Review Essay

"The Long Walk Home" to Politics

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Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: University of Chicago Press, 1991. xii+425 pages. $29.95.

With the Supreme Court now in the hands of seven solidly conservative justices, liberals face a long walk home to the political activism which they participated in during the 1950s and 1960s. Along the way they may find Gerald Rosenberg's *The Hollow Hope* a sobering review of the last generation during which litigation rather than activism became the major channel for pursuing liberal goals.

In lengthy case studies of school desegregation and abortion, and shorter studies of gender discrimination, criminal procedure, reapportionment, and environmental protection, Rosenberg sifts the empirical record for evidence that judicial victories have achieved real gains for the social movements that pursued them. Rosenberg's hard-nosed review of the data (supplemented by the creation of some original measures) is animated by a desire to challenge what he views as the pernicious myth that the Warren and early Burger Courts were the great engine of political transformation from the 1950s to the 1970s. In most instances he finds little for advocates of litigation to cheer about: court decisions sometimes do achieve effects but mainly when other political and social forces are already moving in that direction.

Belief in the effectiveness of litigation has shaped the discussion of courts and social policy on both sides of the political spectrum and biased our perception of the underlying political process. Conservatives have focused on the dangers of judicial displacement of democratic processes (Bork 1990). Liberals have celebrated the activism of courts and developed complex

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theories of judicial review to justify it (Dworkin 1985). Both have tended to assume that courts are capable of imposing substantive policy choices on hostile political branches. From Rosenberg's perspective, this focus has channeled much substantive disagreement about social policy into an often sterile debate about institutional structure and the legitimacy of judicial policymaking.

It has also distorted our view of how political change actually takes place. Insofar as the debate presupposes the effective power of courts to achieve social change, it creates too voluntaristic a picture of history, covering up the role of deep social and economic forces. Insofar as the debate has portrayed the decisive players as litigators and judges, it has diminished the historic role of more radical figures who organized sit-ins, bus boycotts, and other protest movements.

An exaggerated picture of litigation success is more than of scholarly consequence; it may distort the structure and message of social movements (Rosenberg, p. 339). In a situation of scarce resources and critical trade-offs, activists may be led to overemphasize the leadership role of lawyers, translate their goals into legalistic formulas, and ignore the need to build political support. The last point is particularly important because even when movements win victories in court, they may not have the political strength necessary to get those victories implemented. In this respect Rosenberg grimly analogizes courts to "fly paper" which traps, exhausts, and ultimately kills the victims drawn by its sweet promise of reward.

In the opening chapters of the book, Rosenberg assembles from the literature two competing models of the ability of courts to influence policy. The first, which he identifies as the "constraint model," highlights the limitations of courts stemming from their commitment to rights discourse which individualizes social problems, their vulnerability to attacks from other political institutions, and their dependence on other actors to implement the institutional changes mandated by legal decisions. The second, which he identifies as the "dynamic model," highlights the strengths of courts stemming from their ability to operate independently of existing political majorities, their institutional capacity to promote value change, and their internal facility for evolving innovative procedures.

The book's major finding, that litigation victories result in social change only when other political institutions are poised to support change, vindicates the constraint model more than the dynamic model, but Rosenberg is interested in building a model capable of explaining the variation in court effectiveness rather than just its tendency. Rosenberg identifies four conditions that seem conducive to court effectiveness; the availability of incentives for compliance with court mandates, the availabil-

ity of sanctions for resistance to those mandates, the relevance of markets to implementing the decisions, and the degree to which institutional actors are ready to proceed with reform and can use courts to cover their intent. This model is developed in the rich substantive chapters of the book and should provoke testing in future case studies of litigation.

As a lawyer and a political scientist, Rosenberg is well equipped to challenge the myths surrounding constitutional politics and constitutional theory, but this potent combination sometimes mixes in self-limiting ways. In his zeal to challenge the orthodox view of the Warren and Burger Courts, Rosenberg writes what sometimes seems ironically like a legal brief; turning every point, no matter how ambiguous or unreliable the evidence, toward the side he represents. On the other hand, his analysis of the effects of courts suffers from his commitment to a narrowly positivist tradition of social science that overvalues quantitative data and deals uncomfortably with historical and narrative material. As a result, the ideological role of law, its ability to create precisely the kinds of myths that Rosenberg is so motivated to challenge, gets left out of the account altogether. In what follows I explore both these limitations and the directions that the discussion Rosenberg has powerfully opened up might move in without them.

I. The Brief against Courts

Rosenberg gets a lot of analytic power out of asking simple questions. If great litigation victories make a significant contribution to political change their effects should be measurable. Take *Brown v. Board of Education* (1954) the greatest "great case" of them all. The mythic view could be well stated by most undergraduates.[1] In 1954 the Court stood alone in challenging an ingrained pattern of discriminatory state laws in the South and many border states, which either required or permitted public schools to be segregated by race. While the political branches of the federal government were unwilling to intervene in state policies, the Supreme Court condemned school segregation as a violation of the 14th Amendment. In the sequel case, *Brown v. Board of Education* (1955) (*Brown II*), the Court ordered school districts to desegregate with "all deliberate speed."

There was massive and hyperbolic resistance from southern politicians just as many members of the Court feared (Kluger 1975). But in time the Court's order was enforced through the steady and heroic work of civil rights lawyers and certain fed-

[1] The "myth of rights" has been most usefully analyzed by Stuart Scheingold (1974:13).

eral judges in the South. In the meantime the Court's call of conscience helped to further the goal of racial equality by encouraging a civil rights movement that altered the basic racial assumptions of most Americans.

A. Direct Effects

Unfortunately, the percentage of black children enrolled in desegregated schools in each year between 1954 and the late 1960s largely discredits this attractive story as to direct effects. The numbers Rosenberg presents overwhelmingly indicate that desegregation in its first decade progressed only where local officials were ready to pursue it, as they were in the border states in the mid-1950s (p. 50). Southern school leaders were successfully able to delay compliance through numerous appeals of district court decisions (p. 87). As a result virtually no desegregation took place in the deep South until the mid-1960s (p. 52).

Desegregation in the South did begin to unfold with much greater rapidity after 1965 (p. 51). Court orders became effective then precisely because the federal government was willing to tie financial incentives to the process, as they did through implementation of the Elementary and Secondary Education Act of 1965, which made federal funds available to school districts which complied with desegregation orders.

The strength and clarity of the data Rosenberg presents leaves little room for rebuttal as to *Brown*'s direct effects. It is worth noting, however, that *Brown v. Board of Education* does not provide an unambiguous test of courts as agents of political change. The "all deliberate speed" standard, which the Court adopted in *Brown, II* (1955:301) was self-consciously chosen to avoid what many on the Court feared would be the violence and anarchy that would result from providing what the plaintiffs sought—an order to immediately desegregate the challenged districts and all other similarly situated districts (Kluger 1975:728–30).

Much of the decade after *Brown*, during which Rosenberg concludes there was little progress on desegregating the South, the Court avoided making programmatic statements about precisely what desegregation required and which techniques could best achieve it. It was not until *Green v. County School Board of New Kent County* (1968) that the Court even definitively rejected the so-called free choice model that allowed school districts to leave the pattern of segregation virtually intact.[2]

What would have happened if *Brown II* had ordered the immediate desegregation of the schools and then granted to dis-

[2] Some observers, namely, Alexander Bickel (1962), viewed the Court's tortoise pace as a virtue.

trict courts the power to create their own desegregation plans rather than waiting through the prolonged games of the school boards, and implemented them with the threat of contempt proceedings? Perhaps violence would have followed. The Court surely could not respond to such violence by itself, but it might have been able to spur federal attention years earlier than it finally came. We have Little Rock in 1957 for the proposition that even a conservative Republican president might have been unwilling to stand passively in the face of systemic local violence.

Rosenberg can, of course, point to the reluctance of courts to demand radical change. Self-defined as relatively helpless and dependent institutions, courts are generally unwilling to get far ahead of the political branches. Yet the notion that courts must steer clear of radical change lest they collapse in a hemorrhage of legitimacy and respect is also a kind of juridical mythology. Whatever may have been true at the time of *Marbury v. Madison* (1803), no modern Supreme Court decision has been openly flouted for long by members of the political branches. Furthermore, one only has to consult the history of court hostility to labor unions in the 19th and early 20th centuries to reject the view that courts are always unwilling to risk violent social resistance in order to enforce what they deem to be fundamental rights (like private property).

We cannot get reasonable information on counterfactuals, nor should we impose the burden of proof on those like Rosenberg who challenge the effectiveness of courts. Still, to treat the implementation of *Brown* as a test of the institutional power of courts washes out the significant role of racial identification in determining the goals set by the Supreme Court. As Derrick Bell (1985:61–62) has forcefully reminded us, we dare not forget that the Court placed the disruptive effects on whites of rapid change ahead of black rights even as they were acknowledging those rights.

Similarly, in his discussion of the Court and women's rights Rosenberg moves from a convincing discussion of the limited effects of litigation to an unsupported assertion that it is the institutional limitations of courts, as such, that leads to this failure (p. 213). His discussion illustrates all kinds of reasons why the Supreme Court failed to be a very effective source of gender change, including the fact that the doctrinal model of formal equality does not effectively deal with women's oppression in a society where men and women are often not similarly situated; that there is strong cultural and legal bias against women; and that there is a lack of coordinated litigation strategy. Yet none of this provides a convincing reason to believe that it would not be worthwhile for women's rights advocates to argue

for different doctrinal understandings of equality (MacKinnon 1991), or develop a more coordinated strategy of litigation.

B. Indirect Effects

No doubt many who study and teach about law would claim for themselves a more nuanced view of the impact of *Brown* than the one Rosenberg knocks down in this book. Yet one only has to listen to the self explanations of law school bound undergraduates to know that a different message is being communicated—one that posits the case as a singular triumph for civil rights in American society. A good example of the sophisticated version of the mythic view is Kenneth Karst's fine book on civil rights law (1989). Karst acknowledges that "race relations in America eventually would have undergone fundamental changes whatever the Supreme Court might have done" (p. 80) but nonetheless credits *Brown* with providing a fundamental stimulus for the civil rights movement and the legislative victories of the 1960s (p. 73). The engine of this transformation for Karst, as for others, is the symbolic power of a great case to affect the self-understanding of the national community.

Unless one wants to rely on what Alexander Bickel (1962:29) called the "mystic function" of the Court, the way in which symbolic authority is transmitted must be specified and documented. If legal discourse does matter, it ought to matter in ways that are empirically measurable. The first task is to imagine how a court decision might affect politics.

While Rosenberg is far from the first to doubt that *Brown* promoted social change, his effort is the most systematic to date to develop an empirical basis (Steel 1968; Freeman 1978; Bell 1985). He specifies four different possible links between *Brown* and the unquestionably effective civil rights legislation of the 1960s. First, *Brown* as covered by the media might have helped set the agenda for politicians. Second, *Brown* may have directly influenced politicians to take civil rights more seriously. Third, *Brown* might have changed white views on civil rights. Fourth, *Brown* might have encouraged blacks to pursue civil rights with greater vigor, which had its own effects on white voters and politicians.

As with the issue of *Brown*'s direct effects, Rosenberg seeks to test these hypotheses against the available empirical record. In each case Rosenberg works with the assumption that the greater the amount of time between *Brown* and the alleged affected developments, the weaker the plausibility of influence (p. 125). But where relatively straightforward measures are not available, Rosenberg's drive to make his case causes him to ignore the underlying complexity of the issues and the weaknesses of the record. His analysis of *Brown*'s symbolic effects is

not implausible, but it is equally open to alternative interpretations.

Looking for evidence that the media responded to *Brown*, Rosenberg surveys the coverage of civil rights in magazines between 1940 and 1965. He finds that there was a slight increase in stories in 1954 but that by 1959 coverage returned to its pre-1954 level (p. 113). Indeed, Rosenberg's analysis makes it difficult to credit *Brown* at all for the rise of coverage during the 1950s since the increased coverage in 1954 was dwarfed by the increase during the Montgomery bus boycott of 1957 and the Little Rock disorders in 1958.

It is somewhat disappointing that with the exception of the *New York Times,* Rosenberg collected original data only on magazines, relying mainly on secondary sources to support the general conclusion that newspapers did not cover *Brown* and civil rights very much. A survey of the indexes of a sample of major urban dailies would be desirable, as would the inclusion of television reporting, which by the early 1960s was a major news source. The more important point, however, is how the data should be interpreted.

Rosenberg's analysis focuses on two dimensions: the magnitude of coverage and its temporality. But magnitude data is only informative in comparison to something else. One thing we learn is that magazines paid a lot more attention to civil rights after the Montgomery bus boycott and the Little Rock confrontation than after *Brown* (p. 113). It is not, however, necessarily surprising that civil disorders capture the eye of the media more than a court decision that yields neither compelling photos or easily understood quotations. One wants to know more about how *Brown* was covered in comparison with other Supreme Court decisions and with other official statements on civil rights. Moreover, little insight can be drawn from the fact that coverage in 1958 and 1959 dipped below pre-*Brown* levels. The press is inevitably a presentist-oriented institution, and one must always ask what other events and issues unrelated to civil rights may have been competing for space.

We also need to know more about what the articles actually said about civil rights. On 1 June 1955, James Jackson Kilpatrick, Jr., the editor of the *Richmond News Leader,* published a front-page editorial denouncing the Court for the *Brown* decision and calling on southern leaders to resist through all available lawful means. To a daily reader of the *Richmond News Leader*, that an editorial would appear on the front page and that it would call on state leaders to resist the federal court orders must have been powerful. How many magazine features on the bus boycott does that one article equal in influence? It is simply impossible to say with numbers.

Rosenberg also runs up against the limits of raw counts in evaluating the significance of *Brown* for politicians. He asserts that "there is little evidence that *Brown* played any appreciable role" in the debates on the Civil Rights Act of 1964 (p. 120). Perhaps it is not surprising that a debate held a decade after *Brown* was not saturated with references to it. Yet the importance of the underlying issue of desegregation, its constitutionality, and whether the Congress should now throw its support behind a program hitherto only ratified by the Court, is apparent when one reads the actual mentions to *Brown* in the debates that Rosenberg has thoughtfully cited.

Senator Humphrey of Minnesota, one of the bill's supporters, described the purpose of the bill as aiding in desegregation "ordered by the Supreme Court of the United States, whose decision is the law of the land" (110 *Cong. Rec.* 5017 (1964)). Another supporter of the bill, Senator Allott of Colorado, sounds as if he were anticipating Rosenberg's book when he said in the debate: "I agree [with the Senator from Florida] that perhaps a status quo situation as between the races could have been preserved if it had not been for the 1954 Supreme Court decision" (110 *Cong. Rec.* 5703 (19 March 1964)).

Senator Allott went on to describe the nature of black/white relations before *Brown* through an anecdote about a college-educated black man who used to shine Allot's shoes when he was lawyer in Denver during the 1930s. Blacks were deemed competent "only to shine shoes and push brooms" (ibid.). According to Senator Allott, *Brown* changed that. The story may be self-serving, but the very fact that the Senator felt it would be useful might give one pause in the midst of an argument that *Brown* had no effect on the sensitivity of politicians to civil rights.

Opponents seemed even more convinced that *Brown* lay behind their difficulties. Senator Robertson of Virginia excoriated the case.

> There can be little doubt that the Supreme Court decision of 1954 has engendered more strife and discontent in all parts of the nation than any other decision of the Court for 100 years. . . . Since 1954, no person can deny that the situation has become more tense and aggravated. (110 *Cong. Rec.* 5087 (12 March 1964))

Rosenberg (p. 127) explores the effect of *Brown* on white and black opinion through polling data, concluding that the decision did little to alter the opinions of whites or energize blacks in pursuing civil rights. But, as he concedes, the frequency and depth of opinion polling on civil rights during this period are not impressive. The point is not that the fragmentary data Rosenberg cites are misinterpreted but that they sim-

ply do not warrant strong conclusions.[3] This problem does not appear to have given Rosenberg sufficient pause. He cites a Gallup poll from November 1955 showing that only 53% of southern blacks approved of *Brown* and suggests that its reliability (at least as to magnitude) is vindicated by the fact that a poll taken shortly thereafter showed 82% support for Interstate Commerce Commission rulings prohibiting segregation in transportation. Arguably, however, the combination may just reflect the overall poor quality of data on blacks. Black attitudes may have changed over time or may simply have not been adequately sampled.

Fortunately Rosenberg does not rely alone on the poor quantitative data on black attitudes toward *Brown*. He also looks to memoirs and other documentary sources for evidence that black leaders were inspired or influenced by the decision. Rosenberg's conclusion that the civil rights movement among blacks was not a creation of *Brown* is consistent with the social history of that struggle (Morris 1984:25), but it will take a richer appraisal of ethnographic and historical evidence to assess what kinds of influences it might have had on those movements.

A good example of this is his analysis of the Court and Martin Luther King, Jr. (pp. 139–40). Rosenberg concludes from a study of King's writings that he cannot be said to have been "inspired" by the Court. But surely "inspiration" is too high a standard. King did not have to have been "inspired" by the Court to have found the desegregation decision a vital source of authority for his moral stands. A brief look at King's writings suggests an important if complex role for *Brown* that cannot show up on the terms of Rosenberg's analysis.

King opened a 1958 article on race relations by writing:

> In American life there is today a real crisis in race relations. This crisis has been precipitated . . . [in part] by the determined resistance of reactionary elements in the South to the Supreme Court's momentous decision against segregation in the public schools. (King 1986:85)

In a 1960 article seeking to explain the reasons for the rise of the student movement in the South King wrote:

> The United States Supreme Court decision of 1954 was viewed by Negroes as the delivery of part of the promise of change. In unequivocal language the Court affirmed that "separate but equal" facilities are inherently unequal, and that to segregate a child on the basis of his race is to deny that child equal protection of the law. This decision brought hope

[3] The polling data on whites may be sketchy, but there is no particular reason to doubt their representativeness. However, the record is considerably less reliable concerning black opinion.

> to millions of disinherited Negroes who had formerly dared only to dream of freedom. (Ibid., p. 95).

In a 1962 speech in Nashville, King declared:

> Happily, we have made some meaningful strides in breaking down the barriers of racial segregation. Ever since 1954, when the Supreme Court examined the legal body of segregation and pronounced it constitutionally dead, the system has been on the wane. (Ibid., p. 117)

None of this means that King was contented to let the courts take care of the problem or that King and his movement would have been unimaginable without *Brown*, but they do suggest the complex ways in which the *Brown* decision altered the discursive field of American politics and, through that, access to the central meanings of American history. It is to that more complex story that we now turn.

C. Causal Complexity

Rosenberg's problems with data, discussed above, may be less important than the consequences of his commitment to a linear temporal model of effects. It may seem intuitively correct that the longer the amount of time between an event (like a court decision) and a response (like an upsurge in news stories or a statute), the less likely there is to be a causal relationship (pp. 124–25), but cause-and-effect relationships in social phenomena may be more complex. An event at time 1, may, because of independent events at time 3, have a larger influence on time 4 than it did at time 2.

From this perspective, Rosenberg's insistence on treating *Brown* and the sometimes violent struggles of the late 1950s as competing sources of attention for civil rights during the 1960s may be wrong. First, the attention drawn by the Little Rock confrontation over integration in 1958 would never have happened without the *Brown* decision. Second, perhaps *Brown* had more influence on the adoption of the Civil Rights Act of 1964 because of events such as Little Rock and the Montgomery bus boycott. But Rosenberg, assuming that an effect must be in the right order and enduring across time between any two points, simply does not consider such interactions. Ironically he names a chapter "the current of history" but does not contemplate the ripples and eddies in the current.

Likewise, in his analysis of the possible links between *Brown* and civil rights activism, Rosenberg asserts that if *Brown* helped cause civil rights demonstrations to take off, "one would expect to see an increase in the number of demonstrations shortly after the decision" (p. 133). But why? It might be more plausible to expect demonstrations to follow frustrations with the failure to implement the *Brown* mandate.

The causal issue is even more complicated when one considers the volatile relationship between negative and positive perceptions. Thus, Rosenberg concludes that one way in which *Brown* surely had a large effect was in stiffening southern white opposition. Doubtless this is true. Many of the southern states responded to *Brown* by passing laws against the NAACP, establishing "Sovereignty" commissions, or repealing compulsory school attendance laws (app. 4, p. 350). Indeed, a number of states even adopted new flags with the old stars and bars of the confederacy prominently displayed.

Rosenberg views all this action as simply counterproductive from the litigants point of view (pp. 341–42). But was it? A more dialectical model of causation might lead us to inquire how the ugly display of massive resistance in the South influenced northern whites as well as blacks. Did the contorted white faces in the mobs of Little Rock alert northern whites to the true horror of folkways they had treated as quaint and anachronistic?[4] Such effects may have been unintended by the *Brown* court, but perhaps one role of courts is to unsettle deposits of deep social emotion laid down by past struggles but covered over through years of indifference and accommodation.

Likewise Aldon Morris (1984) argues that the *Brown* decision had a very complicated interactive effect on white southerners, the NAACP and the grass-roots black activists. According to Morris (p. 34) *Brown* primed black resistance by delegitimizing the "Jim Crow" system which in turn created a potential mass increase in southern blacks willing to take action. The NAACP was in the best position to take advantage of this growth because of its ties to church leaders and extensive network of local branches (p. 38). White southern leaders outraged by *Brown* opened a systematic attack on the NAACP through hostile state laws. This campaign, which lasted through the 1950s, suppressed membership in the South. While the NAACP ultimately survived, the vacuum formed by its adversities created an opening for local activists to take the lead and break away from the NAACP's bureaucratic structure and legalistic methods (p. 38).

These may represent what Scheingold (1989:79) calls "contingent" and "unintended" consequences of litigation. Perhaps

[4] "There was an unforgettable scene, for example, in one CBS newscast from New Orleans, of a white mother fairly foaming at the mouth with the effort to rivet her distracted little boy's attention and teach him how to hate. And repeatedly, the ugly, spitting curse, NIGGER! The effect, achieved on an unprecedented number of people with unprecedented speed, must have been something like what used to happen to individuals (the young Lincoln among them) at the sight of an actual slave auction, or like the slower influence on northern opinion of the fighting in 'Bleeding Kansas' in 1854–55." Bickel 1962:267. Interestingly, Martin Luther King, Jr. (1986:294), noted the exact same scene in his famous "Letter from the Birmingham City Jail."

such effects are of little value to social movements deciding whether to pursue litigation. But seeking social change is not always a matter of choosing among clear alternatives. Especially for the most disempowered groups, a chance to do something, to shake things up, may be relevant enough.

D. The Interaction of Courts and Other Forces

Even if one agrees with Rosenberg that mobilizing popular forces may be more critical to achieving reforms than court battles, one cannot treat these as completely independent alternatives. No social movement can long keep its state of heightened moral commitment, and successful ones invariably seek to institutionalize their gains in law. As the sad demise of Reconstruction era legislation demonstrates, statutory victories depend ultimately on court decisions to give them generous constructions. This problem has been raised recently by Bruce Ackerman (1991), who suggests that the great task of courts is to preserve the achievements of those social movements that succeed in marking new constitutional norms through sustained challenge to the existing system.

One such "constitutional moment," according to Ackerman, was Reconstruction, 1865–75.[5] Anyone interested in the relationship between constitutional decision like *Brown* and the civil rights movement of the 1950s and 1960s should reflect on Reconstruction (Foner 1988 is the most recent and complete study). Congress, directed by an uneasy coalition of radical and moderate Republicans, was able to sustain the attention of a mobilized national public during a several-year period while they tried to rearrange the race relations of the former Confederacy. The radicals were aware that their time at the helm of national affairs would be short. They sought to transcend the limits of their temporary hold on Congress with a series of civil rights statutes and the 13th, 14th, and 15th Amendments. This process eventually collapsed as is well known in the Hayes/Tilden crisis of 1877 (Woodward 1971). A series of pivotal Supreme Court decisions largely stripped the legal residues of Reconstruction of their power to protect the civil rights of African Americans.[6]

If Ackerman is right in seeing the 14th Amendment as part

[5] Ackerman's (1991) theory of constitutional moments depends heavily on the empirical claim that during periods like Reconstruction and the New Deal a truly mass base was focused on self consciously constitutional decisions about the nation. The bases of these claims are only sketched in *We the People: Foundations* but promise to be examined closely in volumes 2 and 3.

[6] In building on Rosenberg's book which focuses completely on liberal Court decisions it would be interesting to examine the effects of such conservative Supreme Court decisions as the *Civil Rights Cases* (1883) and *Plessy v. Ferguson* (1896) on the politics of social change.

of a constitutional moment in which popular majorities engaged in reinterpreting the meaning of citizenship, we might be able to develop an alternative to viewing *Brown* either as a singular call of conscience or as irrelevant. From this perspective the importance of *Brown* was in reinserting the 14th Amendment's commitment to ridding the political community of the residues of slavery into the pattern of normal politics from which it had been exiled for over a half-century.

A foremost supporter of the Civil Rights Act of 1964, Senator Paul Douglas of Illinois, placed just this construction on the Court's role in a statement cited but not discussed by Rosenberg. According to Douglas, through *Brown* "the conscience of the country was touched, the national conscience came to believe in the equal protection of the laws, and that a state should carry out the 14th amendment" (110 *Cong. Rec.* 13922 (16 June 1964)). This was an act of collective remembering. "So gradually the 14th amendment has been brought to life, notably in the 1954 decision of the Supreme Court in Brown" (ibid., p. 14447).

It is possible that the case against segregation would have been easy enough to make in the general language of human rights that developed in the shadows of World War II and the Holocaust. But perhaps it made a difference that a basic commitment to equal citizenship for African-Americans and a common national community was made by Americans almost a century before.

One gets an uncanny feeling about the renewed presence of the 14th Amendment in the lives of Americans following *Brown* from reading Martin Luther King's famous "Letter from a Birmingham Jail" (King 1986 [1963]). In it, King responds to white clergy who urged him to call off the civil disobedience movement and let the law take its course through the courts; which King rejects. At the outset of the letter, responding to the concerns the clergy expressed about the involvement of his organization as "outsiders" in the struggle over segregation in Birmingham, King invokes this very ideal of common national citizenship.

> I am cognizant of the interrelatedness of all communities and states. I cannot sit idly by in Atlanta and not be concerned about what happens in Birmingham. Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly affects all indirectly. Never again can we afford to live with the narrow, provincial "outside agitator" idea. Anyone who lives in the United States can never by considered an outsider anywhere in this country. (Ibid., p. 290)

Where does King get this idea? Christian idealism might have

been an important source, but notice he speaks of "anyone who lives in the United States." The Christian community is global. Whether consciously or not, King is referencing a sense of national identity that has its origins in the 14th Amendment. The first sentence of the amendment established black citizenship unequivocally by asserting the primacy of national citizenship over all forms of local or state citizenship: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside."

III. A Model of Courts in Society

While Rosenberg argues that cases like *Brown v. Board of Education* (1954), *Roe v. Wade* (1973), and *Mapp v. Ohio* (1961) cannot be shown to have had the effects often attributed to them, he is also interested in highlighting those circumstances under which court decisions may become effective tools for promoting change. For example, the existence of a sympathetic bureaucracy in the border states made desegregation follow smoothly after the Court's *Brown* decision. Where the Court did not have a ready set of allies in power at the local level, as in the South, desegregation was stalled from the start (pp. 50–53) and proceeded only when the creation of financial incentives by Congress created a constituency for compliance among local elites.

A similar tendency is evident in criminal justice. Rosenberg contends that there is little evidence that *Mapp v. Ohio* did much to alter police abuse of Fourth Amendment rights, but he suggests that where police leadership were interested in pursuing professionalization, the Supreme Court's decision in *Mapp* and in other cases provided an excellent justification for the imposition of training and sanctioning systems (p. 323).[7]

The subtleties of the relationship between court effectiveness and contingent political and social conditions is nicely shown in Rosenberg's analysis of the effects of *Roe v. Wade*. Rosenberg's data suggests that the availability of legal abortion increased for several years before *Roe* but made a significant surge after the decision. This success was sustained without support from federal and state governments—indeed in the face of considerable hostility from those sources.

Why did the Court do a better job of helping women obtain access to legal abortions than it did in helping southern black school children obtain desegregated educations? Rosenberg suggests the most important difference was the presence of market forces, in the form of for-profit abortion clinics, capable

[7] A similar argument concerning the exclusionary rule is made in Skolnick and Simon (1989).

of implementing the Court's mandate to make abortion available, whereas they had no direct relationship to the provision of desegregated schooling. He suggests that had the *Roe* opinion permitted states to limit abortion to hospitals, few locations for abortion would today be available in most states. It was the protection of the opportunity for clinics to offer abortions that allowed market forces to come into play. Ironically, this result was urged in only one of the briefs on behalf of abortion rights, and then only in several pages (pp. 195–200).

A. Courts and the Social Construction of Reality

One of the advantages of Rosenberg's approach is precisely that it allows us to build more complicated stories about the interactions of court decisions, administrative policies, and market forces. Here, however, Rosenberg treats markets and bureaucracies as if they were exogenous to law and politics and thus foreshortens what could be a rewarding pathway. In recent years historians, critical legal scholars, and political scientists, have suggested that courts and legal discourse have played a significant role in shaping the popular acceptance of the naturalness and apparent inevitability of market relationships (Thompson 1975; Hay 1975; Gaventa 1980; Tomlins 1988).

Indeed, while court interventions into schools and other institutions may have been somewhat new in the 1950s, courts had for a much longer time intervened in markets by, for example, enjoining labor unions from striking, using bankruptcy laws to reorganize business enterprises, and the law of trusts to manage transfers of wealth between generations. As Robert Cover (1986) remind us, courts never interpret the law without exercising power, indeed violence. The relationship of courts to markets seems different in these "private" law areas than in "public" law, but this is itself a political effect that needs to be explained rather than relied on as an exogenous cause. In treating markets as independent conditions for the exercises of power by courts, Rosenberg risks reifying what is a dynamic relationship.

The relationship between bureaucracies and courts is similarly complex. The exclusionary rule, *Miranda* warnings, and other Court imposed requirements on police did provide enlightened police managers with the excuse to impose controls that they sought in any event, but this highlights only one aspect of the relationship. Agencies faced with systemic litigation find themselves staffed by a growing number of lawyers who bring new viewpoints and concerns with them.[8] Bureaucratic agents deployed to neutralize court-imposed pressures,

[8] Prior to *Morrissey v. Brewer* (1972) the California Department of Corrections had no attorneys on staff, and the California Attorney General's office had no attorneys

whether in police departments, prison systems, or schools, may be themselves transformed by exposure to the process norms of legal actors (Taylor 1984).

As to both markets and bureaucracies, courts and law cannot be treated as totally discrete and independent entities. The conditions that Rosenberg has identified will prove more useful to future researchers if instead of being treated as variables useful in predicting outcomes that are overdetermined in any event, they are treated as opening strategies for exploring the role of law in the way power is exercised.

B. Legal Change and Social Resistance

The Hollow Hope takes aim against the overinflated image of courts as agents of social change in modern American society, but there is a larger story here about the limits of any formal political institutions to impose changes in social practices in the face of social resistance. The ghost of William Graham Sumner hovers in the background. Sumner's (1906) insistence that changes in law could not change "folkways" which had their own pace of evolution has been a marker for conservative pessimism against social reform ever since. Rosenberg's analysis makes it clear why liberals also must attend to these problems.

Rosenberg's study contributes to the larger reconsideration of social policymaking, but in focusing on the failures of courts it risks leaving the impression that other branches may easily succeed. Institutions like Congress and federal administrative agencies can bring more powerful incentives and sanctions to bear against popular prejudices than courts typically can. Yet when we look at the limited success of northern desegregation, of the Great Society programs, of public housing, we must question the assumption that the political branches are inevitably effective. Moreover, as the protracted battle to restore some of the statutory civil rights undermined by the Supreme Court in the late 1980s reveals, courts can be a spoiler if nothing else.

A more accurate summary of Rosenberg's findings would be that successful activism through any institution is most possible when political structures reinforce patterns of interaction that have already been rendered obsolete by deep social change. In such settings it may not matter much where activists first start pushing. The institutional structure, weakened from its foundations, may give in any event. But one should not forget that political institutions, including courts, play a part in shaping social and economic forces.

Part of my dispute with Rosenberg here lies in his explanatory model. Rosenberg follows a tradition in political science of

specializing in prison law. In the 1980s the Attorney General has had up to eight attorneys working full time with the Department of Corrections (Simon 1991).

showing how political changes ultimately emerge from social change that has dominated the discipline since the 1950s. That tradition has been challenged recently by a variety of approaches that take institutional structures and ideologies more seriously (March & Olsen 1989). These "new institutionalists" do not deny that social change is often the motor of political change but rightly insist that our explanations address not just why but how such change occurs.

Rosenberg suggests that political changes in the status of blacks and women that litigation cannot account for are explainable by structural changes in economy and society. These social changes, for example, the heightened demand for black labor in the 1950s and women's labor since the 1970s, might have produced a variety of political forms. The risk in Rosenberg's approach is treating institutions, including the courts, as little more than black boxes through which some kind of exogenous social energy passes on its way to constituting new political forms. It is only through exploring the black boxes and the structures, ideologies, and agendas that operate there that we can begin to delineate the ways in which change is articulated in its historical specificity.

To take an important example, it is not an exaggeration to say that every step of the history of blacks in North America has been interwoven with law; from the slave codes, to the post–Civil War black codes, to the Jim Crow laws of the 20th century. Economic opening in the 1950s promoted change in race relations, just as the abolition of slavery in the second half of the 19th century created an opening, but the forms that would fill those new spaces remained bound up with the legal constructs that have haunted the meaning of race in North America all along. The sheer endurance of the category race against over a century of social change is testament to the need to explore its historical articulation with some care. Of course, the legal meanings of race are not neatly separable from its other aspects, but because of law has been an important part of the mix, courts will remain a central forum for contesting the enduring power of race over the American imagination.

Conclusion

As innovative as Rosenberg's basic questions are, his approach reproduces the basic outlines of the relationship between law and society first set in place by the legal realists more than a half-century ago. Like the realists, Rosenberg debunks the self serving myths of the legal profession with the tools of the social sciences. But he also shares the realist tendency to reify social circumstances as independent of the legal definitions that inscribe them—and legal institutions as independent of the social forces that influence them.

Designed to refute an optimistic myth that courts are powerful agencies of social change, *The Hollow Hope* treats as the null hypothesis what might otherwise have been its starting point: the role of courts as regulators of social change. What is at risk of getting left out is the active role of courts in suppressing radical demands for social change and the power of litigation to open small but potentially critical ruptures in the naturalness of legal order and social hierarchy.

A more productive strategy could be achieved by merging Rosenberg's empirical resourcefulness with insights produced by other offshoots of legal realism—critical legal studies (Freeman 1978; Tushnet 1984; Bumiller 1987), feminist jurisprudence (Minow 1987; MacKinnon 1991), and critical race theory (Bell 1985; Crenshaw 1988). In various ways these literatures have explored the role of law and legal discourse in structuring the self interpretations of social agents engaged in power struggles in many social settings, but with important exceptions (Bumiller 1987) they have largely eschewed empirical exploration.

After generations of arguing about whether courts should exercise power in the political realm, it is indeed time to begin asking how that power is exercised. *The Hollow Hope* marks an important opening in this direction. Its insights and provocations are certain to spark more work. Its commitment to empirical demonstration is highly productive. This review has aimed to suggest how these departures will be strengthened if they can be moved beyond the polemic stance and overly narrow sense of empirical research that limit this path-breaking book.

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