



The US Supreme Court : A "Follower, not a Leader" of Social Change

Shahin Berenji, BA (PoliSci)
University of Southern California
Los Angeles, California, U.S.A.

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In the United States, the Supreme Court is the highest appellate court or legal institution that can define or interpret the rule of law. According to associate justice Felix Frankfurter, ¹ "the Court breathes life, feeble or strong, into the inert pages of the Constitution and the statute books" (Dahl 280). Yet, to consider the Court strictly as a legal institution is to underestimate its significance since the Court must also decide on controversial matters of national policy. In this sense, the Court is a "political institution" that must solve societal disagreements that cannot be "found in or deduced from precedent, statute, and Constitution" (Dahl 281). Nevertheless, although it issues decisions on controversial and divisive matters, the Supreme Court cannot be said to catalyze social change for it utilizes societal and governmental opinion as the medium to interpret, apply, and implement public policy, thus "following, not leading" the United States.

Because of its inability to initiate decisions, the Supreme Court has implemented landmark policies usually based upon societal legal challenges. In the Court case *Marbury vs. Madison* (1803), Chief Justice John Marshall established what would commonly be known as the power of judicial review, enabling the Court to be the final interpreter of the National Constitution. Nevertheless, it is worth noting that the Supreme Court cannot use judicial review unless it receives a court or "test" case from society. And so, even in the face of blatant constitutional violations, the Court would be incapable of exercising judicial review. In essence, challenges to social policy come not from the Supreme Court but from the individuals that file suit or complaints about constitutional violations. The fact that the Court reacts only to societal claims is testament to the Court's limited authority in dealing with social policy. In the historic case of *Gideon vs. Wainwright* (1963), the Supreme Court ruled, through judicial review, that "indigent defendants" charged with a felony were entitled to the services of a lawyer (paid for by the government) as indicated in the Sixth Amendment. ² This Court decision was unique in that it extended the sixth amendment "right to counsel" to all state criminal proceedings. Although the Supreme Court expanded the meaning of the right to counsel, the fact that Gideon's case was needed to expand the sixth amendment right represents the procedural limitations of judicial review. Thus, as the Gideon Case evinces, societal discontent has been used as the starting point to adjust or to initiate social change within the United States.

Similar to its dependency upon the "test case," the Supreme Court also needs societal support to implement and enforce its Court precedents. Although it issues decisions, the Supreme Court cannot directly implement them, which severely constrains their impact upon society. Unlike the executive or the legislative branches of government, the Supreme Court cannot appropriate money to ensure the application of its policies. In addition, the Supreme Court cannot use the police or other law-enforcing entities to execute its decisions. As a result, the Supreme Court must rely on societal support, particularly the federal government, to ensure the implementation of its decisions. According to Alexander Hamilton, "[the Supreme Court] may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments" (Rosenberg 15). This dependency truly limits the power of the Court by making it difficult for the judicial institution to oppose the policies of society. In 1830, for instance, at President Andrew Jackson's urgency, Congress passed the *Indian Removal Act*, which allowed the relocation of most tribes in the eastern United States to reservations west of the Mississippi River. Following the impetus from this act, Georgia passed a series of state laws which enabled white settlers to seize Cherokee territory in the northwestern frontier of that state. The Cherokee Nation, however, made the claim that they were a sovereign political entity within the boundaries of Georgia. In the 1832 case of *Worcester vs. Georgia*, the Supreme Court sided with the Cherokee Indians, ruling that Georgia superceded federal jurisdiction over the Cherokee Nation. This decision marked the first time that the Court actively sought to protect a minority group from the ruling majority. Moreover, this decision declared that the actions of Georgia as well as those actions that were permissible under the 1830 Indian Removal Act were illegitimate and unconstitutional.

Lacking either government or popular support, however, the Court's decision was not enforced, demonstrating the Court's inability to stymie change without majority consensus. As President Andrew Jackson jokingly stated, "Chief Justice

John Marshall has made his decision...now let him enforce it..." (Burner 310). Consequently, without the protection of the Supreme Court's decision, the Indian population, including the Cherokees, Chickasaw, and Choctaw, were forced to migrate westward along the "trail of tears" by federal and/or state governments (Burner 310). This mass exodus of Indians caused an estimated ten thousand deaths which caused some to rename the "the trail of tears" (as it had been called), "the trail of death" (Burner 311). This example truly illustrates the Supreme Court's incapability of implementing decisions without societal support. More importantly, it shows how "words are not action," meaning that force is necessary for the implementation of Court precedents (Rosenberg 18). The blatant demonstration of the Court's inability to forcefully implement change set up a judicial trend to support the tendencies of the majority. According to Robert Dahl, the Court adopted the position of keeping their decisions in line "with the policy views dominant among the lawmaking majorities" [Congress and the President]... " (285). Thus, the decision-making powers of the Supreme Court evolved "to confer legitimacy on the fundamental policies of the successful coalition" (Dahl 294).

Therefore, from *Worcester vs. Georgia*, the Supreme Court learned to coordinate its decisions in line with national opinion. As significant issues of social reform generally trigger opposition, the Court learned to align itself with the majority to facilitate the implementation and enforcement of its policies. Moreover, alignment with the majority inadvertently helped confer strength, respect, and legitimacy to the Supreme Court. According to Robert Dahl, "this legitimacy the Court jeopardizes if it flagrantly opposes the major policies of the dominant alliance" (293). However, since the *Worcester vs. Georgia* case, "such a course of action has been one in which the Court will not normally be tempted to engage" (Dahl 293). For instance, since 1935, seventy-five percent of the Court's decisions have been in support of the majority, indicative of the Court's passivity at opposing society (Rosenberg 13). More recently, sixty-five percent of the Court's decisions have been well supported by the majority of people within the United States, indicative of just how the Court's decisions have been decided in favor of popular or majority opinion (2000 Gallup Poll). In this way, then, the Court's decisions have become relatively predictable, unimportant, and insignificant since its precedents merely reinforce the ideas or opinions that are already prevalent within society. In addition, because the Court's decisions typically reflect the opinions of either the lawmaking or the national majority, it fails to challenge the beliefs or the principles of society. And so, the Court's inability to adjudicate decisions in opposition to the majority prevents it from protecting the rights of minorities and from becoming a true proponent of social change. While many people believe the Court's progressive decisions on civil right issues have been a general exception to this common pattern, those decisions were also fomented by national opinion.

Because of national opinion, the Supreme Court ultimately established civil right precedents to support the de-segregation movement. In *Brown vs. Board of Education of Topeka, Kansas* (1954), the Court unanimously ruled that the "separate but equal" doctrine established by *Plessy vs. Ferguson* (1896) was unconstitutional since "separate educational facilities are inherently unequal" (Rosenberg 39). According to the Court, "state-enforced segregation on the basis of color deprives individuals (particularly school children) of the equal protection of the laws guaranteed by the fourteenth amendment..." (Rosenberg 39). More importantly, the *Brown* case established the precedent that permitted the gradual de-segregation of all public places, including parks, recreational facilities, courtrooms, restrooms, and buses. This was a paradigmatic event in that it represented the Courts' ability to produce social change, particularly in protecting an oppressed minority from the actions of a majority. The fact that the Court protected a minority group, African-Americans, made the Court appear as the "shield and buckler" of all minorities (Dahl 284).

Nevertheless, such a significant change was motivated by the growing discontent with racism and inequality within American society. In 1946, President Truman established the President's Committee on Civil Rights to study discrimination and its effects in the United States. This committee was important in that it symbolized the government's concern for the issue of racial discrimination. Moreover, in 1948, President Truman had prohibited federal job discrimination and had de-segregated the US armed forces. Thus, even before the *Brown* decision, the government was addressing the issue of civil rights on a large scale, going so far as to de-segregate the armed forces. Furthermore, the fact that society re-elected Truman (in 1948), a proponent of civil rights legislation, indirectly demonstrated a certain degree of national support for the civil rights movement. The issue of civil rights was such a pressing concern that it forced the conservative Republican Party to adopt a moderate civil rights platform in later elections. Although many states in the south were vehemently opposed to the civil rights movement, most of the other states in the union vastly approved the government's course of action. In other words, a majority of people in the United States concurred with the plan "to eradicate all racial discrimination" (Burner 890). As is evident, then, the *Brown* case did not profoundly "affect national thinking" since there was already a growing sentiment for equality and de-segregation. Therefore, the Supreme Court merely reinforced the de-segregation ideologies already held within government and society, once again following, not initiating, the route to social change.

In conclusion, the Court is a somewhat constrained institution in that it only responds to the demands and whims of society. The Court's dependency upon society for case initiation as well as case enforcement prevents the Court from rendering decisions entirely opposed to societal opinion, thus why the Court can never fully lead social change within the United States. This is why, "at its best the Court operates to confer legitimacy, not simply on the particular and parochial policies of the dominant alliance, but upon the basic patterns of behavior required for the operation of a democracy" (Dahl 295).

About the Author

Shahin Berenji recently graduated *magna cum laude* from the University of Southern California with a BA in Political Science. His hobbies include, but are not limited to, watching ice hockey, playing the cello, and ballroom dancing. In the future, he wants to work for a political think tank and then attend graduate school

Endnotes

1. Felix Frankfurter- Associate Justice to the Earl Warren Court (1953-1969)
2. Sixth Amendment- States that in all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense"
3. In his article Decision-Making In A Democracy: The Supreme Court as a National Policy-Maker, Robert Dahl explains how the lawmaking majority, Congress and the President, typically make decisions that are in line with the national majority (the people); thus, in his article, Dahl presented the argument that the views of the lawmaking majority are similar to the

views of the national majority.

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