

THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? by Gerald N. Rosenberg.
Chicago: University of Chicago Press, 1991.

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Since 1987, I have noticed a dramatic increase in public curiosity about and interest in the U.S. Supreme Court. Though I do not have data to support this assertion, I do know that over the past four years I have received more phone calls, inquiries, and so forth about the Court from more diverse sources than ever before. Some of this interest concerned specific Court rulings (TEXAS V. JOHNSON was a particularly hot case); but, mostly it centered on Reagan's and Bush's nominations to the Court, especially those of Bork and Thomas. Obviously, what I experienced was not at all unique. Who could have ever imagined a Supreme Court nomination proceeding beating out the baseball playoffs in the television ratings game!

Why all of this interest in the Court? To be sure, the Thomas nomination contained all the ingredients necessary to pique the public; interest here was more closely akin to that of the "Who Shot Laura Palmer" episode of "Twin Peaks" than of the constitutional law seminars provided by the Bork hearings. But even so, these nomination proceedings have caused the public to think more about the Court than at any point in recent memory; that "thinking," it strikes me, is grounded in a rather universal assumption: it "matters" who sits on the Court and, more generally, that the Court itself "matters." This is something the scholarly community has accepted for years; the public outcry over and Senate rejection of Bork, in particular, indicate that we are not alone.

In the much-awaited THE HOLLOW HOPE, Gerald Rosenberg questions that basic assumption. He finds that it is largely wanting. Following his argument to its logical conclusion, it does not matter who sits on the Court because the Court itself does not matter much. To put it more centrally in terms of this study, the answer to the question raised in the subtitle of his book (Can courts bring about social change?) is NO. The question we, the scholarly community, need to consider is whether Rosenberg provides sufficient evidence to support this rather astonishing assertion. Before I provide my assessment, let me give you a better sense of the book's theoretical underpinnings and its design.

Given its anything-but-conventional conclusion, THE HOLLOW HOPE starts in a rather conventional way. In the Introduction and first chapter, Rosenberg lays out two distinctly conflicting, and familiar perspectives on the Court's ability to generate significant social change and the conditions under which it can do so. The first, which he calls the Constrained Court view, generally maintains that courts will rarely be able to produce social change of any magnitude because of three important constraints:

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Constraint I. The bounded nature of constitutional rights prevents courts from hearing or effectively acting on many significant social reform claims, and lessens the chances of popular mobilization (p.13).

Constraint II. The judiciary lacks the necessary independence from the other branches of government to produce significant social reform (p.15).

Constraint III. Courts lack the tools to readily develop appropriate policies and implement decisions ordering significant social reform (p.21)

In contrast, the Dynamic Court view asserts that courts are effective "producers" of social change, and, more to the point, they "can be more effective than other governmental institutions" (p.22). This is because courts have advantages over the other branches:

their members, free from the electoral connection, can "act in the face of public opposition" and, thus, are in a unique position to generate social change;

those litigants entering their doorsteps -- especially groups desiring social change, who are disadvantaged in the electoral and legislative process -- enjoy access that depends neither on "connections nor position" (p.23); and

their decisions have indirect ways of producing social change not necessarily enjoyed by those emanating from the other branches; for example, they can serve to set the agendas of the other branches and they can "educate" Americans.

Rosenberg could have left it at this and gone about his study. He does not. Rather, viewing the two perspectives as too simple, he devises a framework that specifies the conditions under which courts could effectively produce social change:

1. Overcoming Constraint I (there exists ample precedent for change); AND,
2. Overcoming Constraint II (there is support for change from substantial numbers in Congress and from the executive); AND,
3. Overcoming Constraint III (there is either support from some citizens, or at least low levels of opposition from all citizens); AND, at least one of four conditions is met: a. Positive incentives are offered to induce compliance

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b. Costs are imposed to induce compliance c. Court decisions allow for market implementation d. Administrators and officials crucial for implementation are willing to act and see court orders as a tool for leveraging additional resources for hiding behind (p. 36, with some paraphrasing).

The balance of the book (about 230 pages) applies this framework to the areas of civil rights, abortion, and women's rights; Rosenberg also looks at the environment, reapportionment, and criminal law, though in considerably less detail. His modus operandi, thus, is the intensive case study, with mounds of data drawn from primary and secondary sources.

To provide you with detailed descriptions of Rosenberg's specific conclusions would perform an injustice to him. No fair way exists to encapsulate the monumental amount of work he put into this research.

Rather, let me give you the basic punch lines. The first is that the framework depicted above "works." For example, Rosenberg argues that pro-choice groups were able to achieve their significant victory in ROE V. WADE because, in the lingo of the framework, the conditions existed for overcoming the constraints. More specifically, legal precedent was sufficient; elites desired legalized abortion and faced little federal opposition in their quest to achieve that goal; and, the public was increasingly supportive. So too, those arguing for expanded abortion rights were "lucky"; one of the four conditions (listed above) "necessary for change, a market free to implement, was present" (p.189). A second, and related finding is that it is more typically the case that the constraints outweigh the conditions for overcoming them. In Rosenberg's words:

The findings show that, with the addition of the four conditions, the constraints derived from the Constrained Court view best capture the capacity of courts to produce significant social reform. This is the case because, on the most fundamental level, courts depend on political support to produce such reform (Constraint III) (p.336).

Put in less jargonized terms, U.S. courts "can almost never be effective producers of significant social reform" (p.338).

It seems almost unnecessary for me to point out the implications of such a conclusion, but let me name just two. Public interest law groups that have long relied on litigation to achieve policy goals ought start looking elsewhere. Scholars who have long viewed the Court as a place where significant change can occur ought start rethinking some basic assumptions about the institution.

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The \$64k question, however, is whether Rosenberg is correct.

I have no doubt that the scholarly and practicing community will engage in vigorous debate over the "right" answer to this question. Before I present my own response, I owe it to readers of this review to explain the perspective I brought to my reading of the text. As part of a cohort trained less in a "Dahlesque" approach (courts legitimate majoritarian interests) and more in the Casper/Vose school (courts protect minority rights), not only did I read THE HOLLOW HOPE closely but I sought to identify any possible weakness. This is not to suggest I wanted to prove Rosenberg wrong; however, I read it with the eye of skeptic.

This noted, let me give you my bottom line first: to be sure, I have some quibbles with the study, but they do not significantly detract from Rosenberg's findings. I believe Rosenberg has presented sufficient, even abundant, evidence to support his findings. Why did I reach this conclusion?

One reason lies with the areas on which Rosenberg focused: civil rights and abortion/women's rights. These were, in my view, outstanding choices because they are areas on which scholars largely agree the Court had a major impact. Had he picked issues on which its effect was murkier, his conclusions would be far less important and far more vulnerable to attack. But, at least on this score, he is virtually unassailable (i.e., if the Court was ineffective in producing social change in the areas of civil rights and

abortion, then on what could it possibly have had influence?).

Another reason lies with the case studies themselves. With exceptions here and there, they are flawless. Indeed, Rosenberg bends over backwards to demonstrate precisely the opposite of where he ends up. He develops an extraordinary battery of tests to discern any possible impact -- from the direct to the very indirect -- that the Court's rulings may have had on a diverse range of political actors and the public. To give but a taste, here are some of things he uses to assess whether the Court generated change on the abortion issue (pre/post Roe): the number of legal abortions, precedents, mass and elite attitudes, availability of abortion services, media coverage, and legislative activity. In short, he anticipated well, I think, the most obvious sources of criticism. So too the less-than-obvious ones: he managed to address almost all of the Ifs, Howevers, and Buts I mentally raised during the course of my reading. *THE HOLLOW HOPE* is, to say the least, a carefully and thoroughly executed study.

I would, then, GENERALLY agree with Robert Dahl's comment about *THE HOLLOW HOPE*: "Hereafter, anyone who defends the view of the Court as a force for basic reforms will have to confront and rebut the evidence and argument of this book. This will not be an easy task."

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I stress "generally" because I do have some concerns about the work. One is, as I already mentioned, that Rosenberg attributes the success of the pro-choice movement in Roe and of the NAACP LDF in Brown more to luck and less to litigation prowess. In his words, "The chief reason [why the movements won] is that the remaining legal constraint, the lack of legal precedents was weak... There were precedents for change and supportive movements within the broader legal culture" (p.337). I would argue that this was not at all a matter of "luck." As Rosenberg knows, the key precedential cases were brought to the Court by interest groups or movements. According to Greenberg's account in *JUDICIAL PROCESS AND SOCIAL CHANGE*, for example, the LDF sponsored the litigation needed to achieve victory in Brown; it was the group's persistence and not "luck," that weakened "the remaining legal constraint." I think this is an important link, but one Rosenberg largely overlooks.

Another quibble I have is that some of his analyses are too casual. Those on public opinion immediately come to mind. Because he does not examine trends in survey data in a rigorous way, his observations tend toward the pedestrian. Here is what he writes about public opinion on abortion: "there was clearly no rapid or large change in American's support of abortion after the Court's decision" (p.238). He may be correct on an aggregate, first blush, level, but he misses an important point brought to light in Franklin and Kosaki's (APSR, 1989: 751-777) intriguing study: Roe did have the effect of polarizing the citizenry in an unprecedented way.

I could list a few more problems with the study, but they too would be minor or, at best, insufficient to undermine Rosenberg's central findings. Thus, I leave it to readers to reach their own conclusions about the merits or demerits of Rosenberg's research and its implications. In any event, I do believe that *THE HOLLOW HOPE* is absolutely "must" reading. I have just ordered it for my graduate seminar on the Court, and I cannot tell you how much I am looking forward to the session at which we will discuss it. It will undoubtedly generate great debate among my students, as it will among those of us toiling in the

field.

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