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DO COURTS MATTER?†

Stephen L. Carter*

THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?
By *Gerald N. Rosenberg*. Chicago: University of Chicago Press.
1991. Pp. xii, 425. \$29.95.

One of the nation's most prominent journalists recently referred to the President's ability to staff the Supreme Court as "his single most important duty"¹ — ranking, it seems, ahead of the duty to keep the peace or the duty to administer the affairs of the federal government. One can understand that judgment, whether or not one shares it, for the received wisdom of contemporary American politics is that the Supreme Court wields enormous power to affect the future course of American society. Thus, the bitter battles over who gets to serve on the Supreme Court do not, as Robert Bork would have it, constitute part of a larger culture war;² rather, the struggles proceed from the widespread perception that the outcome matters, and matters a lot. In our constitutional mythos, the selection of the right Justice — or the wrong one — can change the course of American history, moving us forward, setting us back, holding the course, or charting a new one.

Since the pioneering work of Robert A. Dahl, most theorists have viewed the Court as one of many actors in the development of national policies on a variety of issues.³ The implication is that the Justices are serious players in the game of societal transformation. Some scholars, Alexander Bickel to the fore, have been more cautious, suggesting a Court of limited ability to make changes.⁴ Bruce Ackerman, for example, has compared the Court to a group of brakemen sitting in the last car of a train, able to make it stop but not to make it go.⁵ Yet in the popular image — the one enshrined by the political rhetoric of left

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1. Anthony Lewis, *Wreck or Rescue?*, N.Y. TIMES, Apr. 5, 1992, § 4, at 17.

2. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 343 (1990).

3. See Robert A. Dahl, *Decision-Making in a Democracy: The Role of the Supreme Court As a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

4. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

5. See Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 546-47 (1989).

and right alike — the Justices ride right up in the engine and choose which track to take.

Political scientist Gerald Rosenberg,⁶ in his new book *The Hollow Hope: Can Courts Bring About Social Change?*, challenges this conventional wisdom. Rosenberg claims that the courts matter a good deal less than our rhetoric insists — or, more formally, that their power to produce significant social change, whether directly through their own decrees or indirectly through sparking other societal forces into activity, is less than Americans have come to believe.

Rosenberg erects two models of judicial behavior: the Dynamic Court model, under which Supreme Court decisions exert important influence on the direction of the society, and the Constrained Court model, under which various limitations on the Court's power make such influence minimal. After analyzing a variety of hotly debated constitutional issues, Rosenberg comes out for a modified version of the much-maligned Constrained Court model which, he says, "best capture[s] the capacity of the courts to produce significant social reform" (p. 336). In fact, Rosenberg suggests that all the old metaphors of judicial weakness, from Hamilton to Bickel, are truer than today's scholars seem to think — implying that our politics, and even our scholarship, should be little concerned with the output of the courts because there is little that the courts can actually accomplish.

A part of the American mythos already accepts this claim, for competing sides in any struggle over constitutional meaning always argue that the law is already as they say it should be. The norms of legal argument hardly permit anything else, which is perhaps what Publius really had in mind in insisting in *Federalist No. 78* that the judicial branch possesses neither force nor will. That the courts simply construe the law is hornbook civics. Even if smart theorists know that it is nonsense, the public, which probably also knows better, still cherishes the ideal of judicial weakness, which is one reason that political rhetoric about "strict construction" — fortunately, never defined — plays so well on the stump. The effort to show that the courts do not make new law has led to some very peculiar results, such as the insistence by former Attorney General Edwin Meese that *Brown v. Board of Education*⁷ represented the rediscovery of an original understanding that *Plessy v. Ferguson*⁸ had ignored.⁹ Still, such an argument is much in keeping with the ideal that the courts possess little power in American life.

6. Assistant Professor of Political Science and Instructor in Law, University of Chicago. Professor Rosenberg was a student of mine in a seminar on Separation of Powers at Yale Law School in 1983.

7. 347 U.S. 483 (1954).

8. 163 U.S. 537 (1896).

9. Edwin Meese III, *The Battle for the Constitution*, POLY. REV., Winter 1986, at 32, 34.

But hardly anyone really believes this. Most Americans seem to think the courts have, or should have, sufficient authority to protect favored "constitutional" rights. The *mythos* of judicial weakness is most emphatically brushed aside during the campaigns (there is no other word) for and against the candidates (still no other word) for election (yet again, no other word) to the Supreme Court. At those defining moments of the people's relationship to their judicial branch, we discover all too often that we want not a least dangerous branch, nor even an independent one — rather, we want a branch possessed of considerable power yet willing to exercise that power only in accordance with our will. By the rhetoric of the President and the Senate, at least, *servant* is not too extreme a word to describe the judiciary's relationship to the public. If our fondest desire is to staff the bench with people whose votes on crucial issues are promised in advance, we certainly cannot use the word *judge* to describe the people the process produces.¹⁰ But our tendency to treat the Justices as servants surely is bottomed on our fear of their power.

Rosenberg suggests that this fear is unfounded — that the courts are less powerful engines of change than we seem to think. The endless squabbling over judicial personnel, Rosenberg implies, wastes enormous energy; if we wish to influence public policy, we should not be so interested in the courts, for they cannot effect significant changes in American society. According to Rosenberg, the Supreme Court might be part of a social movement, but it is rarely the motive force and never the key player.

Rosenberg's analysis of *Brown v. Board of Education*, the paradigmatic case of judicial involvement in social change, best illuminates his thesis. In the orthodox view, *Brown* was a watershed, the crucial development in the movement to abolish legal segregation. Rosenberg, however, seems to delight in challenging the orthodoxy: "[T]here is little evidence that *Brown* helped produce positive change," he tells us, but "there is some evidence that it hardened resistance to civil rights among both elites and the white public" (p. 155). Rosenberg offers evidence that rates of school desegregation changed little during the decade after *Brown*, as the courts pressed their lonely battle for supremacy (pp. 49-57). In the particular case of the South, he insists, "virtually *nothing happened*" (p. 52); statistics on segregation were as dismal in 1964 as they had been in 1954. Other commentators have pointed to the Court's unanimity and steadfastness as critical to general obedience of the *Brown* decrees, but Rosenberg's god is data: "Despite the unanimity and forcefulness of the *Brown* opinion, the Supreme Court's reiteration of its position and its steadfast refusal to yield, its decree was flagrantly disobeyed" (p. 52). The enactment of

10. The themes in this paragraph are developed more extensively in Stephen L. Carter, *The Confirmation Mess, Revisited*, 84 NW. U. L. REV. 962 (1990).

the 1964 Civil Rights Act, he says, tipped the balance — and rather dramatically at that, for the Southern states, with federal funding at issue, at last began to yield.¹¹

The trouble, according to Rosenberg, is that the Dynamic Court model simply didn't work for school desegregation. The courts, he says, were constrained by a variety of rather Bickelian factors, notably the lack during the first decade after *Brown* of "the active support of political elites" (p. 74). The equivocation at the national level, he argues, encouraged private citizens and local government actors (and sometimes lower courts) to continue their resistance at the state level. "The only way to overcome such opposition," he writes, "is from a change of heart by electors and by national political leaders" (p. 81) — a change reflected in subsequent legislation. In the desegregation realm, he concludes, "it is clear that paradigms based on court efficacy are simply wrong" (p. 105).

Rosenberg does not rest with this astonishing rebuttal of the received wisdom on *Brown*; instead, he trots out a variety of data in an effort to demolish one icon of liberal constitutionalism after another. His dismissal of the efficacy of the Court's effort to reform criminal procedure is succinct: "The revolution failed" (p. 335). Women's rights? There is, Rosenberg says, "little evidence that Court action was of help in ending discrimination against women" (p. 247). He is equally unpersuaded that clever litigation strategies can lead to liberal results by eliciting broad judicial readings of remedial statutes: "Environmentalists," Rosenberg concludes, "made only modest gains through the courts . . ." ¹² Even on reapportionment, cited by John Hart Ely as the one area where court decisions once implemented can never be overturned,¹³ Rosenberg is unconvinced: "Reapportionment . . . did not always, or even often, achieve the goals the reformers desired" (p. 301).

On today's hottest of hot-button issues, abortion, Rosenberg runs into some difficulty. He concedes that the courts have had some effect, for the number of abortions has increased since *Roe v. Wade*¹⁴ was decided in 1973 (pp. 178-80). But they increased in the years before *Roe* as well, and public opinion on abortion, he tells us, has changed

11. P. 52. Rosenberg carries the same analysis through other areas in which legislative action followed court action by many years, including voting (pp. 57-63), housing (pp. 67-70), and public accommodations (pp. 65-67).

12. P. 278. William N. Eskridge has argued that congressional overrides of Supreme Court statutory interpretations are relatively rare not because the Court is powerful, but because the Justices are unlikely to interpret a statute in a way that is contrary to the preferences of the *current* (as against the *enacting*) Congress. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 378 (1991). If this is so, it implies a further limitation on the litigation strategy, for litigants will rarely obtain from the Court what they could not obtain in the political process.

13. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 121 (1980).

14. 410 U.S. 113 (1973).

little over the past twenty years (pp. 182-89). Moreover, important elements of the medical establishment have always opposed abortion, or supported it only weakly. In fact, Rosenberg tells us, in the years since *Roe*, "abortion services have remained centered in metropolitan areas and in those states which reformed their abortion laws and regulations prior to the Court's decisions" (p. 195). The key change in abortion practice has come in the marketing of health care services — for what *Roe* really created was legal space for a new provider, the abortion clinic (pp. 195-99). For the rest of the medical world, business has continued much as before, suggesting that, were *Roe v. Wade* to be overturned and many states subsequently to outlaw abortion, the principal market event would be the disappearance of the clinics. This would seem to be a genuine change wrought directly by judicial edict, and thus a challenge to his theory, but Rosenberg's conclusion remains the same: "[T]he Court is far less responsible for the changes that occurred than most people think" (p. 201).

Rosenberg goes beyond the assertion that litigation strategies rarely if ever produce significant change. He argues, correctly, that they are often counterproductive, for they can distort perceptions about where resources are needed (pp. 339-42). In the particular case of abortion, Rosenberg notes that "reliance on the Court seriously weakened the political efficacy of pro-choice forces. After the 1973 decisions, many pro-choice activists simply assumed they had won and stopped their pro-choice activity. . . . The political organization and momentum that had changed laws nationwide dissipated in celebration of the Court victory" (p. 339). The result, of course, was that pro-choice forces abandoned the political arena to pro-life forces — and then professed surprise when pro-life forces won important electoral victories. The current broad public support for at least some abortion rights has arisen largely because of the more recent decision of pro-choice forces to return to the grass roots — the place, Rosenberg tells us, where real social changes take place (p. 341).

There, in fine, is Rosenberg's thesis: the courts can work some changes in the society, but far fewer than most people seem to think. People, not the courts, make social movements. It is not the Supreme Court that integrated schools, he insists, but a Congress that enacted legislation to take away federal funds from schools that would not change. It is not the Supreme Court that created broad abortion rights, but a coalition of activists working at the grass roots level all across America. As for criminal justice, the court decisions that are so politically controversial are widely disregarded and have barely registered any effect at all in data about crime and punishment — presumably because, unlike desegregation and abortion, the issue lacks a powerful constituency.

In a sense, this thesis should have lost the capacity to surprise, for

constitutional theorists should have understood since Bickel that courts operate under a variety of constraints that make them relatively inefficient engines of social change. But a misreading of the relationship of the Supreme Court to the civil rights movement has combined with the typical elite impatience with ordinary politics to lead an entire generation of scholars into a dubious effort to explain how a wide variety of rights are already in the Constitution — as though, should the courts agree, the social changes that the scholars seek would, like magic, come to pass. If, as Rosenberg insists, courts cannot bring about major social changes, then the great bulk of contemporary constitutional theory, which assumes otherwise, is a waste.

Although it occasionally drowns the reader in a sea of statistics, *The Hollow Hope* is engagingly written and thoughtfully reasoned. Still, Rosenberg must overstate his thesis somewhat to make his point, which is a shame, because the world would be far better were matters as he describes them. Abortion, he ought to concede, is simply not a good case for his theory — but then, it is not a good case for most constitutional theories. As for *Brown*, Rosenberg gets so caught up in the arcana of the measurable (e.g., what was the rate of change in contributions to the NAACP?) that he gives short shrift to the decision's vital importance as a confidence-building device for those who were fighting for reform.

To be sure, Rosenberg does not claim that court decisions are meaningless, and he readily concedes that they possess a certain symbolic significance. Even if Rosenberg sometimes carries his thesis too far, it is refreshing to find someone at last looking at the data rather than resting on the usual assertions of vast judicial power. For decades now, conservative critics of the Supreme Court have charged that the Justices are usurping the political functions of the people's elected representatives, and social reformers have complained bitterly that the Court is no longer a reliable ally. If Rosenberg is right, however, there is less to worry about than critics on either side have assumed, for the courts make little policy, or, rather, the policy they make makes little difference. Even if the courts actively try to make policy — as Rosenberg concedes they do, and often — they do not succeed.

Or, more properly, if they do succeed, they succeed because of the interplay of forces larger than themselves. A court might join itself to a social movement, as the Warren Court did in *Brown v. Board of Education* and as some would argue the Burger Court did in *Roe v. Wade* and its progeny (although others would say that it is the Rehnquist Court that joined forces with a social movement in *Webster v. Reproductive Services*¹⁵ and its progeny). But Rosenberg's data confirm what Bickel and others taught long ago: the actions of the polit-

15. 492 U.S. 490 (1989).

ical branches of government ultimately determine whether society changes or not. The courts, acting alone, change almost nothing.

It must not be forgotten, however, that the courts can do a great deal to *stymie* change — a point that Rosenberg mentions (pp. 15-16) but does not emphasize. During the thirty-two years of what is known today as the *Lochner* era, the Supreme Court struck down one piece of economic regulatory legislation after another, hindering the Progressive movement, and, for several years, the New Deal. In the long run, the proponent of the Constrained Court thesis might respond, the popular will prevailed, and the Justices finally sustained broad government powers to intervene in the economy. But, in Keynes' famous phrase (imported into the constitutional dialogue by Robert Bork), in the long run we will all be dead.¹⁶ In the short run, contra Rosenberg, courts *do* matter, and they matter a lot, even if they are far more powerful as brakes than as engines.

Nowadays, government power is generally conceded to be plenary in the absence of a specific claim of right. Where government regulation is most popular, mainly in the realm of the economy, there are few surviving rights to be interposed, and, thus, few opportunities for the Justices to slow things down.¹⁷ So commentators who decry the fact that the Justices are no longer reliable allies are thinking mostly of the cases in which the Court is asked to serve as engine — for example, *Bowers v. Hardwick*¹⁸ — but refuses to do so.

Elsewhere, I have argued that the result in *Bowers* is not defensible as long as *Griswold v. Connecticut*¹⁹ is good law.²⁰ And yet, if Rosenberg is right, the judicial choice to surrender its role as engine of social reform should not bring about the loud cries of doom that it does. There is no logically necessary relationship between the courts and social reform. Those who seek to change the world should seek what allies they can find; they should not be seduced by what is rapidly becoming ancient history into thinking that the Court is the most important branch to capture.

For a brief moment of the nation's history, bounded roughly by *Brown* and *Roe*, the Supreme Court was a reliable ally of those who style themselves progressive. This period, which did not even last two decades, has changed the way America thinks about its courts, and, in consequence, has changed the way that those who want to change America think about its courts, too. But for most of the nation's his-

16. Robert H. Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383, 390 (1985).

17. First Amendment rights are notable exceptions, for regulation of speech seems as popular as ever, all across the political spectrum.

18. 478 U.S. 186 (1986).

19. 381 U.S. 479 (1965).

20. See Stephen L. Carter, *The Inaugural Development Fund Lectures: Scientific Liberalism, Scientific Law*, 69 OR. L. REV. 471, 483-84 (1990).

tory, the Justices have been indifferent to social change or have worked to prevent it. Any other mindset would be surprising. Courts, like the law they interpret, are backward-looking, which renders judges essentially conservative creatures. In other words, it is *Brown*, for all its shining glory, that was the historical accident; the more recent jurisprudence, dismal though it often is, represents business as usual.

For nearly all of the nation's history, those who wanted to change America have stubbornly avoided the courts. True, reformers caught a break when Charles Hamilton Houston and William Hastie, two of the canniest legal minds of this century, devised an antisegregation strategy that paid fealty to the law's own conservatism by appealing to values that judges were scarcely able to deny, and Thurgood Marshall, among the greatest of oral advocates, led the legal team that was able to make it persuasive. But not every cause, even every good one, can craft an argument that so sounds in established legal principle. Sometimes, the principles the courts would need to embrace to give judgment are simply too outlandish, too unconnected to anything resembling "law." Recent efforts to avoid this truth by treating law as mere arbitrary power and bounds on judicial discretion as illusory often read less like serious analysis than like sour grapes.

It may be just as well if the Supreme Court turns out to matter less than was once thought. We live in an era in which it is thought peculiar when potential Justices correctly insist that judicial independence forbids discussing with the Senate Judiciary Committee their views on issues likely to come before the Court — even though the only nominee ever to hold such discussions in any detail, Robert Bork, was defeated. That the Senators inquire is hardly surprising, since the last two Presidents have been so candid in their ideological crusades to staff the federal courts with judges who will vote as their Administration prefers. But partisan battles over which way judges should promise to vote have little to do with principle and nothing to do with law. Liberalism once stood for an ideal of judging as an activity beyond ordinary politics. Nowadays, however, it too often stands for electing legislators in the guise of selecting judges.

We live in an era, moreover, when serious charges of sexual harassment against a Supreme Court nominee are treated as just another occasion for partisanship — and, in particular, as a chance for conservatives to prove their ideological bona fides by doing their best to trash the accuser rather than making even a colorable effort to investigate the actual charges. Once upon a time, conservatism stood for a certain decorum in public officials and certain standards of conduct in public and private life. Nowadays, however, it too often stands only for winning, at whatever cost to truth might be necessary — and, in

this case, the name of the game is getting the courts staffed with people who will vote the right way.

In our political world, it seems, left and right share a faith that judges should rule on cases before hearing them — indeed, before taking the bench. In so crazy a world, it is probably not a good thing if those judges actually have the power to do very much. Which is why everyone who takes law seriously should be praying that Rosenberg is right.