Paper 2

Today the Supreme Court is often seen as wielding a substantial amount of power by definitively determining the constitutionality of laws made by our government and striking them down if they do not believe them to be in like with the Constitution. Though it appears to be a considerable oddity that an unelected tribunal of eight would have almost unchecked power to determine what laws are ok and what laws are not, in today's current political and judicial culture it often seems to be the case. An apprehension that might arise in the mind of someone concerned with adhering to the democratic process at least procedurally then might be, so how much power does the Supreme Court really have? The answer is a two-pronged response that concerns direct and indirect affects of the Court. Gerald Rosenberg makes an excellent argument for the lack of direct affects the Court is capable of unless under very particular, fortuitous circumstances. He then also makes a case against the indirect affects that the court is capable of and proposes several arguments against many of the indirect affects of the Courts. Rosenberg seems to underestimate two potential indirect affects of the Court though; their value in creating backlash that can eventually help a cause, and working with grass roots organization in order to sustain social movements that could otherwise be squelched without the help of the law.

As Rosenberg says in the first chapter of The Hollow Hope, as far as focusing on the court being an effective producer of significant social reform, there are "claims about frequency" and claims about "conditions". Rosenberg describes that "to fully understand the role of the courts in producing significant social reform, we must focus on the latter,"[1] There are certain conditions that must be in place for the court to have any direct affect on social change reform. The first restraint is that "they must convince courts that the rights they are asserting are required by constitutional or statutory language,"[2] This first restraint proved to be a major stumbling block in the case of Rosa Parks. The NAACP thought that they would

seize upon the situation involving the arrest of Rosa Parks and use it as a focal point of a legal attack on the constitutional rights involved with being able to sit where you want on a public bus. Unfortunately, the case kept getting tangled up in the local and state courts instead of reaching any type of constitutional level, and instead "the court relied on a method commonly seized upon by state courts as a reason for not addressing a party's federal claim: Counsel had failed too comply with some rule of state procedure." [3] It was difficult to even get the issue to be considered on a constitutional level, let alone then prove that the constitutional language protected it.

The second restraint is that "courts are wary of stepping too far out of the political mainstream." [4] The Court, while an independent institution, does rely at least in part on the federal government, and they are still subject to the system of checks and balances by Congress who by take action against them. The Court does not often make decisions that more than 50% of the population is against because of the enormous amount of heat that would be generated by the populous and their representatives would mount against a widely unpopular decision. The third constraint that Rosenberg mentions is that since the judiciary "has no influence over either the sword or the purse… but merely judgment", [5] "litigants are faced with the task of implementing the decisions," [4] and without compliance of the other branches of government, "court decisions are often rendered useless given much opposition" [4]. *Brown*, a case that took place with all of these constraints in position illustrates that based on "the numbers…the Supreme Court contributed virtually *nothing* to ending segregation of the public schools in the Southern states in the decade following *Brown*," [6]. The only places that desegregation occurred were "border-states and in isolated portions of the peripheral South," [7] that were already lacking the second constraint and thus the third constraint because their state and local governments were willing to implement the Court's decisions.

Many, even if they don't agree with some of the particulars of Rosenberg's positivist reasoning, still concede that it is at least much more difficult to make direct changes based on court rulings when the constrictions are in place. It is in fact "widely acknowledged that *Brown's* direct impact on school desegregation was limited," [8] though it is perceived by many as being absolutely crucial in the achieving of civil rights. Even the dynamic court view, which generally believes that "courts can be effective producers of significant social reform," still concedes, "courts are *unlikely* to produce significant social reform" it just "does not deny the possibility" that courts can *potentially* create social reform. This view insists that the constraints are not as strong as the constrained court view would suggest, and that the court can provide "'equality of both access and influence to citizens' more 'completely' than any 'other institutional form,'" [9] The Court is a uniquely reactive institution while the other institutions have much more proactive power, and therefore individuals are in a unique position to be able to bring a case to the Court without having to be part of the majority or winning coalition. Yet one must assume the equality of access and influence, which unfortunately is by no means a necessary truth. More often than not, people who are more educated, with more resources and funds to pull from, will be the ones who are able to bring their case to the Supreme Court. Therefore it is true the Court has potential to be an incredibly valuable institution, but there are many factors that might hinder it from filling its potential.

Rosenberg also makes that case that not only can the courts not have a direct affect under these constraints, but the court won't have any indirect affects either.
Both he and Michael Klarman utilize positivist methods to determine the indirect affects of court decisions. They both determine that though the *Brown* decision might have forced the idea of civil rights onto the national agenda, in reality only 17% of northern whites were aware of the decision after it was made. 60% of southern whites were aware of the decision,

but unfortunately instead of goading civil rights progress it resulted instead in a tremendous backlash against the decision. They consider how the decision could have "pricked the consciousness of northern whites by placing the moral authority of the Court and the Constitution behind the black demand for desegregation" [10] but it is difficult to believe it effectively did this on any sort of significant scale if only 17% of northern whites were even aware of the case. Thirdly there is the claim that the decision "inspired black protest by legitimizing the civil rights cause or by improving the prospects for its success,"[10] .Yet African-Americans were surely already aware without the court decision that their desire for civil rights was legitimate, and the civil rights efforts were actually more vibrant during and directly after WWII and during the 60's than they were proceeding *Brown*. So even if it did inspire some African Americans, it wasn't on any visible, large-scale basis.

McCann, agrees with the fact that "legal tactics narrowed in effectiveness as courts narrowed constructions of civil rights later in the decade", and therefore that the courts effectiveness can be constrained as a defender of civil rights, but still maintains that the court can have affective indirect affects regardless. He attributes the inability of researchers like Rosenberg to produce results that corroborate McCann's findings because of the positivist, causal method employed as opposed to a more complex, probing research methods that "treats contexts as complex webs of multiple dynamically interactive, contingent 'social *relations'* that both constrain and facilitate the reflexive actions of research subjects," [11] McCann makes several points regarding the effectiveness of the Supreme Court decision in the context of the pay equality movement of the 1980's. He makes several good points regarding the laws indirect affect as far as establishing legal norms and conventions to be used by those involved in the social movement, educating people on the issue through relatively widespread media coverage, and sparking collective political action.

Though McCann believes even during the era of wage reform that "federal Courts generally have lacked both the will and the capacity to correct discriminatory wage practices" but that "nevertheless…legal norms…shaped the terrain of struggle over wage equality" [12] the equal pay movement still occurs under much more favorable conditions than the civil rights movement and *Brown* took place. Courts were more willing to use the Constitution in order to guard against civil rights infractions specifically, and they were not subject to the three major constraints that the Court was subject to during the *Brown* decision. The absence of the second constraint in particular changed the way the decisions reached and affected the populous. In the *Brown* decision, the Court was stepping far outside of the mainstream, at least within the South, and thus there was no sympathetic widespread media coverage generated, no educational effect and no rallying together of dispersed civil rights forces. Yet since the majority of the public was behind the Court decisions made during the equal pay movement, all of these things were possible, and the Court decisions had a much more significant affect. The absence of the third constraint was also extremely helpful to their cause, because now not only was the public generally willing to implement Court decisions, but the Court also enjoyed the support of the federal government and local governments with implanting their decisions, and thus further change was enabled. Rosenberg would tend to agree with McCann, that under conditions lacking the three main constraints, the Court is in fact able to produce social change.

There are though, two indirect affects of Court cases in particular that Rosenberg seems to dismiss or not really address, that have the ability to contribute substantially to social change. The first affect is interesting because it is probably the most indirect way the Court can bring about change; that is the Court is capable of bringing about change because of the backlash generated by their decisions, *against* their decisions. As Klarman describes, the backlash in *Brown*, "crystallized southern resistance to racial change…temporarily

destroyed southern racial moderation" and thus generated "nationally televised scenes of southern law enforcement officers using police dogs, high-pressure fire houses… which converted millions of previously indifferent northern whites into enthusiastic proponents of civil rights legislation," [13] The *Brown* decision, which as previously mentioned reached more than half of the southern white population actually "created a political environment in which southern elected officials stood to benefit at the polls by boldly defying federal authority and brutally suppressing civil rights demonstrations," [14] This transformation of the south combined with the non-violent tactics of those involved in the protests created scenes and images that were in fact finally enough to prick the conscious of the northern white, and mobilize enough people in the federal government and in the public at large to throw the full force of Congress and the executive behind the enforcement of civil rights, culminating in the Civil Rights Act of 1964. This backlash shouldn't be confused with the Court's decision having the direct affect of pricking the conscious of northern whites, because *Brown's* ruling itself was not enough to do this. This is though, an example of how the Court's decisions do have the capacity to indirectly effect social change, though not a necessarily intuitive way.

The second way in which the Court appears to be able to help bring about social change is that sometimes its decisions, or lack of decisions, have the capability of sustaining a social movement. As Robert Glennon says, "prolonged human effort, no matter how righteous the case, does not inevitably result in favorable political change," [15] He points out several moments in particular during the Montgomery bus boycott, such as *Browder v. Gayle*, "seeking an injunction against further segregated seating on buses, relying on *Brown v. Board of Education* as legal authority, and against legal harassment of the car pool." [16] where the decisions of the Supreme Court at least *technically* enabled civil rights movements occurring on the ground to continue. Those involved in the Montgomery bus boycott were relying on their ability to carpool, so those boycotting could still get around. Judge Carter, a state court

judge "issued a temporary injunction prohibiting the continued operation of the car pool on November 13, 1956", but this was only after the Supreme Court issued a ruling that upheld an earlier ruling of *Browder* that struck down "the Alabama and Montgomery ordinances requiring segregation on Montgomery City Lines buses," [17] While there was still enormous amounts of resistance from the population and even the lower courts (as illustrated by the actions of Judge Carter), it did prove helpful to the movement that might not have ultimately succeeded without the support of the Supreme Court. The law could have been turned directly against the protesters, and it can be assumed that most of the locals would have been happy to enforce it. At least with the law with the protesters, even if local people wanted to continue to stop the protests, they wouldn't have any legal imperative to increase their efforts to do so, and in fact might actually get in trouble further down the road to continue with their actions.

This is not to say that the "Supreme Court decisions may have inspired the Montgomery black community to challenge segregation," [18] or that the Court's decisions alone then single handedly allowed for each grass roots civil rights movement to succeed. Often times, as Glennon himself illustrates in his work, the courts, (the lower courts especially) actually often impeded social justice by blatantly ignoring Supreme Court decisions, like Justice Carter as well as the Alabama Court of Appeals did with *Browder*, and thus not implementing them in their communities, or by obscuring the language as they did with Rosa Parks case as to make it not a constitutional issue but a state statue issue. Glennon actually describes how this ground breaking *Browder* ruling did not actually end up resulting in desegregation, because "peaceful integration ended a few days later, when someone fired gunshots into King's home and several city buses,". [19] that then shut down the bus lines. The Supreme Court's decisions then clearly did not solve the issue of bus segregation. It did form a necessary link though in a chain of events that ultimately led to real change that the federal

government finally took in 1964, after backlash like that generated by the *Browder* and *Brown* rulings got enough national media attention to finally push the northern public and the federal government to the side of actively protecting civil rights.

Our society tends to idolize certain court decisions like *Brown v. Bored of Ed*., as well as certain social movements such as the Montgomery bus boycott. More often than not though, it is simply impossible for any single one of these events to have the cataclysmic affect that our society at large, as well as certain scholars, attribute to them. It is not necessarily true that "the existence and strength of pro-civil-rights forces at least suggest that change would have occurred" [20] without any interventions from the courts, nor is it necessarily, nor even probably, true that "the Montgomery protest failed to produce any change in the transportation system" and that "the intervention of federal courts caused that change and paved the way for achievement of the other long-term success," .[21] It is actually quite apparent that the Supreme Court's ruling was continually flouted and ignored by most southern whites and local courts and law enforcement. Glennon himself concedes that "voluntary integration of buses and trains occurred in some upper South cities though bus companies shied away from integrating terminals" and "as of 1960, only limited bus integration had taken place in the deep South,". [21] It was a mix of massive, public grass roots involvement, court cases, backlash against the court cases and involvement and sympathetic media coverage that was eventually able to turn the tides of civil rights protection in the United States.

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[1] Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*,
[2] Rosenberg, p. 23
[3] Robert Jerome Glennon, *The Role of Law in the Civil Rights Movement: The Montgomery Bus Boycott, 1955-1957,* p. 88
[4] Rosenberg, p. 21
[5] Federalist Paper No. 78, found at http://www.yale.edu/lawweb/avalon/federal/fed78.htm
[6] Rosenberg, p. 52
[7] Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis,* p. 84
[8] Klarman, p. 83

[9] Rosenberg, p. 24
[10] Klarman, p. 87
[11] Michael McCann, *Casual versus Constitutive Explanations (or, On the Difficulty of Being so Positive…)*, pg. 462
[12] Michael McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*, p. 4
[13] Klarman, p. 82
[14] Klarman, p. 110
[15] Glennon, p. 61
[16] Glennon, p. 68
[17] Glennon, p. 79
[18] Glennon, p. 90
[19] Glennon, p.87
[20] Rosenberg, p. 157
[21] Glennon, p. 97