

Book Reviews

Public Law Litigation and Social Reform

The Hollow Hope: Can Courts Bring About Social Change? By Gerald N. Rosenberg.* *Chicago: University of Chicago Press, 1991. Pp. xii, 425. \$29.95 (cloth), \$16.95 (paper).*

Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice. By Gerald P. López.** *Boulder, CO: Westview Press, 1992. Pp. 433. \$48.50 (cloth), \$16.95 (paper).*

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I. INTRODUCTION

Perhaps the central issue raised by the contemporary public law system is the nature of the relationship between law, courts, and lawyering, on the one hand, and politics and policymaking, on the other. The results of the 1992 election render this concern even more salient.¹ One cannot rule out the kind

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1. For the first time since 1933, the same party controls the Presidency and both houses of Congress after a long period (twelve years in both cases) during which the other party had the opportunity to appoint much of the federal judiciary. Indeed the expansion of, and turnover within, the judiciary during the Reagan-Bush years meant that, between them, the two Presidents appointed nearly 600 judges (the total number of federal judgeships is 828). On the other hand, the accumulation of an unusually large backlog of judicial vacancies, coupled with a continuing high turnover rate, is expected to give President Clinton the opportunity to name many more judges to the federal bench during his first term than President Bush

of fierce interbranch conflicts over constitutional and statutory interpretation that occurred after the elections of 1800 and 1932, although for a variety of reasons they seem unlikely. The academic legal commentary concerning the connection between law, politics, and policy is remarkable in one respect: almost all of it is *normative* in character, consisting of arguments that proceed from one or another conception of justice (often asserted rather than defended). These arguments purport to imply or justify some ideal role for lawyers, law, and courts in the construction of social policy. *Rebellious Lawyering*² is a book very much in this tradition, advancing strong claims about how lawyers and clients should relate to one another and to the local cultures and institutions that hold power over them.

Most of the academic legal commentary, however, is preoccupied, even obsessed, with the role of *courts* in legal reform. This line of inquiry invites an obvious follow-up question: to what extent do these normative theories accurately reflect what courts do, and how courts affect social reality? Regrettably, legal scholars seldom ask (much less answer) this question, a fact that should dismay all of us who believe that empirical reality must inform the normative theories that we embrace and teach our students.³ Fortunately, scholars in other disciplines have attempted to fill the enormous void which we, for reasons that are not altogether clear,⁴ have created and then tolerated. Virtually all of the work in this area has been by political scientists.⁵

The Hollow Hope,⁶ by lawyer and political scientist Gerald Rosenberg, represents the most recent contribution to this small but exceedingly stimulating and valuable literature. Rosenberg contrasts his book with previous studies of reform litigation which, he says, have "not squarely centered on whether, and under what conditions, courts produce significant social reform."⁷ This claim exhibits the common scholarly conceit of uniqueness, but

did, and almost as many as President Reagan did in his two terms. Stephen Labaton, *Clinton Expected to Change Makeup of Federal Courts*, N.Y. TIMES, March 8, 1993, at A1; Henry J. Reske, *Molding the Courts*, A.B.A. J., Jan. 1993, at 20.

2. GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992) [hereinafter referred to as LÓPEZ].

3. There are, however, exceptions. See, e.g., JERRY L. MASHAW & DAVID HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990).

4. See generally Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323 (1989).

5. A number of these political scientists are, however, legally trained or teach in law schools. For example, Martin Shapiro teaches at Berkeley's law school, Boalt Hall, though he has no law degree; Donald Horowitz holds a joint appointment at Duke; Gerald Rosenberg received a law degree from Michigan and a Ph.D. in political science from Yale, and teaches both political science and law at the University of Chicago.

6. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) [hereinafter referred to as ROSENBERG].

7. ROSENBERG at 9. Rosenberg cites, but dismisses, the study by Michael A. Rebell and Arthur R. Block, *EDUCATIONAL POLICY MAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM* (1982), because it is concerned with "admittedly non-controversial areas," ROSENBERG at 10, an odd way to characterize disputes over urban school policies. See also *id.* at 29.

in this case it is, quite simply, false. It ignores, for example, two relatively recent, well-known, book-length studies published by the Brookings Institution on the effectiveness of court-driven reform—books that Rosenberg cites elsewhere in his study.⁸ It also ignores a sizable political science literature on the inherent difficulties of policy implementation. This implementation literature applies, *mutatis mutandis*, to court-initiated policies as well as to legislative or administrative ones, and already makes all of Rosenberg's theoretical points.⁹ Rosenberg's omissions are highly regrettable as a scholarly matter, and they merit criticism.¹⁰ Nonetheless, *The Hollow Hope* is an

8. The first Brookings book was Donald L. Horowitz's detailed, theoretically informed empirical case studies of reform litigation, *THE COURTS AND SOCIAL POLICY* (1977). Indeed, three of Horowitz's case studies involve courts' effects on school desegregation, criminal procedure, and juvenile justice, *id.* at 106-70, 220-54, 171-219—areas that Rosenberg examines in *The Hollow Hope*. (Ironically, Horowitz's book was itself criticized for having failed to cite earlier social science studies on the subject. See Stephen L. Wasby, Book Review, 31 *VAND. L. REV.* 727, 733, 740 (1978)).

The second Brookings book was R. Shep Melnick's equally detailed study of environmental regulation, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT* (1983) [hereinafter MELNICK, REGULATION]. A new book by Melnick, *THE POLITICS OF STATUTORY RIGHTS: THE COURTS AND CONGRESS IN THE AMERICAN WELFARE STATE* (forthcoming) (manuscript on file with author) [hereinafter MELNICK, STATUTORY RIGHTS], was unavailable (except, perhaps, in manuscript) when Rosenberg's book went to press. Rosenberg may believe that these books do not meet his criteria. If so, he does not explain why. Perhaps it is because they are case studies rather than systematic, rigorous, empirical analyses; given the limitations of their methodologies, they cannot really isolate the precise contributions of the courts in those cases.

An earlier classic in the field that takes a view roughly similar to Rosenberg's—ROBERT MCCLOSKEY, *THE AMERICAN SUPREME COURT* (1960)—is never specifically cited, although it is included in the general bibliography. In addition, Rosenberg neither cites nor includes in his bibliography a number of other studies of the implementation of particular Supreme Court decisions. For example he omits the literature on school prayer, see *School Dist. v. Schempp*, 374 U.S. 203 (1963), which includes KENNETH M. DOLBEARE & PHILLIP E. HAMMOND, *THE SCHOOL PRAYER DECISIONS: FROM COURT POLICY TO LOCAL PRACTICE* (1971); WILLIAM K. MUIR, JR., *PRAYER IN THE PUBLIC SCHOOLS: LAW AND ATTITUDE CHANGE* (1967).

9. See, e.g., EUGENE BARDACH, *THE IMPLEMENTATION GAME* (1977); JEFFREY L. PRESSMAN & AARON WILDAVSKY, *IMPLEMENTATION* (1973); Richard Elmore, *Organizational Models of Social Program Implementation*, 26 *PUB. POL'Y* 185 (1978); Joel F. Handler, *Controlling Official Behavior in Welfare Administration*, in *THE LAW OF THE POOR* 155 (Jacobus tenBroek ed., 1966); Peter H. Schuck, *Regulation: Asking the Right Questions*, *NAT'L J.*, Apr. 28, 1979, at 711; *Symposium on Successful Policy Implementation*, 8 *POL'Y STUD. J.* 531 (1980); Donald S. Van Meter & Carl E. Van Horn, *The Policy Implementation Process: A Conceptual Framework*, 6 *ADMIN. & SOC'Y* 445 (1975); Richard Weatherly & Michael Lipsky, *Street-Level Bureaucrats and Institutional Innovation: Implementing Special-Education Reform*, 47 *HARV. EDUC. REV.* 171 (1977).

10. Thus, I am puzzled by Professor Powe's apparent effort, in his review of Rosenberg's book, to excuse this failing. Powe observes that fundamentally "Rosenberg's theory is not an implementation theory" and that "the earlier implementation studies are not well known." L.A. Powe, Jr., *The Supreme Court, Social Change, and Legal Scholarship*, 44 *STAN. L. REV.* 1615, 1631 (1992) (reviewing LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* (1991) and *The Hollow Hope*). Whatever Rosenberg's theory purports to be, it is plainly a theory about the conditions under which courts seeking to initiate or reinforce social change can "effectively" do so—that is, can *implement* such change, alone or in combination with other forces. And even if Powe's assertion that implementation studies are not well known is true of the general public, this ignorance is either false or irrelevant insofar as social scientists and legal scholars choosing to write in the field are concerned. In either event, it is their duty to know about and, where germane to their arguments, to discuss such studies. In this spirit, Powe observes at the end of his review that lawyers should read more social science; indeed, he criticizes a law professor (whose book was also under review) for having failed to do so. *Id.* at 1641. This criticism must be all the more damning when applied to another social scientist.

important addition to the field, one that all public lawyers and political scientists will read with great profit.

II. REBELLIOUS LAWYERING

Rebellious Lawyering, by law professor and legal activist Gerald López, addresses a quite different question than that examined by *The Hollow Hope*: how should a “progressive” or “public interest” lawyer¹¹ conduct herself both personally and professionally¹² in order to advance the cause of social change? Although this question about modes of lawyering is of direct interest to a much smaller group than that addressed by Rosenberg, the two books are related in at least three important respects. First, López’s principal audience consists of a set of actors who initiate much of the “public law litigation”¹³ that is Rosenberg’s subject. Second, and more interestingly, López seems to share much of Rosenberg’s skepticism about the capacity of such litigation to bring about enduring social change.¹⁴

A third, and more damning, commonality is this: although the notion of “social change” lies at the heart of both books—for Rosenberg it is the dependent variable being analyzed, while for López it is the goal of progressive lawyering—neither book has much to say about its substantive or programmatic content, and neither offers a theory of what causes social change. Rosenberg defines it as “policy change with a nationwide impact” affecting “large groups of people.”¹⁵ It is, he says, *liberal* change.¹⁶ Although he does not detail what this means, he implies that it has a decidedly egalitarian, and presumably statist, character.¹⁷ He explicitly renounces any

11. These labels are used interchangeably throughout the book. They are, of course, somewhat tendentious and self-serving, which is why I put them in quotes. But they are no more so than other labels used by political groups on both the right and the left—for example, “pro-life,” “pro-choice,” and “libertarian”—which seek to show membership on the side of the angels.

12. López seems to be making the claim that, for these lawyers at least, the two spheres should be integrated—that their personal values and their professional behavior must be consistent. This is interesting but not obviously correct. One argument that might be made against it, for example, is that a lawyer must maintain a certain distance between herself and her client if she is to furnish the sound, professional judgment to which the client is entitled.

13. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1231 (1976).

14. I say “seems to” because López offers no systematic explanation of what actually constitutes the “social change” to which progressive lawyers should bend their efforts. See *infra* text immediately following this note.

15. ROSENBERG at 4.

16. *Id.* at xi. This is presumably because the Court decisions that he discusses, all in the pre-Reagan years, have generally been characterized as “liberal.” He gives no hint as to how his account of judicial effectiveness would have to be altered if more “conservative” changes of the sort sought by the Rehnquist Court were the objects of analysis. This omission is unfortunate.

17. He defines social change as “the broadening and equalizing of the possession and enjoyment of what are commonly perceived as basic goods in American society.” *Id.* at 4. Drawing on John Rawls’ expansive conception, he speaks of “political goods such as participation in the political process and freedom of speech and association; legal goods such as equal and non-discriminatory treatment of all people; material goods; and self-respect, the opportunity for every individual to lead a satisfying and worthy

intention to supply a “full blown” theory of what brings social change about, although he does attempt to “assess a host of social, political, and economic changes that could plausibly have led to significant social reform independent of court action.”¹⁸

López is even more Delphic about what constitutes and causes social change. Since his book seeks to instruct lawyers about how to help their clients and communities produce it, this is an astonishing omission.¹⁹ The reader is simply left to infer from several clues what progressive change is, and how it comes about: the facts López uses in his fictional case studies,²⁰ the groups that he wants progressive lawyers to work with and represent,²¹ and the evocative terms that he uses as synonyms for injustice.²²

López’s vivid elaboration of his ideas about progressive legal practice—his “rebellious idea of lawyering against subordination”²³—constitutes a bold, potentially far-reaching challenge to what he considers the standard practice mode of legal services lawyers, which he calls “the regnant idea of the lawyer for the subordinated.”²⁴ His preferred model, which he characterizes as “teaching self-help and lay lawyering,”²⁵ contrasts even more sharply with the brand of “public interest law” practiced by organizations such as the Public Citizen Litigation Group, the NAACP Legal Defense and Educational Fund, the Center for Law in the Public Interest, and the Washington Legal Foundation. These organizations, about which López says little, typically are highly professionalized large-city groups strongly oriented toward (and often partly funded by) major impact litigation, which is conducted by lawyers trained at elite law schools who enjoy high status and visibility. Such groups tend to have only the most formalistic relationships with their clients, organizational or individual, and engage in little or no community organizing;

life.” *Id.* (citing JOHN RAWLS, A THEORY OF JUSTICE 42, 440 (1971)).

18. *Id.* at 8.

19. Although López insists (through the mouth of a fictional community organizer) that one must have a vision of the “good life” that includes “a view of the state,” he fails to offer even a hint of what such a view would look like. LÓPEZ at 377. A page later, the organizer says that one must also be “programmatic.” *Id.* at 378. Again, however, López never mentions, much less defends, any specific agenda.

20. López states at the outset: “Everything I describe is fictional.” *Id.* at 8. His fictional case studies include legalization efforts on behalf of undocumented aliens, landlord-tenant disputes, the operation of a community law office, disability claims, racial discrimination, and community organizing around a variety of issues. He also refers to the practitioners he describes as “poverty lawyers.” *Id.* at 20.

21. These groups include “women, low-income people, people of color, gays and lesbians, the disabled, and the elderly.” *Id.* at 37.

22. The most prominent example is “subordination,” which he uses to refer generally to a sense of powerlessness but which otherwise remains essentially undefined. *See id.* at 11-82 (ch. 1), *passim*. He also writes of “efforts to fundamentally change the world,” *id.* at 10, without indicating what this means or entails.

23. *Id.* at 37.

24. *Id.* at 11. López lists twelve characteristics of the “regnant idea” of such lawyering, including formal representation of clients, an emphasis on litigation, and situating the lawyer as primary problem-solver. *Id.* at 23-24.

25. *Id.* at 70.

they are concerned with client empowerment in only a narrow, legal rights-oriented sense.²⁶

The role of these other modes of legal activism in López's world of progressive lawyering remains unclear. Is there room there for the "regnant" and litigation-oriented forms of lawyering? Or are these instead merely degenerate forms which, even when they appear to succeed, further disempower people—both by placing professionals between them and the levers of enduring change, and by fostering the illusion that legal rights are the raw materials of self-actualization? To what extent are these other forms inevitable concessions to limited reformist resources and economies of scale, to the increasing importance of technical and professional know-how in influencing public and private decisionmakers, and to other such realities?

These questions raise some poignant ethical and tactical dilemmas, and López exhibits a good deal of sensitivity to some of these issues as they arise in his imaginary practice settings.²⁷ But he does not thoroughly canvass or articulate the competing considerations, and his normative assessments rest essentially on plausible but largely unexamined intuitions about human nature and social dynamics, intuitions that he imparts through the storytelling genre now in vogue among some legal scholars.²⁸ He prefers to argue from *ipse dixit* and personal reflection than from extended, disciplined analysis or available empirical evidence.²⁹

The remainder of this Book Review is mostly about *The Hollow Hope*. My reason for confining my discussion in this way, however, is certainly not that *Rebellious Lawyering* is devoid of interest. In fact, it is an engagingly written, insightful, often moving argument in favor of a distinctive conception of professional responsibility by progressive lawyers: more humane, engaged, client-centered, self-abnegating, unheroic, and situational. *All* lawyers,

26. For descriptions of such groups, see ANDREW S. MCFARLAND, *COMMON CAUSE: LOBBYING IN THE PUBLIC INTEREST* (1984); ANDREW S. MCFARLAND, *PUBLIC INTEREST LOBBIES: DECISIONMAKING ON ENERGY* (1976); Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 *STAN. L. REV.* 207 (1976); Peter H. Schuck, *The Nader Chronicles*, 50 *TEXAS L. REV.* 1455 (1972) (reviewing ROBERT F. BUCKHORN, *NADER: THE PEOPLE'S LAWYER* (1972) and CHARLES MCCARRY, *CITIZEN NADER* (1972)).

27. See, e.g., LÓPEZ at 14, 18.

28. This genre is especially popular among law professors interested in critical race theory, feminism, literary theory, and related modes of legal theory. See, e.g., Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 *MICH. L. REV.* 2411 (1989). For a recent critique of the storytelling genre, see Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narrative*, 45 *STAN. L. REV.* 807 (1993). López defends the narrative approach, LÓPEZ at 39-44, and uses it throughout.

29. Notably absent from his discussion, for example, is any explicit reference to the extensive empirical law-and-society literature on lawyer-client interactions. He does, however, list several such studies in an unannotated bibliography at the end of the book, including, e.g., DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974); Austin Sarat, '... *The Law Is All Over*': *Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 *YALE J.L. & HUMAN.* 343 (1990); Austin Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 *YALE L.J.* 1663 (1989); Austin Sarat & William L.F. Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 *LAW & SOC'Y REV.* 93 (1986).

progressive or not, should take up this challenge, for it invites us to “disenthrall ourselves,” to “think anew”³⁰ about how and why we live in the law as we do.

III. THE HOLLOW HOPE

Methodologically, *The Hollow Hope* could hardly be more different from *Rebellious Lawyering*. In sharp contrast to López’s highly confessional, normative, sometimes epistolary mode,³¹ Rosenberg draws heavily on the kinds of data and analytical techniques that social scientists conventionally use.³² His principal claims are empirical; he purports to be concerned only with the *fact* of judicial effectiveness in producing social change, not with normative judgments about what constitutes desirable change or what the courts’ posture toward change ought to be.³³ Commendably, he lays out these claims for all to see, appraise, and criticize. Such an appraisal is my project in the remainder of this Book Review.

Generally speaking, we may distinguish three kinds of scholarly views³⁴ concerning the effectiveness of court-driven approaches in producing significant social reform.³⁵ Those I shall call “strong-court” scholars believe that the courts are often effective reformers by reason of their unique institutional features, especially their relative independence from electoral and bureaucratic politics. “Court skeptics” hold that court-directed reform, although not inevitably doomed to failure, is highly problematic. They argue that the most significant effects of such efforts are likely to be unanticipated and often perverse. “Court fatalists” maintain that the effectiveness of social reform depends on factors that courts can perhaps reinforce, but to which they are otherwise either irrelevant or epiphenomenal.³⁶

These three views do not correspond to the conventional, often reductionist, polarities of left and right. Most strong-court scholars are liberal; they emphasize the courts’ superior ability to articulate and instantiate public

30. ABRAHAM LINCOLN, [Second] *Annual Message to Congress* (December 1, 1862) reprinted in 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 518, 537 (Roy P. Basler ed., 1953).

31. López makes many of his points through the literary device of fictional memoranda from lawyers, legal investigators, etc. See, e.g., LÓPEZ at 145.

32. But while conventional, these techniques are also quite rudimentary by the standards of quantitative social science. Rosenberg’s tables and figures, for example, use simple comparisons of absolute numbers rather than more complex statistics, regressions, or other forms of multivariate analysis.

33. ROSENBERG at xi. Of course, how one defines and measures effectiveness is not simply a matter of objective fact but inescapably involves some value judgments.

34. These are more akin to perspectives than to articulated, systematic theories.

35. Rosenberg uses the phrase “significant social reform” to apply to nationwide changes in bureaucratic or institutional practices. ROSENBERG at 4. One could quarrel with this definition, but it will serve for purposes of the present discussion. See also *supra* text accompanying notes 15-18.

36. One can be both a skeptic and a fatalist. My colleague Jerry Mashaw places himself in this camp, finding judicial intervention under some circumstances to combine “[i]mpertinence and irrelevance” to social reality. JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY CLAIMS 4 (1983).

values in the face of what they regard as political and bureaucratic abdications. But some—Robert Bork, for example—are militantly conservative. Like the liberals, conservative strong-court scholars believe that court-initiated change is often effective. For precisely that reason, however, they denounce such change, arguing that it is institutionally illegitimate, constitutes lamentable public policy, or both.

The first two views are already well-represented in the literature. Strong-court scholars include commentators like Bork, Owen Fiss, Abram Chayes, and Michael Rebell and Arthur Block.³⁷ Skeptics are even more numerous; examples include Donald Horowitz, Jeremy Rabkin, Colin Diver, Shep Melnick, Robert Katzmann, and myself.³⁸ Fatalists, however, are a rarer breed, at least in recent years³⁹ as popular and professional ambitions for the judicial enterprise, nurtured by the Warren Court during the 1960's and state court expansions of liability law in the 1970's and early 1980's, have grown. Although *The Hollow Hope* sometimes approaches mainstream skepticism, its general thrust is emphatically fatalistic. Thus, Rosenberg in his concluding chapter states that "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."⁴⁰ With the publication of *The Hollow Hope*, Rosenberg becomes the leading contemporary exponent of court fatalism.

Rosenberg sets forth his version of fatalism by contrasting what he calls the "Dynamic Court" view (roughly corresponding to what I have called the strong-court view)⁴¹ with a "Constrained Court" view, in which the courts are "weak, ineffective, and powerless."⁴² It is hard, however, to think of a single scholar today who adheres to the constrained court view as Rosenberg defines it, nor does he cite any. His organizing scheme, moreover, does absolutely no analytical work for him; indeed, he quickly suggests that both views are partly

37. See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); REBELL & BLOCK, *supra* note 7; Chayes, *supra* note 13; Owen M. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

38. See generally HOROWITZ, *supra* note 8; ROBERT A. KATZMANN, *INSTITUTIONAL DISABILITY: THE SAGA OF TRANSPORTATION POLICY FOR THE DISABLED* (1986); MELNICK, *REGULATION*, *supra* note 8; MELNICK, *STATUTORY RIGHTS*, *supra* note 8; JEREMY A. RABKIN, *JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY* (1989); PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 147-81 (1983) [hereinafter SCHUCK, *SUING GOVERNMENT*]; Colin S. Diver, *The Judge As Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979); Peter H. Schuck, *The New Judicial Ideology of Tort Law*, in *NEW DIRECTIONS IN LIABILITY LAW* (Walter Olson ed., 1988).

39. Perhaps the greatest fatalist, though certainly an unconventional one, was Justice Holmes. See Yosal Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213 (1964). I thank Owen Fiss for suggesting the Holmes example.

40. ROSENBERG at 338.

41. In Rosenberg's words, the Dynamic Court view "sees courts as powerful, vigorous, and potent proponents of change." *Id.* at 2.

42. *Id.* at 3. Rosenberg intends to confine the contrast to the reform litigation context. "[T]here is no clash between the two views in dealing with individuals." *Id.* at 5. Although he does not discuss the fact that reform cases are often concerned with, and initiated by, individuals, he surely recognizes it.

correct and must therefore be combined to produce a refined understanding of the courts' role. The dichotomy thus turns out to be little more than a temporary placeholder for Rosenberg's own theory, which borrows from each of its halves.⁴³

Merging his "Dynamic" and "Constrained" court views, Rosenberg produces a theory of the conditions under which courts produce significant social reform. The effectiveness of courts, he postulates, is limited by three structural constraints: (1) the limited nature of constitutional rights, (2) the low level of judicial independence; and (3) the judicial lack of implementation power. Each of these three constraints can be overcome, however, when three corresponding conditions are met: (1) "ample legal precedent for change"; (2) "support for change from substantial numbers" of congressional and executive officials; and (3) "support from some citizens, or at least low levels of opposition from all citizens" plus at least one of four other conditions: (a) positive incentives for compliance; (b) costs for noncompliance; (c) court decisions allowing market implementation; or (d) the presence of crucial implementation officials who "are willing to act and see court orders as a tool for leveraging additional resources or for hiding behind."⁴⁴

Several problematic features of this theory should be noted at the outset, for they will recur in the discussion that follows. First, it is radically indeterminate. Virtually every one of the theory's key concepts—court, judicial decision, judicial effectiveness, social change, political support and opposition, incentives for compliance, market implementation, and official willingness to act—is deeply ambiguous and question-begging for Rosenberg's theoretical purposes, which are to explain and predict the consequences of Supreme Court decisions.⁴⁵ He disclaims any intention to explicate what is his most indeterminate yet theoretically fundamental concept of all—causality. In sum, Rosenberg cannot escape the inherently complex nature of his subject.⁴⁶

Second, Rosenberg neglects certain dynamic effects unleashed by many Court decisions. In particular, he neglects the repetitive, dialogic nature of the

43. Lest the reader think that I am blind to the shortcomings of my own "trichotomy" (strong-court scholarship, court skepticism, and court fatalism), let me hasten to add that I use it only for the most limited purpose—simply to distinguish at the outset Rosenberg's approach from other scholarly approaches that might otherwise be confused with it.

44. ROSENBERG at 35-36.

45. To cite one striking example, it is not at all clear to which "courts" his theory relates. His two main case studies (school desegregation and abortion) focus on Supreme Court decisions; yet some of his other examples, such as environmental litigation, deal with lower court cases. This is not a trivial ambiguity for, as he himself notes, the Supreme Court enjoys only limited control over the lower courts. Indeed, his own account of the lower courts' early sluggish response to *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*), 349 U.S. 294 (1955) (*Brown II*), dramatically underscores the need for clarification on this point. See ROSENBERG at 42-71. Other examples of fundamental conceptual ambiguity are mentioned throughout this Review.

46. Rosenberg, however, seems to feel that he has avoided this flaw; in this connection, he notes that Stephen Wasby's 1970 book on the impact of Supreme Court decisions "suggested so many hypotheses (one hundred and thirty-five of them) as to be of little practical help." ROSENBERG at 10 (citing STEPHEN L. WASBY, *THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES* (1970)).

interactions between courts, legislatures, agencies, and other social processes, as well as the political synergy that some litigation engenders.

Third, Rosenberg's measure of court effectiveness appears to give excessive weight to whether litigation advances the avowed agendas of public interest litigators and too little weight to more modest, but still significant, reform goals and to the substantive merits of the policies at stake in the litigation.

Finally, his theory makes no effort to differentiate between constitutional and statutory interpretation decisions. Even if the kinds of reformist court initiatives with which Rosenberg is concerned tend to take the former path, statutory construction remains another significant but quite different route for such efforts;⁴⁷ indeed, one of his case studies (environmental litigation) takes precisely this route.⁴⁸ Social reform through statutory interpretation has a distinctive dynamic that produces its own patterns of cause and consequence. To note only the most obvious difference, administrative agencies ordinarily play central roles in effectuating statutory regimes. Their relationships to courts, legislatures, and constituencies are pivotal in determining how judicial doctrines are both shaped and implemented.⁴⁹ Any theory of court effectiveness that conflates these two reform techniques, then, is bound to miss a great deal.⁵⁰

For all these reasons, Rosenberg's theory is unpersuasive. In themselves, however, these shortcomings do not necessarily render it valueless. After all, a good theory can crystallize important issues, facilitating subsequent resolution through further conceptual clarification or data-gathering. The real test of Rosenberg's approach, then, is whether it can further these processes of hypothesis-refining, prediction-generating, and prediction-testing in the specific contexts to which he seeks to apply it, and hopefully in other contexts

47. For example, in 1978 the Supreme Court reversed a line of circuit court cases holding that the procedures specified in Administrative Procedure Act § 553 provided merely a "floor" of procedural requirements. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978); see also Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345 (1979) (describing and praising Supreme Court's rejection of D.C. Circuit's reasoning). Antitrust law supplies other examples of judicially-initiated reform accomplished through statutory interpretation; for example, early in this century the Supreme Court abandoned per se rules against restraints of trade in favor of a rule of reason, shifting the focus of antitrust law from consumers to small businesses. For a discussion of the relevant cases, see ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 15-49 (1978). Anti-discrimination disability law is yet another field in which the judiciary has attempted reform by means of statutory interpretation. See, e.g., KATZMANN, *supra* note 38.

48. ROSENBERG at 271-92.

49. See MELNICK, *STATUTORY RIGHTS*, *supra* note 8. Indeed, Melnick expressly contrasts his findings with Rosenberg's argument. *Id.* (manuscript at 578 & 660 n.2).

50. Rosenberg does say that the political support necessary (but under his theory, not always sufficient) for judicial effectiveness may exist "when legislation supportive of significant social reform has been enacted and courts are asked to interpret it." ROSENBERG at 31. Although he does not make this point, his claim is supported by the frequency with which Congress overrules judicial interpretations of statutes. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991).

as well. As we shall see, his theory and analysis only partly satisfy this criterion, for they fail at many points. On the other hand, they have already succeeded in provoking much scholarly debate,⁵¹ and they provide a (loose) framework around which he can drape some very interesting, significant data that enrich our understanding of the phenomena he discusses. Most important, his work should stimulate more refined theories of judicial effectiveness. Nevertheless (as I suggest in the Conclusion), to expect such theories to do much predictive work is to indulge in a hope as hollow as that which Rosenberg is at such pains to debunk.

A. *Brown v. Board of Education*

Rosenberg's first and most obvious challenge is *Brown v. Board of Education*.⁵² This decision is usually viewed as the most famous instance of judicial activism—and more to the point, of *effective* judicial activism—in the modern history of the Supreme Court. *Brown* has long been celebrated by its supporters⁵³ and detractors⁵⁴ alike as the fountainhead of the civil rights movement and as a milestone of Equal Protection jurisprudence. If Rosenberg can demonstrate that *Brown* actually had little effect, and that the Court's impotence was a result of the constraints and the absence of the conditions identified by his theory, then he will have gone a very long way toward vindicating that theory.

Through a resourceful, imaginative, and pointed marshalling of evidence, Rosenberg succeeds in casting serious doubt on the conventional wisdom about *Brown*. In the end, however, the weaknesses of his theory prevent him from mounting a convincing refutation. After noting the familiar fact that there was little compliance with the decision for over a decade, he shows that when compliance finally did come in the areas of education, voting, transportation, public accommodations, and housing, the trigger was not *Brown* but civil rights legislation authorizing federal program agencies to cut off funding to noncomplying recipients. Anticipating the argument that *Brown* was

51. Reviews of *The Hollow Hope* include Stephen L. Carter, Book Review, 90 MICH. L. REV. 1216 (1992); Neal Devins, *Judicial Matters*, 80 CAL. L. REV. 1027 (1992); Stephen J. Kastenber, Book Review, 29 HARV. J. ON LEGIS. 589 (1992); David L. Kirp, Book Review, 254 NATION 757 (1992); L.A. Powe, Jr., *supra* note 10; Cass R. Sunstein, N.Y. REV. BOOKS, Oct. 22, 1992, at 47.

52. 347 U.S. 483 (1954) (*Brown I*), 349 U.S. 294 (1955) (*Brown II*).

53. *See, e.g.*, Annual Judicial Conference, Second Judicial Circuit of the United States, 130 FR.D. 161 168 (1989) (remarks of Justice Thurgood Marshall); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982); Fiss, *supra* note 37; Jack Greenberg, *Litigation for Social Change: Methods, Limits and Role in Democracy*, 29 REC. ASS'N B. CITY OF N.Y. 320, 337-54 (1974); HARVIE J. WILKINSON, III, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION, 1954-1978 (1979).

54. *See, e.g.*, JOHN AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY 154 (1984); LINO A. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS 18-37 (1976); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-35 (1959).

responsible for this legislation, he notes that its sponsors did not cite *Brown* as a source of inspiration, and that Congress had been considering a similar remedy since the 1940's.⁵⁵

Rosenberg's point is *not* that *Brown* was irrelevant to what followed or that the courts were always ineffective. He surely recognizes (although he does not say) that Title VI of the 1964 Civil Rights Act was legitimated, was rendered compelling policy, and probably passed constitutional muster⁵⁶ only because *Brown* had already established desegregated public education as a substantive right protected by the Equal Protection Clause. Nor does he deny that the courts did help to enforce school desegregation after 1968.⁵⁷ Rather, his point is that the Court's contribution to the civil rights revolution depended almost entirely on the efficacy of nonjudicial political forces and that *Brown* was largely irrelevant to their emergence. Like becalmed ships, the courts made little real headway until the mid-1960's when favorable winds generated by independent political forces became strong enough to carry them toward their destination. (A quarter-century later, they still are far from reaching it, especially in the area of higher education).⁵⁸

Rosenberg argues that it was the constraints identified by his theory that operated to stymie judicial implementation of *Brown* in its first decade. Political leaders at all levels opposed vigorous enforcement. Public opinion in the South was deeply recalcitrant. The court system's own structure assured judicial impotence. Only when those constraints began to dissolve and some of the conditions for compliance specified by his theory were met—for example, the creation of incentives and the willingness of local actors to use the courts to provide political cover for their compliance—was real progress

55. ROSENBERG at 42-71 (ch. 2). For a contrary claim on the inspiration point, see Devins, *supra* note 51, at 1041-42. Immediately after, Rosenberg states that "[o]nly after there was a major change in the congressional climate with the passage of the 1964 Civil Rights Act, did the Court re-enter the field." ROSENBERG at 74. This ignores several important Supreme Court decisions decided after *Brown* and before passage of the Act, including *Griffin v. County School Board*, 377 U.S. 218 (1964) (enjoining public schools from closing to avoid desegregation plan), *Goss v. Board of Education*, 373 U.S. 683 (1963) (disapproving desegregation plan that allowed any student to transfer out of desegregated school district), and *Cooper v. Aaron*, 358 U.S. 1 (1958) (rejecting district court suspension of Little Rock school board's plan to desegregate schools), all of which Rosenberg discusses in his second chapter.

56. Although much of the Act relied on Congress' power to regulate interstate commerce, see *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250 (1964) (upholding Title II, the public accommodations section, as a legitimate use of the commerce power), Title VI, which authorized the termination of federal funds to school districts that discriminated, was premised on the Fourteenth Amendment. See *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 856, 882 (5th Cir. 1966) (Wisdom, J.), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967). In addition, Title IV provided that the Department of Justice could itself sue to desegregate recalcitrant school districts. Thus, federal enforcement of the norm of desegregation was at least in part directly dependent on *Brown* and its progeny. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971); cf. U.S. COMM'N ON CIVIL RIGHTS, TITLE IV AND SCHOOL DESEGREGATION: A STUDY OF A NEGLECTED FEDERAL PROGRAM (Jan. 1973).

57. ROSENBERG at 52-54. Devins apparently misreads Rosenberg on this point. Devins, *supra* note 51, at 1043-46 (discussing judicial role in period following *Green v. County School Board*, 391 U.S. 430 (1968)).

58. *United States v. Fordice*, 112 S. Ct. 2727, 2734, 2746 (1992) (a recent extension of *Brown* to desegregation in higher education), documents the still-segregated status of Mississippi State Universities.

made. Only congressional and executive branch actions could dissolve these constraints and establish these conditions, but those actions could not be mounted until a decade after *Brown*.

In the meantime, the decision was essentially a dead letter. Rosenberg marshals evidence showing that during that initial decade, press coverage of civil rights—even in the media read by political elites and even in the black press—did not increase or change much; indeed, there was less coverage in those years than in some years of the 1940's. Textbooks continued to portray blacks with the same condescension and out-and-out racism as in the pre-*Brown* period. Elite attitudes appear to have been influenced little by the decision, and the general public remained ignorant of its existence and import.⁵⁹ Finding little evidence that *Brown* had much direct effect on civil rights enforcement during its first decade, Rosenberg flatly rejects the traditional view of *Brown* as social apocalypse that American legal scholars have propounded and propagated.⁶⁰

To his credit, however, Rosenberg does not stop there. He goes on to consider the strong-court scholars' obvious fallback position—their contention that *Brown's* effects were powerful, as advertised, but *indirect*; that subsequent events and additional factors mediated and obscured these indirect effects, rendering *Brown's* true significance inaccessible to Rosenberg's method of investigation. For the optimist, *Brown's* real contribution was to put civil rights on the liberal political agenda, force white politicians to respond, raise public consciousness of racial injustice, and inspire civil rights organizations and the black community to take to the streets and the voting booths, thereby producing the long-deferred political gains of the 1960's and 1970's. To exemplify this view, Rosenberg quotes C. Herman Pritchett's rhetorical question: "[I]f the Court had not taken the first giant step in 1954, does anyone think there would now be a Civil Rights Act of 1964?"⁶¹ Rosenberg's intriguing court fatalist's answer is "yes." He recognizes (as he must) that even if the strong-court scholars' indirect effects thesis were in fact false, the complex nature of an encompassing social upheaval like the civil rights revolution would make it hard to rebut and impossible to refute conclusively. Causal pathways for such phenomena are never singular and are seldom clearly marked.⁶² He deals with this problem in the only way an empiricist can,

59. ROSENBERG at 72-106 (ch. 3).

60. For quotations from sources presenting the traditional view, see ROSENBERG at 39-40.

61. *Id.* at 107 (quoting C. Herman Pritchett, *Equal Protection and the Urban Majority*, 58 AM. POL. SCI. REV. 869, 869 (1964)).

62. Or as Rosenberg puts this indeterminacy point: "Ideas seem to have feet of their own, and tracking their footsteps is an imperfect science. Thus, even if I find little or no evidence of extra-judicial influence, it is simply impossible to state with certainty that the Court did not produce significant social reform in civil rights." ROSENBERG at 108.

seeking to support his fatalistic theory factually by disproving its more optimistic alternatives.⁶³

Searching the record for the kind of tracks that even indirect causality would leave, Rosenberg compares the pre- and post-*Brown* eras across a stunningly broad array of political indices: legislative initiatives, congressional debates, presidential pronouncements, political party and other elite attitudes, citizen awareness of *Brown* (and other Court decisions), the volume, motivation, and rhetoric of civil rights demonstrations, relationships among (and funding of) civil rights organizations, and public opinion among both blacks and whites on civil rights issues generally and on *Brown* in particular.⁶⁴

On this evidence (and Rosenberg adduces a great deal of it), *Brown* did not "give [civil rights] salience, press political elites to act, prick the consciences of whites, legitimate the grievances of blacks, and fire blacks up to act."⁶⁵ Especially revealing in this regard is Rosenberg's discussion of the black community's response to *Brown*. He shows, for example, that the community's knowledge of *Brown* was probably not widespread; that many blacks had a lukewarm response to the decision; that protest actions, far from being sparked by *Brown*, had been more common in the 1940's than in some of the immediate post-*Brown* years; that *Brown* played a negligible role in inspiring the Montgomery bus boycott of 1956, the sit-in movement, or the leading black protest groups other than plaintiff's counsel (the NAACP Legal Defense and Educational Fund); that Martin Luther King, Jr. and other leaders outside the NAACP viewed *Brown*-type court actions as a formalist distraction from a mass protest strategy; and that partly for this reason there was serious conflict between the NAACP and the groups committed to mass protest.⁶⁶

Rather than constituting a watershed in American race relations, then, *Brown* as depicted by Rosenberg was simply one point along an upward trajectory of public sympathy toward civil rights that began in the 1930's and steepened in the wake of World War II. In his fatalist account, this public support achieved political takeoff only in the mid-1960's when nonjudicial factors coalesced to create auspicious conditions for significant legislation and more aggressive enforcement.⁶⁷ Although the immediate precipitant of this transformation was the public fear and revulsion aroused by Southern violence against black and white demonstrators, other more structural changes had laid the groundwork. Economic pressures against segregation had mounted;

63. He employs this technique of proof in his other case studies as well.

64. ROSENBERG at 107-56 (ch. 4).

65. *Id.* at 156. Indeed, by "stiffening resistance and raising fears before the activist phase of the civil rights movement was in place," Rosenberg suggests, "*Brown* may actually have delayed the achievement of civil rights." *Id.*

66. *Id.* at 131-50.

67. *Id.* at 107-56 (ch. 4).

demographic and migratory shifts had concentrated black voters in pivotal, electorally competitive states; the United States' growing international responsibilities made state-sanctioned racism here an embarrassment; the power of mass communications accelerated changes in public opinion.⁶⁸ The Court, whose *Brown* decision was already a decade old and unavailing, was merely a midwife of racial progress, not its parent.

Although Rosenberg's data on *Brown* and its aftermath are intriguing and undeniably provocative, they cannot substantiate a theory as open-ended and indeterminate as the one that he offers. At most, the data raise important but ultimately unanswerable questions about causality in a social context in which, as just noted, many factors other than *Brown* were also at work transforming social attitudes. These other factors presumably influenced, and were in turn influenced by, *Brown* in complex ways that are simply impossible to disentangle, though Rosenberg's is an imaginative effort.

B. *Roe v. Wade*

Rosenberg's analysis of the Court's first major abortion decision, *Roe v. Wade*,⁶⁹ is far less persuasive. It purports to exemplify a different aspect of his theory of court fatalism—the proposition (consistent with Rosenberg's "Dynamic Court" view) that courts can effectively propel social change *if* certain conditions are met, especially the existence of widespread public support and of market incentives for the reform. Even here, of course, the public support condition serves to underscore Rosenberg's claim that the Court's reformist role is essentially derivative, reinforcing, and epiphenomenal, not initiatory and causal.

His crucial factual claims center on the observation that the number of legal abortions, although flat in the late 1960's, began a steep, steady rise in 1970 (three years before *Roe*), flattening out again in 1980.⁷⁰ From this he argues that widespread availability of abortion, as well as liberal reform activity in state legislatures and relative passivity by conservative politicians on the issue, had already made abortion a mainstream social practice by 1973, when *Roe* was decided. At that time, he says, "there was little political opposition to abortion on the federal level, widespread support for it among

68. *Id.* at 157-69 (ch. 5).

69. 410 U.S. 113 (1973).

70. ROSENBERG at 178-80. Thus the percentage increase, figured annually, declined steadily. Though Rosenberg does not say so, the abortion *rate* (number of abortions per 1000 women age 14 to 44 years of age) and the abortion *ratio* (number of abortions per 1000 live births) followed the same general pattern. Centers for Disease Control and Prevention, *CDC Surveillance Summaries, Abortion Surveillance—United States, 1989*, MORBIDITY & MORTALITY WKLY. REP.; vol. 41, September 4, 1992, at 3 (Figure 1), 12 (Table 2); *Abortion Surveillance—United States 1990*, 41 MORBIDITY & MORTALITY WKLY. REP. 936, 937 (1992). Rosenberg's abortion figures, although compiled in part from CDC data, differ slightly from the numbers reported by the CDC.

relevant professional elites and social activists, large-scale use of it . . . , and growing public support.”⁷¹ When the Court rendered its decision in *Roe*, his argument implies, it was sailing comfortably with the wind at its back.⁷² Further, since the number of legal abortions increased steadily before and after *Roe*, Rosenberg argues that the decision had little effect.

But *Roe* did, after all, invalidate *forty-six* state laws restricting abortion.⁷³ Rosenberg’s explanation is that the laws that *Roe* struck down had been so massively evaded that their demise had little practical effect. There are several serious difficulties with this argument as a factual matter. As Neal Devins points out, the pre-*Roe* liberalizations of state abortion laws typically had been quite modest, leaving significant restrictions in place.⁷⁴ Thus, *Roe* immediately produced far-reaching changes in the law. Nor was the pre-*Roe* liberalization trend as powerful and irreversible as Rosenberg suggests. Indeed, immediately before *Roe*, reform initiatives in Michigan and North Dakota had failed. In qualitative terms as well, *Roe* did not simply continue the pre-*Roe* state of affairs; it appears to have sharply reduced both the maternal death rate from, and the cost of, abortions.⁷⁵ To frame *Roe*’s effect another way, it improved the outcomes for even those women who, before the decision, would have successfully evaded the legal restrictions on abortions.

Several interpretations that do *not* support Rosenberg’s general theory can explain the data he uses. An alternative explanation for the fact that the post-*Roe* rise in abortions was merely linear might be the effectiveness of new statutory restrictions that states adopted after *Roe* in order to circumvent the decision. The fact that the increase in legal abortions did not flatten until after 1980—*despite* the new state law restrictions—is, under this explanation, what is intriguing about the data. In addition, Rosenberg’s comparison is between pre- and post-*Roe*. Perhaps he should instead have attempted to compare the world following the actual *Roe* decision, and the hypothetical world that would have existed had the Supreme Court decided the case the other way. If *Roe* had gone the other way, the abortion rate might have increased at a lower rate or even declined, for evasion of state restrictions might have become more

71. ROSENBERG at 182. Later, he writes that “[i]n recent times, public discussion [of abortion] did not surface until the 1950s,” *Id.* at 258-59, failing to note that nineteenth-century discussion of abortion was extensive, *see, e.g.*, CARL N. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT* 239 (1980); JOHN P. HARPER, “BE FRUITFUL AND MULTIPLY”: THE REACTION TO FAMILY LIMITATION IN NINETEENTH-CENTURY AMERICA (1975); JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900* (1978); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 *STAN. L. REV.* 261, 281-87 (1992) and sources there cited (describing nineteenth-century anti-abortion advocacy of American Medical Association).

72. Even when Congress first passed its annual Hyde Amendment in 1976, severely limiting the use of federal funds to pay for abortions, it took no direct action to prohibit abortion itself, and the pre-*Roe* rate of increase continued. ROSENBERG at 187.

73. *Id.* at 175.

74. Devins, *supra* note 51, at 1057 & n.138.

75. *Id.*, at 1057-58 and sources there cited.

difficult than during the pre-*Roe* period, before the Supreme Court had spoken decisively on the issue. Indeed, had *Roe* upheld state criminalization of abortion, the burden of political inertia would have strongly, probably decisively, favored the pro-life forces; to legalize abortions in certain states might well have required a national constitutional amendment, which a passionate pro-life minority almost certainly could have defeated. Unfortunately, Rosenberg does not pursue these (and other) avenues, which might seriously undermine, or at least require him to refine, his interpretation of *Roe*'s consequences.

Rosenberg notes that *Roe* provoked a severe backlash by abortion opponents⁷⁶ but that the number of abortion providers and legal procedures nevertheless continued to increase after the decision, as private clinics proliferated.⁷⁷ These clinics provided market alternatives to hospital-based abortions, which were hard to obtain since many hospitals—under pressure from pro-life groups—refused to provide abortions even after *Roe*.⁷⁸ From this, Rosenberg infers that the *Roe* decision could not have been effective alone. Rather, effective social change occurred as a result of the *combination* of the decision with public support and the existence of market alternatives capable of neutralizing the unavailability of hospital-based abortions.⁷⁹

This inference is certainly plausible and tends to support Rosenberg's larger theoretical structure of constraints and conditions. But since the issue of clinic versus hospital setting is so important to Rosenberg's analysis, and since the *Roe* Court (like the litigants in the case) largely ignored the question of where abortions occur, the analysis would have been more compelling had he taken account of the post-*Roe* decisions in which the Court actually did grapple with the topic. In looking at those cases, a point and a series of questions emerge. First, to treat the existence of market alternatives as an exogenous factor is hardly accurate; it was the Court, after all, that refused to allow states to confine abortions to hospitals.⁸⁰ Second, how is Rosenberg's analysis affected by subsequent court decisions permitting states to regulate clinics that provide abortions?⁸¹ Do those decisions confirm his theory, by showing that the reform is rendered ineffective when market alternatives are restricted? Do

76. ROSENBERG at 185-89. Devins discusses the nature and scale of this backlash in greater detail than Rosenberg. Devins, *supra* note 51, at 1059-60.

77. ROSENBERG at 195-98.

78. *Id.* at 189-90. Although Rosenberg does not cite data on hospital practices prior to 1973, he implies that the limited availability of hospital abortions may have preceded *Roe*. *Id.* (referring to hospitals that have never performed abortions). This suggests that the post-*Roe* backlash may not have been this pattern's cause.

79. *Id.* at 199-201.

80. *Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 434-39 (1983) (state may not require that all second-trimester abortions be performed in a hospital); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 481-82 (1983) (same).

81. *See, e.g., Simopoulos v. Virginia*, 462 U.S. 518 (1983) (state may require that second trimester abortions be provided either in hospitals or licensed outpatient clinics); *Planned Parenthood v. Danforth*, 428 U.S. 52, 79-81 (1976) (upholding recordkeeping requirements for clinics that provide abortions).

they refute it, by showing that as a result of public law litigation and judicial action, the number of abortions did not decrease despite these restrictions?⁸² Or do they (as I think) show that the theory's formulation is too ambiguous to be very useful either in clarifying the relevant concepts or in yielding testable, refutable propositions?⁸³

Three examples amply illustrate the importance of this last question. First, Rosenberg's theory fails to tell us whether the reformist "court decision" to which he is applying the theory is simply *Roe*, or also includes the series of decisions that have purported to elaborate *Roe*, such as *Webster v. Reproductive Health Services*.⁸⁴ Why should his analysis be confined to *Roe* when the legal culture, and most certainly the Court, correctly assumes that such a decision merely initiates a long process through which a principle is elaborated and given content through specific and repeated applications? Second, the theory fails to tell us how to identify the "effects" of a decision like *Roe*—clearly a necessary precedent to appraising its "effectiveness." How did it alter the complex balance of political forces affecting not only future court decisions but state and federal legislative struggles, litigants' strategies, and private behaviors? Again, social reality is far too complex for *post hoc ergo propter hoc* reasoning about causality.

Finally, at the end of his discussion of the abortion cases, Rosenberg draws the following lesson: "[A]s with civil rights, the Court is far less responsible for the changes that occurred than most people think."⁸⁵ Yet, once again, if we try to imagine what abortion practices would have been like had *Roe* been decided the other way (rather than merely not decided), it seems plain that neither his theory nor his facts establish even this general proposition. It is one thing to say that *Roe* reinforced pro-abortion forces that were already in train, quite another to say that a contrary decision in *Roe* would not have much affected the course of abortion policy. If Rosenberg is saying the latter when he diminishes the Court's responsibility for the continuing availability of legal abortions, then it is hard to credit the claim.

C. Other Legal Areas

Rosenberg extends his analysis to other categories of cases, but because his treatment of these is more summary and less interesting, I shall discuss them only briefly. His approach in each of these case categories is flawed by one or more of the four problematic features of his theory noted earlier.⁸⁶ His

82. See sources cited *supra* note 70.

83. See *supra* text accompanying notes 45-46 for a list of some of the crucial ambiguities in the theory.

84. 492 U.S. 490 (1989).

85. ROSENBERG at 201.

86. See *supra* text accompanying notes 45-50.

discussion of women's rights (other than abortion) suffers both from the indeterminacy of the theory, and from his tendency to depreciate the courts' effectiveness by measuring it according to the agenda of the groups initiating the cases rather than more modest, albeit important, goals. His analysis of these cases is also confusing in other ways. He first contends that although the Court struck down many (but not all) gender-based distinctions during the 1970's and early 1980's,⁸⁷ and the other branches moved simultaneously to enlarge and enforce these antidiscrimination principles, little progress was made against wage discrimination because of the persistence of cultural barriers, family structure-based disadvantages, and other factors.⁸⁸ He also maintains, however, that a "tide of history" comprised of economic, demographic, educational, technological, ideological, and other factors has produced great gains for women in almost all areas.⁸⁹ Finally, he shows that there is little evidence—in media coverage, political activity, public opinion, or the growth and funding of the women's movement—that the Court's decisions had much to do with whatever gains women did make. He argues that this confirms his theory: "[N]one of the conditions allowing for Court effectiveness," he says, "are regularly present with women's rights."⁹⁰

Here again, the theory is so ill-specified that it is hard to know how to evaluate his application of it to women's rights. Is the fact that so-called "comparable worth" claims have not been judicially recognized (Rosenberg's major example of lack of progress) evidence that courts are ineffective reformers, or is it simply evidence that, for better or for worse, they have not chosen to define the right to nondiscrimination to include this conception of pay equity?⁹¹ If the latter, it seems wrongheaded to charge them with being ineffective at achieving a goal, comparable worth, that they never adopted as part of the reform they did embrace, and that many commentators, including some who support that goal, think courts (as distinguished from legislatures or agencies) are poorly equipped to achieve.⁹²

87. The most notable exceptions concerned statutory rape laws, in *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (upholding statutory rape law that applied only to persons who had sex with females under eighteen years old), and the draft, in *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding Selective Service Act's application to men only). See ROSENBERG at 204 n.9.

88. ROSENBERG at 202-27 (ch. 7). The data on women's progress in wages during the 1980's support a far more upbeat view than Rosenberg's. See, e.g., Sylvia Nasar, *Women's Progress Stalled? Just Not So*, N.Y. TIMES, October 18, 1992, § 3, at 1.

89. ROSENBERG at 247-65 (ch. 9).

90. *Id.* at 213.

91. Proponents of comparable worth argue that women are systemically underpaid when they work in typically female job categories, if salaries are compared to typically male jobs of comparable "worth," determined by looking at job skills, duties, etc. The attractiveness of comparable worth as a policy is far more controversial than Rosenberg seems to realize. See, e.g., JENNIFER ROBACK, *A MATTER OF CHOICE: A CRITIQUE OF COMPARABLE WORTH BY A SKEPTICAL FEMINIST* (1986).

92. See, e.g., HENRY J. AARON & CAMERAN M. LOUGY, *THE COMPARABLE WORTH CONTROVERSY* (1986).

Rosenberg's discussion of environmental cases exemplifies all four of the problematic features noted earlier: theoretical indeterminacy, neglect of important political dynamics unleashed by court decisions, measurement of reform effectiveness according to the litigators' most ambitious goals, and the failure to differentiate between constitutional and statutory interpretation by courts. Here too, his discussion is puzzling, and not simply because most of the cases that he cites are (unlike those in the earlier chapters) decisions by lower courts. First, he cites the failure of the courts to *constitutionalize* the right to a healthy environment as evidence of the ineffectiveness of court-initiated reform, predictable on the basis of his theory's constraints and conditions.⁹³ He does not consider the possibility that no such right was created because it was in fact a demonstrably bad idea, difficult if not impossible to justify on doctrinal, policy, or political grounds.⁹⁴ Nor does he consider that the court's role in interpreting environmental *statutes* is altogether different, and far more consequential, than its failure to constitutionalize environmental rights.

Next, he finds that the courts had "varying success" in enforcing environmental laws.⁹⁵ As in the gender discrimination area, this mixed verdict enables him to claim vindication for his theory, with its mixture of unspecified (hence analytically slippery) constraints and conditions. Moreover, his notion of judicial effectiveness here seems especially unsatisfactory; the criterion seems to be whether the courts agreed with the claims of environmental groups, not whether the courts' decisions had the beneficial policy results that Congress presumably intended.⁹⁶ This latter standard is more appropriate; further, applying it can yield even better, more substantive reasons to doubt the courts' effectiveness than Rosenberg adduces. Some detailed studies of court-regulatory agency interactions, for example, find that courts tend to be poor environmental policymakers whose decisions can often degrade, rather than improve, environmental conditions.⁹⁷

Rosenberg's strategic point—which converges with Gerald López's argument—is that environmentalists (and other reformers) should not look to the courts for much help but should instead invest their resources in political

93. ROSENBERG at 271-73.

94. See, e.g., CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 89-91 (1990).

95. ROSENBERG at 285.

96. See, e.g., *id.* at 284-85.

97. See, e.g., MELNICK, *REGULATION*, *supra* note 8; JOHN M. MENDELOFF, *THE DILEMMA OF TOXIC SUBSTANCE REGULATION* (1988). Rosenberg cites Melnick, ROSENBERG at 278, but appears not to have read him carefully; Rosenberg sees courts' "lack [of] meaningful independence from the other branches" as the reason for environmental litigation's ineffectiveness, *id.* at 279, while Melnick sees the problem as courts' inadequate attention to the needs of the other branches, especially the implementing agencies. As for Mendeloff's study, Rosenberg does not include it even in his general bibliography.

Scholars have also found perverse, unanticipated consequences from court decisions outside the environmental area. See, e.g., William A. Fischel, *Did Serrano Cause Proposition 13?*, 42 NAT'L TAX J. 465 (1989).

mobilization and legislative lobbying. Courts, he concludes, simply “preserve victories achieved in the political realm from attack. But preservation, while important, is only useful when there are victories to preserve. And environmental litigation, as a strategy for producing a clean and healthy environment, achieved precious few victories.”⁹⁸ For several reasons, however, this seems a dubious balance sheet on environmental litigation since the early 1970’s. First, environmental groups have in fact won many victories in the courts during this period, as industry and government litigators will ruefully attest. The harder, more significant question (as noted above) is whether those victories were actually good for the environment, a question about which Rosenberg shows little sustained interest.⁹⁹ Second, there can be little question that environmental litigation was effective in helping to slow, and occasionally to defeat, the Reagan-Bush deregulatory juggernaut, and in helping to build up membership in environmental action organizations.¹⁰⁰

More generally, his argument moves from the undeniable fact that reformers’ resources are limited, so that public law litigation must compete for those resources with other forms of political activity conducted in nonjudicial forums, to what appears to be an implicit but far more doubtful assumption about the *process* of social reform. He writes that “the courts also limit change by deflecting claims from substantive political battles, where success is possible, to harmless legal ones where it is not.”¹⁰¹ The process of social change, however, is not a zero-sum game in which efforts initiated by courts and in other quarters are competitive rather than complementary. It is true, of course, that court-initiated change may generate a political backlash that can defeat or at least impede the reform enterprise, as with the abortion controversy. But this particular dynamic hardly exhausts the range of interactions between courts and politics, many of which are synergistic with respect to both substantive reform and political resources. Here as elsewhere in the book, Rosenberg’s agnosticism concerning how social change actually occurs weakens the persuasiveness of his analysis.

In a very brief discussion of reapportionment litigation, Rosenberg likens his findings to those in the environmental area: “A procedural victory was won but one that didn’t automatically lead to substantive ends. Legislatures were reapportioned, but the reformers’ liberal agenda did not then automatically

98. ROSENBERG at 292.

99. The closest he comes to addressing this question is one paragraph that summarizes the results of environmental action as “decidedly mixed,” and a footnote that refers the reader to the Council on Environmental Quality annual reports. *Id.* at 275.

100. See JONATHAN LASH ET AL., *A SEASON OF SPOILS: THE REAGAN ADMINISTRATION’S ATTACK ON THE ENVIRONMENT* (1984); PHILIP SHABECOFF, *A FIERCE GREEN FIRE: THE AMERICAN ENVIRONMENTAL MOVEMENT* (1993). Again, the extent to which these tactics actually improved the environment and whether they were cost-effective from a purely organizational perspective are separate and quite difficult questions on which Rosenberg sheds little light.

101. ROSENBERG at 341.

come to pass."¹⁰² To imply that any reform is ineffective unless it can produce an "automatic" success is patently unreasonable, of course; I know of no reform that would satisfy it. Nevertheless, Rosenberg does make some telling points about how politicians have managed to mute the effects of reapportionment.¹⁰³ He goes on, however, to ignore a characteristic aspect of reapportionment litigation that is inconvenient for his theory and conclusion. Compared to the other areas that Rosenberg analyzes, court implementation of reapportionment decrees is easy; the court can either enjoin the election until a satisfactory districting plan is adopted or draw the plan itself.¹⁰⁴

The final sphere of litigation discussed by Rosenberg is criminal justice reform—more specifically, the rights of prisoners and juveniles, the exclusionary rule, and the right to counsel.¹⁰⁵ Here again, his verdict is that the courts have been only partly effective in these areas ("problems still abound"¹⁰⁶) and that his theory of constraints and conditions explains why. Indeed, despite the theoretical shortcomings already noted, his analysis seems more persuasive as applied to the criminal justice system—in which all of the effectiveness constraints and none of the conditions prescribed by the theory ordinarily obtain¹⁰⁷—than to any of the other areas that he considers.

IV. CONCLUSION

Rebellious Lawyering and *The Hollow Hope* share an important insight. Liberal activist courts are not as effective in producing enduring social change as many of their proponents would wish. Partly because of this, López urges "progressive" lawyers (he tends to avoid the terms "liberal" or "radical") to put their energies and resources elsewhere—into community organizing and political mobilization.¹⁰⁸ He also conjures up a vision of lawyering that *all*

102. *Id.* at 297-98.

103. *Id.* at 296-302. On this point, see also Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and the Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325 (1987).

104. I should not be misunderstood as suggesting that enjoining an election is unproblematic (for example, it may keep incumbents in office beyond the term for which they were elected) or that drawing a districting map is straightforward (there are numerous politically sensitive choices to be made). See Schuck, *supra* note 103. My point is only that courts can—for better or for worse—do reapportionment essentially alone (with the help of special masters), unlike in the other areas studied. In terms of Rosenberg's theory, then, the third of the structural constraints limiting courts' ability to effect social change, the (normal) judicial lack of implementation power, is not present. See *supra* text accompanying note 44.

105. ROSENBERG at 304-35 (ch. 11).

106. *Id.* at 307.

107. See *id.* at 307-13. Rosenberg discerns more political support for prison reform than I do, at least if reform is not understood as prison construction. See *id.* at 308-09.

108. I say "partly" because I suspect that even if court-ordered change could be more effectively implemented, López might nonetheless prefer the kind of "bottom-up" reform practices that he discusses on the grounds that they are more authentic representations of what community people actually want, more effective techniques for achieving their personal self-realization, and more successful modes of political mobilization.

lawyers should find challenging and that some will even find inspirational. He makes no large theoretical claims, however, about courts or about their connection to social change.

Rosenberg, in contrast, is preoccupied with these questions. He insists that “a great deal of writing about courts is fundamentally flawed,”¹⁰⁹ and he is correct. His own book is less about courts than about other political forces that surround and intersect with courts: public opinion, other government institutions, the media, and private organizations. Herein lies *The Hollow Hope*'s greatest value. It reminds us of a fact so obvious that only a subculture as parochial and self-absorbed (I am tempted to say autistic) as contemporary legal education and scholarship could possibly miss it: in the world of public law, the problems that reach courts are problems that the larger society has already been working on longer, with richer and more varied instruments, and in more comprehensive, systemic—hence more intractable—contexts.¹¹⁰ The evidence that Rosenberg mobilizes to illuminate this fact is arresting, resourcefully compiled, and for the most part convincing; so far as I know, use of such evidence in this way is novel. One hopes that other commentators, especially legal scholars who pontificate about the social effects of legal decisions, will emulate and perhaps improve upon his techniques in the future.

When Rosenberg turns to analyzing the relationships between courts and these other political forces, however, his work is of considerably less value and may even be misleading. His court fatalism seems largely oblivious to the dialogic, sequential, iterative quality of court-society interactions in important public law cases,¹¹¹ a quality so elegantly elaborated by Alexander Bickel and applied by those scholars who have followed in the Bickelian tradition.¹¹² Rosenberg's theory of constraints and conditions, while identifying factors that are undeniably significant in determining judicial effectiveness, adds little that scholars literate in the political science of judicial behavior and policy implementation do not already know,¹¹³ and it is in any event too ill-specified to be either fruitful or refutable.

It bears repeating, however, that *any* theory of judicial effectiveness is likely to suffer from these defects—or others at least as disabling. The many

109. ROSENBERG at 342.

110. See, e.g., sources cited *supra* note 38.

111. For a more detailed criticism of Rosenberg on this ground, see Devins, *supra* note 51, at 1030, 1046-54 (listing examples of effective court-initiated changes in race area effected through dialogic process).

112. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* (1992); HARRY H. WELLINGTON, *INTERPRETING THE CONSTITUTION* (1990); Fiss, *supra* note 37. See also SCHUCK, *SUING GOVERNMENT*, *supra* note 38, at 169-81.

113. A possible exception to this is his emphasis on the extent to which court decisions allow market alternatives, to which policy analysts are sensitive but many other scholars are not. For an example of legal analysis that recognizes the significance of this factor, see Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 *STAN. L. REV.* 1105, 1139-42 (1989). As mentioned at text accompanying *supra* notes 79-82, Rosenberg's own discussion of the market alternatives factor is not wholly satisfactory.

threads of causality are simply too tightly knotted to disentangle. The phenomenon of judicial effectiveness is far too complex to be captured in any transparent model. It is too contingent on the social context, political stakes, incentive and enforcement structure, level of rule specificity, power of the court's underlying theory of social action, particular policy domain, and other factors that are too numerous, hard to measure, or even ineffable to lend themselves to social science testing.

This is not a counsel of despair, however—only a plea for caution in the making of strong scholarly claims about causal efficacy, or lack of it, in public law. To say that Rosenberg's theory about judicial effectiveness in large-scale social reform fails to persuade is not to say that some competing theory has thereby been vindicated. Although I believe that the court skeptics, rather than the strong-court scholars or the court fatalists, have the best of the argument, a rueful candor compels me to add that we skeptics, like our competitors, are guided more by our professionally honed, often intuitive grasp of an elusive social reality than by any robust scientific theory worthy of the name.