that Brown neither led to school desegregation nor to the Civil Rights Act of 1964 (CRA). Yet, there is reason to believe that various other social, cultural, political, and economic factors did lead to the CRA. And it is that Act, not Brown, which seems to have directly led to school desegregation, among other civil rights advances.

At the very least, Rosenberg has shifted the burden of proof regarding judicial power back onto its claimants. Although Canon and Johnson (1984) agree that courts must rely on other actors to translate their policies into action, they nevertheless believe that the translation occurs, though sometimes in an indirect manner. In contrast to Rosenberg, Canon and Johnson (1984, 269) conclude that "the courts have had and will continue to have an important impact on U.S. society. On occasion they will initiate fundamental changes in public policy". A full ten years after Brown, very little desegregation had occurred in southern schools; yet, Canon and Johnson (1984, 259) claim that "the Court's decision has on an overall basis been reasonably successful in changing public policy and attitudes about racial equality". They even go so far as to state that Brown was a powerful symbol (it "worked its way into the minds of many blacks, especially younger ones") and, indirectly, led to both the sit-ins and the CRA (Canon and Johnson 1984, 257-58). According to Rosenberg, assuming such a causal connection is an incredible feat considering the facts that many blacks had never heard of the decision and that most never mentioned the decision as their motivation for action. In spite of their praise of empiricism, Canon and Johnson do not provide any empirical support for these claims. In contrast, Rosenberg searches widely for empirical evidence from social and political leaders to textbooks to song lyrics; however, he is completely unable to find any. The burden of proof remains on Weberians (as opposed to Durkheimians and Marxists) who believe that the structure of law and courts can serve as agents of social change.<sup>1</sup>

While it is indeed true that the justices do not technically have to respond to “public opinion, Congress, or the President”, Rosenberg indicates that if the mass public, many of the congressional members, and the President do not respond to the justices, then the Supreme Court’s decisions become effectively meaningless in substantive value and essentially minimal in symbolic value. Decisions in and of themselves produce neither policies nor outcomes; other actors are needed for the uncertain and uneven process of implementation. The justices may be able to decide cases as they see fit, but they may not be able to effect national policy changes, in spite of what they decide. It is well accepted that judges and justices have the power of judicial review, and in exercising it also proclaim policies. However, one cannot claim that judges make policy, especially national policy, without giving evidence which supports a strong connection between court decision and actual policy, in addition to ruling out plausible alternative explanations. Despite the seduction of correlation, theories are only consummated by evidence of causality.

Rosenberg, by implication, demands such evidence of causality and additionally insists that meaningful policy change neither originates in nor is produced by the courts at any level, whether at the base or at the pinnacle. Like the courts, any individual can declare a policy. But also like the policy of the courts, that person’s new policy would only be a paper tiger if the three constraints were not overcome and at least one of the four conditions were not met. *B la Rosenberg*. If the constraints were overcome and a condition were met, with the new policy now in place, could anyone reasonably assert that it was the individual who had made policy? The answer is clearly “No” for the simple reason of an absence of causality. Rosenberg admits that the answer is less clear for the courts in many people’s minds, yet the scenario is remarkably similar. Again, Rosenberg cannot find any evidence of causation between court decisions and meaningful policy change. Indeed, Rosenberg is even able to point to plausible alternative explanations which may have given rise to the policy. With regard to civil rights, for example, he cites “growing civil rights pressure from the 1930’s, economic changes, the Cold War, population shifts, electoral concerns, [and] the increase in mass communication” (Rosenberg 1991, 169). Rosenberg concludes that “[t]he Court reflected that pressure; it did not create it” (*ibid.*). According to Rosenberg, there is no reason to believe that *Brown* led to either desegregation or the CRA; yet, there are several reasons to believe that the CRA would have materialized even in the absence of the court decision. Still, then, the burden of proof remains on the side of those who claim that the Court, through *Brown*, helped bring about racial equality.

We should not, therefore, concur with Nathan Glazer’s opinion regarding an “imperial judiciary”. In support of Rosenberg’s thesis, O’Brien (1989, 464) maintains that “when focusing on particular cases of judicial intervention in public policy and affairs, [Glazer and others] fail to pay sufficient attention to broader yet more fundamental legal, socio-economic, and political changes” in accounting for judicial power. The burden of proof is still on Glazer and others who believe in an “imperial judiciary” to demonstrate that the emperors do indeed wear more than their black robes.

Decades ago, Robert Dahl hypothesized about the Supreme Court's role vis-B-vis minorities. Supporting Dahl's hypothesis that "the Court cannot and does not...function to protect minorities", Funston (1975, 795, 811) concludes that with regard "to the Court qua institution: Its significance is essentially symbolic". Rosenberg, of course, questions even the Court's symbolic (and indirect) power.

The Hollow Hope should remind us of the need to demonstrate causality rather than assume it. Rosenberg also specifically questions the power of courts to bring about social change in the areas of civil rights, abortion and women's rights, the environment, reapportionment, and criminal law. In doing so, he has shifted the burden of proof for the existence of judicial power, whether substantive or symbolic, to the believers in and theorists of that power. Following Rosenberg, judicial review is de facto reconciled with democracy in that it does not effect fundamental issues.

It may be instructive, though, to step back and take counsel from Mather (1991). She perceptively notes that "[i]n the final analysis, the answer to the question, Do...courts make policy? depends simply on the definition of policy making used in the discussion, since a narrow definition tends to deny...courts a significant policy making role while a broader one does not" (Mather 1991, 123). Perhaps the burden is not one of proof, but rather one of operationalization and conceptualization based on theory. That is, the way in which we theoretically define power necessarily structures whether or not, and to what extent, we find it to exist.

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