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REVIEW ESSAYS

Judicial Matters

THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?

By Gerald N. Rosenberg.† Chicago, Illinois: The University of Chicago Press, 1991. Pp. vii, 425. Cloth.

Reviewed by Neal Devins‡

Imagine the rights of criminal defendants without *Mapp v. Ohio*¹ or *Miranda v. Arizona*;² the rights of women without *Roe v. Wade*;³ or the rights of racial minorities without *Brown v. Board of Education*.⁴ For those who see the courts "as powerful, vigorous, and potent proponents of change" (p. 2), that world would be horrific—"a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, [and] rogue police could break down citizens' doors in midnight raids."⁵ Indeed, the political furor over Clarence Thomas, Robert Bork, and other Supreme Court nominees is largely informed by the belief that Supreme Court Justices wield enormous political power. This belief also explains, as Justice Scalia complained, why the Justices are subject to "carts full of mail from the public, and streets full of demonstrators, urging us—their unelected and life-tenured judges . . .—to follow the popular will."⁶

This portrayal of the Court as a player, shaping policy through decisions with a nationwide impact, is hardly surprising. To suggest other-

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1. 367 U.S. 643 (1961).

2. 384 U.S. 436 (1966).

3. 410 U.S. 113 (1973).

4. 347 U.S. 483 (1954).

5. That is how Senator Edward Kennedy described "Robert Bork's America" in a speech he delivered from the Senate floor. 133 CONG. REC. S9188 (daily ed. July 1, 1987) (statement of Sen. Kennedy).

6. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 535 (Scalia, J., concurring in the judgment). On the question of whether judges should be removed from overt political demonstrations, see Robert F. Nagel, *Political Pressure and Judging in Constitutional Cases*, 61 U. COLO. L. REV. 685 (1990).

wise, that court decisions are of little consequence in altering bureaucratic and institutional practices, seems preposterous. This counterintuitive thesis, however, lies at the heart of Gerald Rosenberg's *The Hollow Hope*. Pointing to "severe limitations" in the "design[]" of American courts, Rosenberg concludes that courts "rarely . . . can make a difference" (pp. 342-43). Meaningful reform, instead, is accomplished through social movements and elected branch initiatives.

The Hollow Hope, by suggesting that courts "rarely" matter, breaks new ground in the debate over the judicial role. Others have fought over the consistency of court-ordered social reform with the separation of powers, the propensity of courts to advance individual rights, the vulnerability of courts to elected branch reprisals, the capacity of courts to effectively administer institutional reform, the impact of such court orders, and the propriety of elected government efforts to shape constitutional norms.⁷ While this debate is far-reaching and sharp lines have been drawn on every issue, it presupposes that courts (for better or worse) make a difference. By challenging this assumption, *The Hollow Hope* seeks to fundamentally change the way social reformers, academics, and politicians view the courts.

Rosenberg accomplishes this task by measuring both the direct and indirect effects of court action.⁸ Direct effects concern changes in institu-

7. For even-handed overview discussions of the judicial activism debate, see CHARLES A. JOHNSON & BRADLEY C. CANON, *JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT* (1984); MICHAEL A. REBELL & ARTHUR R. BLOCK, *EDUCATIONAL POLICY MAKING AND THE COURTS* 3-15 (1982); Robert A. Katzmann, Note, *Judicial Intervention and Organization Theory: Changing Bureaucratic Behavior and Policy*, 89 YALE L.J. 513, 513-18 (1980). For arguments that far-reaching judicial policymaking is an inevitable outgrowth of congressional incentives and judicial attributes, see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (arguing for a broader judicial role when dictated by the needs of justice); Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980) (arguing that modern broader judicial roles are consistent with traditional judicial attributes); Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1269-88 (tracing the roots of the modern judicial role). For criticisms of judicial policymaking, see DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977) (arguing that courts lack the institutional attributes of policymakers); R. SHEP MELNICK, *REGULATION AND THE COURTS* (1983) (arguing that courts cannot manage unintended consequences of their decisions); JEREMY RABKIN, *JUDICIAL COMPULSIONS* (1989) (arguing that courts improperly transform government agencies into agencies of constituent interests); Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 88-106 (1979) (same); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 718-23 (1978) (arguing that separation of powers limits judicial lawmaking). For defenses of judicial policymaking, see REBELL & BLOCK, *supra*, at 205-10 (arguing that courts are good factfinders and able administrators); Eisenberg & Yeazell, *supra*, at 495-501 (arguing that separation of powers demands judicial policymaking); Stephen L. Wasby, Book Review, 31 VAND. L. REV. 727, 744-47 (1978) (arguing that legislatures and courts share comparable deficiencies in making sound policy).

8. Rosenberg considers both constitutional and statutory matters, although he limits his inquiry to federal claims in federal courts. State court interpretations of state constitutional provisions are not considered at all. This is unfortunate, for state courts increasingly play a leadership role on questions involving the exclusionary rule, freedom of speech, freedom of religion,

tional behavior attributable to court action; indirect effects are court-influenced changes in social attitude and political behavior. Through an examination of the immediate effect of the decision, opinion polls (measuring both awareness of Court opinions and changes in attitude as a result of the ruling), news coverage of issues that were subject to Court decision, and other measures, a startling conclusion is reached: court action "seldom bring[s] reform any closer" (p. 343) and often "strengthen[s] the opponents of such change" (p. 342). Changes in race relations, gender roles, criminal procedure, and the environment often attributed to court action, instead, are the product of independent action taken by elected government and social reform movements.

Rosenberg's objective is not simply to deconstruct the judiciary. He seeks to transform his findings of judicial inpotence into a call for action, not despair: social reformers accomplish more by seeking change through "inobilizing citizens" and other "political" means than through expensive and often counterproductive litigation (p. 343). This conclusion suggests images of the phoenix of social reform rising from the ashes of failed judicial activism. When juxtaposed with the Rehnquist Court, whose *raison d'être* often appears the repudiation of social reform-oriented judicial activism, *The Hollow Hope's* message is forceful.⁹

The Hollow Hope, moreover, is perfectly timed. With civil rights interests, women's groups, and environmentalists increasingly turning to elected government and away from the courts, Rosenberg delivers a provocative justification for such behavior and encourages more of it. If Rosenberg is correct and social reform can only be accomplished through political means, then the Rehnquist Court is a blessing in disguise for liberals. By refusing to play an affirmative countermajoritarian role, the Rehnquist Court may encourage populist initiatives. If Rosenberg is wrong and the courts play a vital role in reforming society, then the complacency of the Rehnquist Court tragically negates a critical engine for social reform.

equal educational opportunity, and privacy. See Louis Fisher, *How the States Shape Constitutional Law*, STATE LEGISLATURES, Aug. 1989, at 37. In *Right to Choose v. Byrne*, for example, the New Jersey Supreme Court provided broader privacy protections than the U.S. Supreme Court, explaining that "[a]lthough the state Constitution may encompass a smaller universe than the federal constitution, our constellation of rights may be more complete." 450 A.2d 925, 931 (N.J. 1982). For commentary on the importance of state constitutional interpretation, see William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Robert F. Williams, *State Constitutional Law: Teaching and Scholarship*, 41 J. LEGAL EDUC. 243 (1991). For commentary on the ability of special interest groups to successfully advance their agenda through state court litigation, see Donald N. Jensen & Thomas M. Griffin, *The Legalization of State Educational Policymaking in California*, in *SCHOOL DAYS, RULE DAYS* 325, 325 (David L. Kirp & Donald N. Jensen eds., 1986) ("The result is that there are fewer areas of educational policy now left to local discretion than ever before.").

9. See DAVID SAVAGE, *TURNING RIGHT* (1992). The 1992 Rehnquist Court rulings on school prayer and abortion do not dispel this suggestion. Instead, these decisions indicate that a bare majority of the current Court is reluctant to disavow long-standing, highly controversial precedents.

The truth, not surprisingly, lies somewhere between the image of the Court as a vigorous agent of social change and Rosenberg's portrayal of judicial ineffectiveness. This Review Essay will define and defend that middle ground. In so doing, *The Hollow Hope* will be both vilified and applauded. The book deserves harsh criticism because its conclusions are checkered by problems of emphasis, articulation, and analysis. It endorses inconsistent measures of effective judicial action, focuses on the Court in isolation rather than as part of a larger political culture, uses presumptions hostile to the recognition of a broad judicial role, and employs inadequate data and questionable portrayals of existing research. To the extent that *The Hollow Hope* intimates that court-ordered reform is an oxymoron, these problems are fatal.

Strangely, *The Hollow Hope* can stand tall, if not erect, even in the face of the deficiencies noted above. The image of judicial impotence suggested by Rosenberg is rooted as much in the author's questionable presentation as in his analysis. Specifically, in an effort to isolate and quantify the Court's impact, short shrift is given to the essential role that courts do play in "constitutional dialogues"¹⁰ with elected government. With little effort, Rosenberg's articulation can be recalibrated and *The Hollow Hope* can serve as a testament to the fundamental role played by nonjudicial actors in shaping constitutional values.

Rosenberg convincingly shows that courts cannot do it alone. Congress, the White House, the states, and interest groups also play a pivotal role. State efforts to legalize abortion before *Roe*, congressional and administrative efforts to eliminate dual school systems, and the civil rights and women's movements highlight a remarkable inventory of nonjudicial influences identified by Rosenberg. *The Hollow Hope* also does an extraordinary job of demonstrating that numerous landmark Supreme Court opinions were little known and even less discussed at the time of decision. In fact, Rosenberg's evidence of the paramount role played by nonjudicial forces is one of the strongest to date.

The Hollow Hope then offers abundant support for a more modest, more accurate, and equally important thesis: the Supreme Court works within and hence both influences and is influenced by a larger culture of political and social interests. While severe problems in analysis still remain, this rearticulation accomplishes Rosenberg's principal objective of sobering those who endorse an active judicial role. That this accounting is less vitriolic, less provocative, and less pathbreaking than the thesis Rosenberg suggests seems an acceptable price for accuracy.

This Review Essay will advance this alternative formulation in the following ways. First, this Review Essay will identify problems in Rosenberg's articulation and analysis. Second, an alternative depiction

10. This phrase is borrowed from LOUIS FISHER, *CONSTITUTIONAL DIALOGUES* (1988).

of *The Hollow Hope* will be suggested. This depiction will show that Rosenberg's work—stripped of its provocative veneer—makes a good (albeit flawed) case for seeing constitutional decisionmaking as a combination of judicial and nonjudicial forces. Moreover, through an examination of issues both discussed and ignored in *The Hollow Hope*,¹¹ this alternative formulation will be defended. Third, this Review Essay will suggest the significance of these findings to developing modern day strategies for seeking social reform.

I

THE HOLLOW HOPE DESCRIBED

Rosenberg begins his inquiry with a series of questions "important for understanding the role of any political institution, yet . . . seldom asked of courts[.] . . . To what degree, and under what conditions, can judicial processes be used to produce political and social change? What are the constraints that operate on them? What factors are important and why?" (pp. 1-2). Two answers are suggested—one a "constrained view," the other a "dynamic view." The constrained view emphasizes inherent limits in the reach of judicial authority, namely: (1) courts are grounded "by precedent and the beliefs of the dominant legal culture" and hence are unlikely to play the role of social crusader (pp. 10-13); (2) the power of elected government to appoint and confirm, to strip the courts of jurisdiction, and to argue cases deprives the judiciary of the necessary independence to produce significant social reform (pp. 13-15); and (3) "[c]ourts lack the tools to readily develop appropriate policies and implement decisions ordering significant social reform" (pp. 15-21). The dynamic view, in contrast, "sees courts as powerful, vigorous, and potent proponents of change" (p. 2). Specifically, this model portrays judges as well-qualified policy analysts who are willing to protect the underrepresented and whose decisions not only are obeyed but also set the tone of future debate (pp. 21-30). *The Hollow Hope*, rather than seeing the truth as somewhere between these poles, fully embraces the constrained court model.

Rosenberg concludes that "effective" and "significant" court-ordered reform only takes place when nonjudicial actors support such reform by, for example, offering incentives for compliance, imposing penalties for noncompliance, implementing the decision through pre-existing market mechanisms, and using the decision as a justification for action for those already willing to act (pp. 30-36). Rosenberg also concludes

11. The following topics will be considered in this Review Essay: race and education, affirmative action, employment discrimination, women's rights, abortion, and, of course, the legislative veto. Admittedly, my choice of topics is selective. However, since I consider those issues to be at the heart of *THE HOLLOW HOPE*, my choices are appropriate to a review of Rosenberg's analysis.

that Supreme Court decisions neither reshape public discourse nor spur on legislative and administrative initiatives. By examining press coverage, elected government action in the immediate wake of the opinion, public recognition of the Court, and other political, social, and economic factors at work, Rosenberg finds little evidence supporting the claim that the Court is an effective prod. Indeed, Rosenberg finds some evidence indicating that the Court has had an adverse influence (pp. 155-56, 182, 342).¹² Pointing to these findings, Rosenberg argues that the burden of proof now rests on those who herald the Court's indirect influence (p. 110).

The key to these surprising conclusions is *The Hollow Hope's* examination of civil rights and women's rights. In both instances, Rosenberg concludes that the Court's impact has been negligible at best and counterproductive at worst. On civil rights, he asserts both that "courts contributed little to civil rights" (p. 169) and that "changes in civil rights could plausibly have happened without Supreme Court action" (p. 169). Moreover, in a disturbing passage, he assails *Brown*: "By stiffening resistance and raising fears before the activist phase of the civil rights movement was in place, *Brown* may actually have delayed the achievement of civil rights" (p. 156). On women's rights, he speaks of "the lack of judicial and extra-judicial effects of Court decisions" (p. 265), saying that "the Court is far less responsible for the changes that occurred than most people think" (p. 201), and that the growth of "right-to-life" forces in the wake of *Roe* suggests "that one result of litigation to produce significant social reform is to strengthen the opponents of such change" (p. 342).

Rosenberg's conclusions on civil rights derive, for the most part, from his evaluation of *Brown* and its aftermath. Claiming that "[t]he Court had spoken clearly and forcefully" (p. 45) in its 1954-64 school desegregation decisions, Rosenberg attributes the failure of southern desegregation to constraints on the judicial power in the face of widespread hostility to *Brown*. For example, President Eisenhower publicly refused to comment on the case and privately criticized the decision (p. 76), state legislatures enacted 136 laws and constitutional amendments in the three years after *Brown* (p. 79), and private groups resorted to violence and intimidation (ranging from newspaper publication of the names of blacks who signed a petition in support of desegregation to the bombing of black churches and murder) (pp. 82-83). The consequence of this

12. The focus of Rosenberg's analysis is the period immediately following a Court decision. For Rosenberg, "the more time that elapses between the order and the action, the more tenuous is the causal link" (p. 109). Other commentators, however, argue that the impact of Court decisions is not capable of accurate measure until some period of years has passed. See JOHNSON & CANON, *supra* note 7, at 257 ("Usually some time must pass before new symbols achieve widespread acceptance . . ."); see also *infra* note 26 (discussing the long-term impact of the exclusionary rule and *Miranda*).

hostility was that in the decade after *Brown* only 1.2% of black children attended school with white children, demonstrating, in the words of Rosenberg, that "*Brown* and its progeny stand for the proposition that courts are impotent to produce significant social reform," (p. 71) "contribut[ing] virtually *nothing* to ending segregation . . . in the Southern states" (p. 52).

Rosenberg likewise concludes that *Brown* did not serve as a catalyst to other political and legal challenges to race discrimination. Recognizing that "there are no precise and exact measures that can be applied" (p. 109) to quantify indirect effects, a host of factors are considered: press coverage, opinion polls, and legislative and executive actions that make reference to a decision. None of these measures, in Rosenberg's estimation, indicate that *Brown* shaped public discourse on civil rights. For example, media coverage of civil rights, both in large circulation magazines (*Reader's Digest*, *Life*) and elite publications (*New Republic*, *New York Times Magazine*), did not increase at the time of the decision (pp. 111-16); reference to *Brown* in debates over civil rights legislation in 1957, 1960, and 1964 occupied "only a few dozen out of many thousands of pages" (p. 120); public opinion on school desegregation did not change in the immediate aftermath of *Brown* (pp. 127-31); *Brown* did not prompt public demonstrations and marches (pp. 133-50); and financial support for and membership in civil rights groups was unaffected by the decision (pp. 150-55).

In finding *Brown*'s effects inconsequential, *The Hollow Hope* argues that civil rights reforms are attributable to federal action directed at southern school systems in response to sit-ins, boycotts, and other nonjudicial pressures.¹³ The conclusion that nonjudicial forces were behind these changes is convincingly evidenced in the growth in demonstrations, news coverage, and civil rights group support in the wake of the 1956 Montgomery bus boycott, the sit-in movement of the early 1960s, the 1961 freedom rides, and police brutality in the 1963 Birmingham demonstrations. Rosenberg charts each of these episodes and finds that both individually and collectively, these events mattered much more than the *Brown* decision (pp. 133-56). Additionally, the rise of the black electorate helped spur the federal government into action, and the south became more receptive to change due to the influx of northern businesses ready to invest in a desegregated south (pp. 157-62). The best that can be said about the Court, for Rosenberg, was that it swam with and thus

13. According to Rosenberg, "[t]he actions of the Supreme Court appear irrelevant to desegregation from *Brown* to the enactment of the 1964 Civil Rights Act and 1965 ESEA [Elementary and Secondary Education Act] (p. 52)," legislation spurred on by "growing civil rights pressure from the 1930s, economic changes, the Cold War, population shifts, electoral concerns, the increase in mass communication" (p. 169).

became part of a current of history; but "[t]hat current was growing in force and . . . the Court contributed little to it" (p. 169).

Rosenberg is on strong footing in arguing that legislative reform, not court action, prompted school desegregation.¹⁴ In the decade following *Brown*, less actual desegregation of southern schools occurred than in 1965 alone. The Elementary and Secondary Education Act of 1965,¹⁵ making available billions of dollars in educational assistance, coupled with the 1964 Civil Rights Act's (Title VI) demand that federal grant recipients not discriminate,¹⁶ spurred recalcitrant southern systems to alter their segregationist practices. For example, for the 1965-66 school year, the percentage of black children in biracial schools in Southern states rose from two percent to six percent.¹⁷ From 1968 to 1972, school districts acting under federal administrative pressure were less segregated than those acting under court order (p. 53).

The Hollow Hope's assessment of abortion and women's rights, while less detailed and less systematic, reaches similar conclusions. Indeed, Rosenberg uses identical metaphors, speaking of the Court as "join[ing]," "not creat[ing]," "a current of social change and a tide of history" (p. 265). Moreover, like his analysis of civil rights, Rosenberg sees courts as trying to play a leadership role but failing: "[A]s with civil rights . . . the Court is far less responsible for the changes that occurred than most people think" (p. 201); "[a]dvocates of women's rights have 'won' quite a number of legal cases" (p. 212), but "[p]recedent-setting decisions in women's rights have produced little because courts lack all the essential tools required of any institution hoping to implement change" (p. 227).

Roe v. Wade, rather than being characterized as a watershed, is seen as solidifying a "widespread, vocal, and effective" pro-choice lobby (p. 184). That forty-six state laws were invalidated under *Roe* is downplayed; highlighted, in its stead, are statistics showing that the rate of legal abortions rose more dramatically the two years before *Roe* (300%, from 193,500 in 1970 to 586,800 in 1972) than the two years after *Roe*

14. This contention is well accepted. See GARY ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT* 356-57 (1969) (arguing that constraints limited the courts to effecting symbolic change, and that changes in school segregation required the mobilization of Congress and the federal bureaucracy); Neal Devins & James Stedman, *New Federalism in Education: The Meaning of the Chicago School Desegregation Cases*, 59 NOTRE DAME L. REV. 1243, 1245-51 (1984) (arguing that the first major inroads to southern school desegregation followed from the implementation of legislative reforms, not court decisions).

15. Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C. (1990)).

16. Pub. L. No. 88-352, Title VI, § 601, 78 Stat. 241, 252 (codified at 42 U.S.C. § 2000d (1981)).

17. STEPHEN K. BAILEY & EDITH K. MOSHER, *ESEA: THE OFFICE OF EDUCATION ADMINISTERS A LAW* 153 (1968).

(52%, from 586,800 in 1972 to 898,600 in 1974) (pp. 178-80). Rosenberg also minimizes *Roe*'s impact by arguing that nonjudicial market mechanisms were critical in effectuating the decision. Specifically, had *Roe* demanded that abortions be performed in hospitals, the widespread refusal of hospitals to perform abortions (only 17% of public and 23% of private hospitals perform abortions) suggests that the case's impact would have been negligible (pp. 189-201).

Rosenberg's examination of "women's rights" is also critical of the Court. Noting that the gap between men's and women's earnings has stayed constant since 1955, that litigation has not affected the wage structure, that most employment is sex-segregated, and that the ABA Committee on Judicial Selection typically gives better ratings to men than women, Rosenberg deems court action in this area inconsequential (pp. 207-12). The crux of the problem, instead, is a long list of social ills, including domestic violence, disproportionate household work, inadequate child support, and biased laws (pp. 212-26).

Rosenberg likewise finds a limited judicial role in his analysis of indirect judicial effects on women's rights in general and abortion in particular. Media coverage did not increase with *Roe*; instead, greater attention was given to abortion in the years preceding *Roe* than in 1973, the year of the Court's decision (pp. 229-34). Political leaders, too, spoke more about women's rights in the early 1970s, before a spate of "pro-women" Supreme Court decisions (pp. 234-35). Similarly, most significant changes in public opinion predate Court decisions (pp. 235-41). Finally, a rise in membership in women's organizations did not follow *Roe*, but came several years later (pp. 242-45). Based on this analysis, Rosenberg concludes: "I have looked at sensible and appropriate places to find evidence [of the extra-judicial effect of Court decisions here]. The evidence is not there" (pp. 245-46). While Rosenberg feels that the reasons for improvement in women's rights "may be impossible to understand or state precisely," he nonetheless finds "the lack of judicial and extra-judicial effects of Court decisions" in the area "clear" (p. 265).

Rosenberg does not limit himself to race and gender. In a grab bag section titled "The Environment, Reapportionment, and Criminal Law," he hardly bats an eyelash in arguing that environmental litigation "achieved precious few victories" (p. 292), that "only under unusual circumstances" (p. 303) could courts make a difference in reapportionment, and that the "revolution" to reform the criminal law through litigation "failed" (p. 335). Rosenberg's conclusions here, while echoing his judicial ineffectiveness theme, vary significantly from his findings on civil rights and gender. In those extensive case studies, Rosenberg suggests that the courts were without power—that *Brown* did not effect black-white student contact, *Roe* did not alter already rising abortion rates, and women's rights decisions did not impact on the wage gap. With respect

to the environment and criminal law, at least, Rosenberg is often concerned with whether the courts can effectively manage social change, not whether court decisions had an impact.¹⁸ On environmental issues, for example, agency compliance with court orders may result in shifting resources away from other equally important programs. By "ignor[ing] the possible in favor of the principled," "the best-intentioned judicial decisions may hurt rather than help the environment" (pp. 281-82). A similar point is made in Rosenberg's description of prison reform litigation. Recognizing that "some changes have been made," Rosenberg expresses concern over the courts' "fail[ure] to deal with 'underlying issues and conditions'" as well as the possible positive correlation between prison reform and prison violence (pp. 306-07). Questions over the efficacy of such judicial stalwarts as *Miranda* and *Gideon* are also raised: *Miranda* because—despite the reading of rights—the disequilibrium in power between police and suspect remains and therefore the rate of statements to the police and confessions remains constant (p. 326); *Gideon* because "while the availability of counsel has increased greatly, the legal revolution does not seem to have greatly increased the availability of the effective assistance of counsel" (p. 331). To realize the ultimate objectives of *Gideon*, *Miranda*, prison reform, and environmental litigation, Rosenberg contends that political support is necessary (pp. 281-82, 313, 334). Until reformers "put as much time, energy, and resources into political and social change as into litigation . . . litigation will not be effective. . . . The political challenge must be faced directly. Litigation . . . 'is not, of course, the real answer'" (pp. 313-14 (footnote omitted)).

The Hollow Hope, in the end, tries to deliver a double whammy to court-ordered change. First, the discussion of *Brown*, *Roe*, and women's rights indicates that court-ordered change does not effect institutional behavior. When implementing bodies are hostile to change (*Brown*), court orders will be disregarded like waste paper.¹⁹ When change occurs (*Brown*, *Roe*), it is likely that that change would have occurred even if the Court did not act. Second, the discussion of criminal law and the environment suggests that compliance with court orders is a far cry from

18. There is no question that court action affected institutional behavior here. On environmental matters, see generally MELNICK, *supra* note 7 (examining intended and unintended effects of clean air litigation). On prison reform, see Samuel J. Brakel, *Prison Reform Litigation: Has the Revolution Gone Too Far?*, JUDICATURE, June-July 1986, at 5 (discussing widespread court oversight of state prison systems); Jack Drake, *Judicial Implementation and Wyatt v. Stickney*, 32 ALA. L. REV. 299 (1981) (discussing the impact of the first case establishing a right to treatment for persons involuntarily committed to a state mental institution); Daryl R. Fair, *Prison Reform by the Courts*, in GOVERNING THROUGH COURTS 149 (Richard A.L. Gambitta et al. eds., 1981) (arguing that courts can change prison conditions).

19. This phrase is borrowed from LEARNED HAND, THE BILL OF RIGHTS 14 (1958) (noting that without final judicial review, court judgments might be little better than "waste paper" when other branches disagreed).

court-ordered change. In some cases (prison reform, environment), court-ordered improvements in one area yield unintended adverse consequences in a different area. In other cases (*Miranda*, *Gideon*), technical compliance with court orders seems meaningless because underlying conditions are not changed.

II

DO COURTS MATTER?

Rosenberg may well be correct in criticizing environmentalists, civil rights groups, women's interests, and others for relying too much on the courts. Rosenberg errs, however, in suggesting that the courts' impact is nugatory. First, in reaching his ultimate conclusions on the futility of litigation, Rosenberg treats two related but quite different issues as if they were the same; namely (1) whether court decisions affect social institutions, and (2) whether litigation is an effective way to reform social institutions. Second, Rosenberg's measures of the direct and indirect effects of decisions such as *Brown* and *Roe* are inaccurate. In seeking to isolate and then measure the judicial role, Rosenberg underestimates that role. Relatedly, his choice of case studies is subject to question. Decisions not considered by Rosenberg, such as *Bob Jones University v. United States*²⁰ (race and education), *Metro Broadcasting v. F.C.C.*²¹ (affirmative action), *Griggs v. Duke Power Co.*²² (employment discrimination), and *Webster v. Reproductive Health Services*²³ (abortion), reveal that the Court's direct and indirect effects may be of great magnitude. In the end, the structure of analysis in *The Hollow Hope* and the execution of that analytic model suggest that Rosenberg is content in not finding a significant judicial role. Put simply: courts—in Rosenberg's hands—seem destined to fail.

The Hollow Hope is filled with language indicative of an anti-court bias. The book's repeated attacks on the futility of litigation do more than simply drive home a point. By summarizing its findings in their starkest, most extreme form, the book is far too absolutist. In contrast to problems of overbearingness, Rosenberg also discounts the judicial role through an often elusive presentation. He treats interchangeably quite different concerns about the potential of judicial reform. In the book's introductory chapter, he questions whether "judicial processes [can] be used to produce political and social change" (p. 1); whether courts can be "consequential in effecting significant social reform" (p. 5); and "whether and under what conditions courts can produce significant social reform" (p. 6). While these measures of judicial influence are quite different, Rosenberg views them as fungible because "[a]ll of these formulations

20. 461 U.S. 574 (1983).

21. 497 U.S. 547 (1990).

22. 401 U.S. 424 (1971).

23. 492 U.S. 490 (1989).

suggest that courts can sometimes make a difference" (p. 5). In later chapters and especially the conclusion, however, *The Hollow Hope* is framed as a "study . . . examin[ing] whether . . . courts can produce significant social reform" (p. 336 (emphasis added)).²⁴

There is another way in which Rosenberg restates his inquiry. The ultimate purpose of *The Hollow Hope* is to help reformers determine whether they should expend scarce resources on court-centered strategies (pp. 4, 342-43). Of course, if court action has no impact, litigation is senseless. It is possible, however, that court action may alter institutional behavior without ultimately advancing the agenda of social reformers. For example, social reform efforts would be undermined were a state to drop a social program rather than respond to court demands that the program be better administered.²⁵ Rosenberg recognizes this possibility. Early in the book he discusses the importance of determining whether the "courts are effective producers of significant social reform" (p. 6 (emphasis added)), and in the book's final section he criticizes apparently significant court-ordered environmental and criminal reform on effectiveness grounds. Confusing this distinctive inquiry, however, Rosenberg in both the book's introduction and conclusion treats "significant social reform" and "effective" reform as interchangeable (pp. 5-6, 338). Moreover, Rosenberg's effectiveness criticism is wanting. In his chapters on race and gender, Rosenberg seeks to ascertain the judiciary's influence by speculating on "what would have happened if the Court had not acted as it did" (p. 157). In criticizing prison reform litigation, *Miranda*, and *Gideon*, this critical question is not pursued. Despite recognizing that the most severe prison overcrowding and most deplorable prison conditions have been eliminated (p. 306), that police routinely read a suspect her rights (p. 326), and that access to a court-appointed attorney has grown tremendously (p. 330), Rosenberg's effectiveness attack on these cases never considers what the world would look like absent judicial intervention.²⁶ By failing to consider this matter, Rosen-

24. For similar articulations, see pp. 22, 32, 343. Rosenberg is a bit unclear on what he means by "social reform." He claims that litigation affecting a single bureaucracy is outside his definition; instead, social change is about litigation "altering bureaucratic and institutional practice nationwide" (p. 4). At the same time, as his discussion of school desegregation and prison reform litigation reveal, interrelated but piecemeal reform efforts fit his definition. Moreover, as is the case with abortion, reform is often measured by individual decisionmaking and private market forces. Consequently, this Review Essay will utilize Rosenberg's broadest articulation of social reform—"policy change with nationwide impact" (p. 4).

25. This "policy" argument supports the Supreme Court's decision not to impose liability on the state for child abuse connected to the gross negligence of a social worker. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989). For a commentary critical of this reasoning, see Jack M. Beermann, *Administrative Failure and Local Democracy: The Politics of DeShaney*, 1990 DUKE L.J. 1078.

26. Problems with Rosenberg's criminal law analysis are multi-fold. His analysis of *Miranda*'s impact relies heavily on studies conducted five years after the decision, although the case is now twenty-five years old (pp. 326-29). Reliance on such dated material may prove misleading. See

berg again discounts the judicial role. More significantly, his advice on the futility of litigation seems at best presumptuous.

Problems in articulation, while significant, are overshadowed by problems in Rosenberg's measurement of judicial impact. The heart of *The Hollow Hope* is its case studies on race and gender, studies where Rosenberg commits error by seeking to isolate the judiciary's impact. A fuller treatment of these issues reveals that courts play a significant role in shaping public values. This is evident both in topics examined in *The Hollow Hope* and in related topics not considered by Rosenberg; namely, busing, the tax-exempt status of private schools, affirmative action, employment discrimination, and state responses to the *Webster* decision.

A. Race

1. The Courts and School Desegregation

Rosenberg's analysis of race and education is a mixed bag. He does an exceptional job in showing that nonjudicial forces overshadowed the Supreme Court in making tangible *Brown*'s demand for "a system without a 'white' school and a 'Negro' school, but just schools."²⁷ Without the backing of elected government, *Brown* was ineffective in southern states, holding out "great promise" but "heeded with all due deliberate delay."²⁸ Furthermore, Rosenberg is clearly correct in arguing that, rather than *Brown*, the moving forces in civil rights legislation were sit-ins, boycotts, and police brutality.²⁹ Rosenberg, however, incorrectly concludes that the predominance of non-judicial influences suggests an inconsequential judicial role. This conclusion is based on a misreading of *Brown*, a misunderstanding of how the case influenced others, and a fail-

Jonathan D. Casper, *The Impact of Criminal Justice Innovation: Feeley on Court Reform*, 1983 AM. B. FOUND. RES. J. 959, 962 (reviewing MALCOLM M. FEELEY, *COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL* (1983)) (criticizing the assessment of reform by looking only at its immediate aftermath). Indeed, more recent studies suggest that one indirect effect of *Miranda* is to reduce police violence during arrests. DAVID SIMON, *HOMICIDE: A YEAR ON THE KILLING STREETS* 198-203 (1991). It is also risky business in criminal procedure issues to reach definitive conclusions. As Thomas Davies warned in his 1983 study of the exclusionary rule, "empirical research . . . reflects [the] tensions between empirical and doctrinal analysis . . . [thereby pointing to] the mischief that may result from basing legal policy on an inadequately researched empirical premise." Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule*, 1983 AM. B. FOUND. RES. J. 611, 678.

27. *Green v. County Sch. Bd.*, 391 U.S. 430, 442 (1968).

28. CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE* 232 (1985) (quoting Martin Luther King, Jr.). In border states, however, *Brown* did make a difference.

29. See *id.* at 232-33 (listing the forces behind the 1964 Civil Rights Act passage as national protest, violent response, and the martialing of religious groups); see also PAUL BURSTEIN, *DISCRIMINATION, JOBS, AND POLITICS* 69-96 (1985) (linking passage of the Act to changes in public opinion and to social protest); ROBERT A. DAHL, *PLURALIST DEMOCRACY IN THE UNITED STATES* 428 (1967) (passage of the 1964 Act explained by "a collection of events and circumstances beyond the power of any one person to shape, control, or even channel").

ure to examine the judicial role in race and education subsequent to the "first decade after *Brown*" (pp. 74-93).

Brown, contrary to Rosenberg's assertions, was never intended to restructure southern school systems; instead, it was an opening salvo in a nationwide debate on race equality. At the time of the decision, the Supreme Court was sharply divided on the question of segregated education. In fact, Justice Harold Burton's conference notes and Justice William Douglas' autobiography reveal that a majority of the Court was prepared to uphold "separate but equal" schools when oral arguments were first heard in *Brown*.³⁰ Reflecting both this division and its recognition that its decision would face massive resistance in the south, the Court was purposefully evasive in its *Brown* decisions. Rather than require southern systems to take concrete steps to dismantle dual systems, the Court did not issue a remedy in *Brown* and then stated a year later in *Brown II* that "varied local school problems" were best solved by "[s]chool authorities," that district court judges were best suited to examine "local conditions," and that delays associated with "problems related to administration" were to be expected.³¹

The inevitable result of this "remedial" order was inaction. As J. Harvie Wilkinson put it, "the South was audibly relieved by *Brown II*, a victory of sorts snatched from the defeat of only a year ago [in *Brown*]." ³² Indeed, southern newspapers heralded the remedial order, especially since the Court entrusted the implementation of its decision to "[o]ur local judges [who] know the local situation."³³ These local judges did not disappoint segregationists, sometimes because they too opposed *Brown* and sometimes because they were hesitant to fight entrenched local institutions.³⁴

The Supreme Court, then, did not seek to provide the type of leadership against which one can measure changes in black-white student contact. Those efforts did not begin until 1968, when the Supreme Court demanded, in *Green v. County School Board*,³⁵ that school boards "come

30. See WILLIAM O. DOUGLAS, *THE COURT YEARS 1939-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* 113 (1980); S. Sidney Ulmer, *Earl Warren and the Brown Decision*, 33 J. POL. 689, 691-92 (1971) (summarizing Burton's conference notes).

31. *Brown v. Board of Educ.*, 349 U.S. 294, 299-300 (1955). See generally LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* 261-64 (1992) (discussing Chief Justice Warren's attempt to craft a unanimous decision in order to temper southern hostility); J. Harvie Wilkinson, III, *The Supreme Court and Southern School Desegregation, 1955-1970: A History and Analysis*, 64 VA. L. REV. 485, 488-505 (1978) (discussing *Brown II* and the subsequent period of southern defiance).

32. Wilkinson, *supra* note 31, at 490.

33. REED SARRATT, *THE ORDEAL OF DESEGREGATION* 200 (1966) (quoting a southern attorney). For other comments, see Wilkinson, *supra* note 31, at 490.

34. See ORFIELD, *supra* note 14, at 15-18 (discussing the pressures on southern district court judges in the wake of the *Brown II* decision); J.W. PELTASON, *FIFTY-EIGHT LONELY MEN* (1961) (same).

35. 391 U.S. 430 (1968).

forward with a plan that promises realistically to work, and promises realistically to work *now*."³⁶ What can be measured in 1964 is whether the Supreme Court's decisions in *Brown* contributed to the national dialogue resulting in mid-sixties legislative and administrative reforms.

Rosenberg answers this question with a resounding no, but he is wrong. First, both the promise and failure of *Brown* were lightning rods to the civil rights movement. According to federal judge Constance Motley, who assisted the NAACP in *Brown*, blacks construed the opinion to mean "that the Supreme Court was behind them . . . *Brown* gave them the courage to go into restaurants, to go on freedom rides in the South."³⁷ The ultimate failure of *Brown* also spurred black activism by heightening the anger felt over the continuing denial of equality.³⁸ Second, *Brown* influenced legislative deliberations over the 1964 Civil Rights Act and the Elementary and Secondary Education Act (ESEA). On the issue of Title VI funding prohibitions, bill sponsor Thomas Kuchel argued that Title VI prevented "unconstitutional" expenditures of federal funds, thereby "furthering a policy of nondiscrimination, and thus eliminating defiance of the law of the land"—in other words, *Brown*.³⁹ Hubert Humphrey similarly defended Title VI, observing that "massive Federal funds are now being paid each year, to help construct and operate segregated schools, and thus to maintain and perpetuate a system which violates the Constitution."⁴⁰ For both Kuchel and Humphrey, southern resistance to *Brown* made Title VI a moral imperative; otherwise, Congress would knowingly fund blatantly unconstitutional state action.⁴¹

36. *Id.* at 439.

37. Francis J. Flaherty, *Brown, Part III: 30 Years After 'All Deliberate Speed,' Country Still Litigates Desegregation*, NAT'L L.J., May 14, 1984, at 1, 27; see also TAYLOR BRANCH, *PARTING THE WATERS* 124 (1988) ("[T]he *Brown* case had brought fresh excitement to the NAACP . . ."); Robert J. Glennon, *The Role of Law in the Civil Rights Movement: The Montgomery Bus Boycott, 1955-1957*, 9 LAW & HIST. REV. 59 (1991) (legal developments and the civil rights movement are integrally intertwined).

38. WHALEN & WHALEN, *supra* note 28, at 232. Rosenberg responds to this argument by claiming that "[because *Brown* was so little known] it does not seem likely that the Court added very much to the level of frustration" (p. 139).

39. 110 CONG. REC. 6562 (1964) (statement of Sen. Kuchel).

40. 110 CONG. REC. 6543 (1964), reprinted in BERNARD SCHWARTZ, *STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS PART II* 1212 (1970). Humphrey also recognized that "[w]hat is needed, therefore, is a balance between the goal of eliminating discrimination and the goal of providing education . . . [to] minority groups." 110 CONG. REC. 6547 (1964), reprinted in SCHWARTZ, *supra*, at 1222.

41. Without *Brown*, the "separate but equal" doctrine would have retained vitality. Segregated schools—as the south argued in *Brown*—would then have been considered separate but nondiscriminatory. See Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 21 (1990) (discussing the oral arguments in *Brown*). In other words, without *Brown*, Title VI's effectiveness would have hinged on congressional endorsement of nondiscrimination standards at odds with Supreme Court measures. There is no doubt that *Brown* made Title VI an easier sell.

More striking, Title IV of the 1964 Act, authorizing the Justice Department to file desegregation lawsuits,⁴² seems a direct response to *Brown*. Act sponsors spoke of "expediting the decade-old mandate of the Supreme Court"⁴³ and noted that civil rights groups lacked the funds needed to launch separate lawsuits in each of 2,000 segregationist southern school districts.⁴⁴ The House Committee Report likewise featured ample references to *Brown*: proponents spoke of "implementing the decision of the Supreme Court" and argued that "the constitutional right to be free from racial discrimination in public education must be realized";⁴⁵ opponents fretted about federal control of education and battled for a limitation on federal efforts to achieve racial balance through busing.⁴⁶ Unfortunately, Rosenberg fails to make this connection between Title IV and *Brown*.

Rosenberg also ignores the connection between *Brown* and the ESEA. After *Brown*, but prior to 1964, federal assistance to education was doomed, in part because "[t]he storm clouds of race . . . hovered over the federal aid fight."⁴⁷ With the passage of Title VI, this battle evaporated and the ESEA was quickly enacted.⁴⁸ Ironically, while Adam Clayton Powell and other civil rights proponents fought against federal aid to racist southern schools before 1964 (p. 123), objections to the 1965 ESEA came from southern members of Congress who were concerned that ESEA money would be used to force desegregation.⁴⁹ Granted, neither the ESEA nor the 1964 Act are principally about *Brown*. Nonetheless, Rosenberg's conclusion that "the introduction and enactment of these bills was based on factors other than Court decisions" (p. 124) incorrectly minimizes the Court's role.

Rosenberg also minimizes the judiciary's role by artificially limiting his inquiry to the decade after *Brown*. Prior to 1968, elected government clearly provided leadership on the school desegregation issue. Due to federal guidelines that exceeded the requirements of federal court rulings, the percentage of black children in all-black schools in the south dropped

42. Pub. L. No. 88-352, § 407, 78 Stat. 241, 248 (1964) (codified as amended at 42 U.S.C. § 2000c-6 (1988)).

43. 110 CONG. REC. 6560 (1964) (statement of Sen. Kuchel), reprinted in SCHWARTZ, *supra* note 40, at 1245.

44. 110 CONG. REC. 6540 (1964) (statement of Sen. Humphrey), reprinted in SCHWARTZ, *supra* note 40, at 1205-06.

45. H.R. REP. NO. 914, 88th Cong., 1st Sess. (1963), reprinted in BUREAU OF NAT'L AFFAIRS, THE CIVIL RIGHTS ACT OF 1964: TEXT, ANALYSIS, LEGISLATIVE HISTORY 272-77 (1964).

46. BUREAU OF NAT'L AFFAIRS, *supra* note 45, at 208. The anti-busing provision is contained in 42 U.S.C. § 2000c-6 (1981).

47. EUGENE EIDENBERG & ROY D. MOREY, AN ACT OF CONGRESS 24 (1969). *Brown* clearly exacerbated this "storm cloud." See BAILEY & MOSHER, *supra* note 17, at 21-22; EIDENBERG & MOREY, *supra*, at 55; Devins & Stedman, *supra* note 14, at 1246-47.

48. See EIDENBERG & MOREY, *supra* note 47, at 55-56.

49. See ORFIELD, *supra* note 14, at 25; Neal Devins, *The Civil Rights Hydra*, 89 MICH. L. REV. 1723, 1741 (1991).

from 98% in 1963 to 25% in 1968.⁵⁰ But the pendulum shifted in 1968 with the rejection of "freedom of choice" in *Green*⁵¹ and the election of Richard Nixon. Mounting concern over the extension of desegregation to districts outside the south and heightened opposition to busing provoked a political reaction that ultimately resulted in the taming of federal school desegregation enforcement efforts.⁵² This elected-government retreat was not matched by a judicial retreat; instead, the courts began playing an increasingly active role, which culminated in the Supreme Court's approval of busing in its 1971 *Swann* decision.⁵³

The post-*Green* period, while ignored by Rosenberg, is the judiciary's most significant, most controversial, and most debated foray into court-ordered institutional reform. Battle lines were drawn, with critics and proponents propounding vastly different viewpoints about white flight and other forms of resegregation, educational achievement or the lack of it, judicial factfinding and management, and school board compliance.⁵⁴

Four things are not in debate, all of which speak to a significant—if not dominant—judicial role. *First*, courts affect behavior. When court orders result in new budgeting processes (Boston), the imposition of a state-wide tax levy (Kansas City), the building of state-subsidized housing (Yonkers), and the freezing of U.S. Department of Education accounts (Chicago), change occurs.⁵⁵ Furthermore, parents do send

50. See GARY ORFIELD, *PUBLIC SCHOOL DESEGREGATION IN THE UNITED STATES, 1968-80*, at 5 (1983).

51. *Green v. County Sch. Bd.*, 391 U.S. 430, 439 (1968) (imposing affirmative duty on school boards to "come forward with a plan that promises realistically to work, and promises realistically to work now").

52. See Devins & Stedman, *supra* note 14, at 1248-51.

53. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 30 (1971) (implementing busing decree was "well within the capacity of the school authority").

54. Scholarship defending an active judicial role includes: EDUCATIONAL EQUITY PROJECT, VANDERBILT UNIV., *COVERING SCHOOL DESEGREGATION: A DESKBOOK FOR EDUCATION WRITERS* III-3 (1982) (arguing that mandatory techniques of desegregation are generally more effective than voluntary techniques); GARY ORFIELD, *MUST WE BUS?* 2 (1978) (arguing that judges, when pressed, chose forced busing over segregation); REBELL & BLOCK, *supra* note 7 (arguing that courts are effective factfinders whose orders are generally respected); Willis D. Hawley, *The New Mythology of School Desegregation*, 42 LAW & CONTEMP. PROBS. 214 (1978) (arguing that busing neither harms student performance nor leads to significant white flight); Willis D. Hawley & Mark A. Smylie, *The Contribution of School Desegregation to Academic Achievement and Racial Integration*, in PHYLLIS A. KATZ & DALMAS A. TAYLOR, *ELIMINATING RACISM: PROFILES IN CONTROVERSY* 281 (1988) (arguing that desegregation improves black student achievement with no adverse impact on white students).

Scholarship critical of the courts includes: LINO A. GRAGLIA, *DISASTER BY DECREE*, 258-83 (1976) (portraying compelled racial integration as "self-defeating"); RICHARD A. PRIDE & J. DAVID WOODARD, *THE BURDEN OF BUSING* (1985) (describing desegregation efforts in Nashville); ELEANOR P. WOLF, *TRIAL AND ERROR* (1981) (portraying courts as incompetent factfinders); David J. Armor, *The Evidence on Busing*, 28 PUB. INTEREST 90, 99 (1972) (busing produces no academic gains for black children).

55. See, e.g., *Morgan v. McDonough*, 540 F.2d 527 (1st Cir. 1976) (Boston), *cert. denied*, 429 U.S. 1042 (1977); *Jenkins v. Missouri*, 639 F. Supp. 19 (W.D. Mo. 1985) (Kansas City), *aff'd as*

their children to private schools or move to other school systems in response to school desegregation orders, although there is typically some increase in minority-nonminority contact in the public schools.⁵⁶

Second, court decisions prompt federal legislative action. Immediately after *Swann*, President Nixon delivered a national address on the evils of busing and proposed legislation making busing a remedy of "last resort" for school segregation, to be implemented "only under strict limitations."⁵⁷ Congress refused to limit court remedial authority, but numerous restrictions on federal financial support of mandatory busing and federal advocacy of busing have been enacted since 1972.⁵⁸ Congress' decision to limit federal enforcement and advocacy, while at the same time preserving judicial authority, is telling. Apparently, intrusions into judicial power are "discredited and deceitful"⁵⁹ and represent "a basic challenge to the Constitution—and the separation of the powers."⁶⁰ However, intrusions into federal desegregation efforts are politics as usual.

Third, court action or the threat of court action is nonetheless essential to meaningful school desegregation. In most instances, the political process has not broken down and the threat of legal action prompts "voluntary" reform. Fear of overreaching court orders and the costs of litigation encourage such voluntary compliance.⁶¹ In rare instances, school boards look to courts to impose remedies that they support but lack the political courage to endorse.⁶² In such cases, courts are far from incidental; they are a necessary conduit to legitimate socially desirable but politically costly behavior.⁶³

modified, 807 F.2d 657 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987); *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988); *United States v. Board of Educ.*, 567 F. Supp. 272 (N.D. Ill.) (Chicago), *aff'd in part and vacated in part*, 717 F.2d 378 (7th Cir. 1983). For commentary on these cases, see Devins & Steadman, *supra* note 14, at 1273-91; Robert Wood, *Professionals at Bay: Managing Boston's Public Schools*, 1 J. POL'Y ANALYSIS & MGMT. 454 (1982).

56. See Erwin Chemerinsky, *The Constitution and Private Schools*, in PUBLIC VALUES, PRIVATE SCHOOLS 274 (Neal E. Devins ed., 1989) (state action doctrine studied in light of flight to private schools); F. Welch & A. Light, *New Evidence on School Desegregation* (U.S. Commission on Civil Rights 1987) (exposure of minorities to white students increased in 74 of 125 districts studied, although court order prompted decline in the percentage of white students).

57. H.R. DOC. NO. 195, 92d Cong., 2d Sess. 3 (1972); see also Richard M. Nixon, *Address to the Nation on Equal Educational Opportunities and School Busing* (March 16, 1972), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RICHARD NIXON: CONTAINING THE PUBLIC MESSAGES, SPEECHES, AND STATEMENTS OF THE PRESIDENT: 1972 (1974).

58. See FISHER & DEVINS, *supra* note 31, at 267-69.

59. 118 CONG. REC. 28,845 (1972) (statement of Rep. Badillo).

60. *Id.* at 28,849 (statement of Rep. Scheuer).

61. See generally DAVID KIRP, *JUST SCHOOLS* (1982) (describing several voluntary desegregation efforts which were prompted by the fear of litigation).

62. *Id.* at 61.

63. Rosenberg infers otherwise. He views courts as incidental in such circumstances, emphasizing that courts produce a shield for "persons crucial to implementation who are willing to

Fourth (and most visibly), courts can impose remedies on reluctant districts. The results can vary dramatically. Sometimes judges or court-appointed special masters can work with community leaders to forge successful desegregation plans.⁶⁴ In those cases, courts play an affirmative instrumental role. On other occasions, court orders provide little more than a pyrrhic victory for civil rights litigants. When a school system prefers resistance to compliance, court action is not likely to succeed. For example, a recent study concluded that school systems can subvert school desegregation orders by delaying the remedy, devoting fewer resources to predominantly black schools, and aiding white flight and the erosion of the city's tax base.⁶⁵ Whether successful compromises outnumber political debacles is an open question. What is clear is that courts can facilitate success stories, but only when school systems are willing players.⁶⁶

On the issue of busing, it may be that "[o]nly a reordering of the environment" will result in racially balanced public schools.⁶⁷ That courts cannot accomplish that task comes as no surprise. The story of school desegregation reveals that the judiciary is only a piece in a much larger puzzle. Support or resistance from the federal government and local school authorities are also pieces of this puzzle (and perhaps larger ones at that). The Supreme Court often recognizes these limits; its decisions in *Brown* testify to this sensitivity. That the judiciary is constrained, however, does not mean that the courts are without significant influence. The eradication of dual southern systems has always had *Brown* as its foundation; the busing controversy cannot be separated from its judicial origins. Granted, *Brown* and the busing controversy are also about politics; but, when it comes to race and schooling, "[p]olitics

act" (p. 35). The question of whether those shielded by the courts would have acted in the absence of judicial leverage is not considered by Rosenberg.

64. For an optimistic portrayal of special masters, see Curtis J. Berger, *Away from the Court House and into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707 (1978). For a mixed portrayal, see David L. Kirp & Gary Babcock, *Judge and Company: Court-Appointed Masters, School Desegregation, and Institutional Reform*, 32 ALA. L. REV. 313 (1981). For a negative portrayal, see Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1297-302.

65. See Paul L. Tractenberg, *The View from the Bar: An Examination of the Litigator's Role in Shaping Educational Remedies*, in JUSTICE AND SCHOOL SYSTEMS 406 (Barbara Flicker ed., 1990) (summarizing results from survey of plaintiffs' attorneys in school desegregation cases).

66. A coalition of social scientists supportive of mandatory reassignments put it this way: "[While] [s]chool districts who [sic] adopt desegregation in good faith are able to use it as an opportunity to increase the achievement of their students, [and to] promote racial harmony . . . local officials opposed to the process of desegregation can resegregate students within the schools . . . [or] foster interracial tensions within a desegregated school." Brief of the NAACP, DeKalb County, Georgia, Branch of the NAACP, American Jewish Committee, Children's Defense Fund, Fund for an Open Society, Mexican American Legal Defense and Educational Fund, Puerto Rican Legal Defense and Education Fund, and Southern Christian Leadership Conference as Amici Curiae in Support of Respondents, app. at 25a, *Freeman v. Pitts*, 111 S. Ct. 2233 (1991) (No. 89-1290).

67. ALEXANDER BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 132 (1978).

and law . . . each reshapes the other."⁶⁸

2. *Civil Rights: The Story Not Told*

Rosenberg's discussion of civil rights, while far-reaching, does not consider three significant topics suggestive of a broad judicial role; namely, tax breaks for racist schools, diversity preferences for minority broadcasters, and employment discrimination.⁶⁹ These omissions are unfortunate. Not only do these topics speak directly to Rosenberg's central concerns, they provide a much different image of the judicial role than that suggested by *The Hollow Hope*.⁷⁰

The story of tax exemptions for segregated private schools is one of judge-made social policy.⁷¹ Prior to 1970, the IRS granted exemptions to schools regardless of their admissions policies or practices. Although civil rights interests had urged the IRS to deny tax breaks to discriminatory private schools, the Johnson administration concluded that it had no authority to do so. In 1969, instead of seeking legislative reversal of the IRS policy, the Lawyers' Committee for Civil Rights filed suit on behalf of William Green, raising statutory and constitutional objections to the IRS policy. This strategy was successful.

The Nixon administration recognized the high political costs of racial discrimination and responded to this lawsuit by reversing the IRS policy and seeking to moot the *Green* lawsuit.⁷² However, civil rights plaintiffs, perceiving that the Nixon IRS would be lax in enforcing its newly announced policy, asked the court both to issue a permanent injunction against the IRS and to specify nondiscrimination enforcement policies. In 1971, the court complied with this request. While IRS conformity to the plaintiffs' wishes raised significant adverseness problems, the *Green* court nevertheless mandated that private schools seeking tax-exempt status adopt and publish a policy of racial nondiscrimination.⁷³

The injunction issued in *Green* did not end the tax-exemption controversy. In 1978, the Lawyers' Committee again filed suit—this time on

68. KIRP, *supra* note 61, at 70.

69. Another issue revealing a broad judicial role is the civil rights interests' "capture" of the Office for Civil Rights in the Department of Education. The source of this "capture" is a lawsuit first filed in 1970, *Adams v. Bell*. Writing about the case in 1984, Jeremy Rabkin observed that "the suit has succeeded in placing this executive agency in what might be called judicial receivership, allowing a single federal judge—and a handful of private civil rights lawyers—to determine how it should enforce the civil rights laws Congress has confided to the agency's responsibility." Jeremy Rabkin, *Captive of the Court: A Federal Agency in Receivership*, REGULATION, May/June 1984, at 16, 16.

70. Rosenberg, of course, should not be criticized for failing to discuss each and every public law topic that bears on his thesis. Problems in selectivity, however, limit *The Hollow Hope*.

71. See generally FISHER & DEVINS, *supra* note 31, at 52-68.

72. See Thomas McCoy & Neal Devins, *Standing and Adverseness in Challenges of Tax Exemptions for Discriminatory Private Schools*, 52 FORDHAM L. REV. 441, 457 (1984).

73. *Green v. Connally*, 330 F. Supp. 1150, 1179 (D.D.C.), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1971).

behalf of Inez Wright—asserting that the 1971 injunction was inadequate. Prodded by the pending litigation, the IRS under Carter proposed—consistent with plaintiffs' demands—regulations denying tax-exempt status to private schools enrolling an insignificant number of minority students.⁷⁴

The Carter proposal never took effect, however. Prompted by an overwhelmingly negative public response, including 150,000 angry letters, Congress denied any funds to the IRS to enforce the proposed policy.⁷⁵ In explaining this measure, amendment sponsor John Ashbrook claimed: "Isolated court decisions and ex parte agreements with litigants of pending legal actions against the IRS have brought the IRS into criticism for permitting itself to be used as an instrument to implement certain social policies."⁷⁶

The Carter IRS controversy was exploited by presidential candidate Ronald Reagan. In an appeal to the growing voting block of Christian fundamentalists (whose schools would have been adversely affected by the Carter proposal), Reagan campaigned on a platform attacking "Mr. Carter's IRS Commissioner" for his "regulatory vendetta . . . against independent schools."⁷⁷

The battleground on which the Reagan administration sought to implement this campaign pledge ultimately centered around Bob Jones University. The issue in *Bob Jones University*,⁷⁸ however, was not the expansive nondiscrimination regulations proposed by the Carter IRS. In 1976, the IRS had applied the Nixon policy to revoke the tax-exempt status of Bob Jones University, a South Carolina college which prohibited interracial dating as a matter of religious conviction. In response, the university filed suit—a suit which worked its way up to the Supreme Court where certiorari was granted in 1981. On January 8, 1982, the Reagan administration reversed the IRS nondiscrimination policy and petitioned the Supreme Court to vacate as moot *Bob Jones University*.⁷⁹

A barrage of criticism from newspapers and civil rights groups followed in the wake of this policy reversal. Ultimately, through a bizarre combination of circumstances, the administration sought to return this issue to the Court, withdrawing its mootness petition and requesting that

74. 43 Fed. Reg. 37,296-97 (1978). In testimony before Congress, IRS Commissioner Jerome Kurtz referred to conversations between the Service and civil rights attorneys leading up to the proposed regulations. *Tax-Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 860-64 (1979) (testimony of Jerome Kurtz).

75. Treasury Department Appropriations Act, Pub. L. No. 96-74, 93 Stat. 559, 562 (1979) (current version at 15 U.S.C. § 1692d (1988)). See generally Neal Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456.

76. 125 CONG. REC. 18,444 (1979) (statement of Rep. Ashbrook).

77. 1980 Republican Party Platform Text, reprinted in 36 CONG. Q. ALMANAC 63-B (1980).

78. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

79. See FISHER & DEVINS, *supra* note 31, at 57.

the Court appoint a "counsel adversary" to defend the Nixon policy.⁸⁰ The Court complied with the government's unorthodox request and appointed William Coleman to argue the "government's side" in these cases, thus permitting the case to proceed despite its apparent inability to satisfy the adverseness requirement.⁸¹

In May 1983, the Supreme Court ruled that racially discriminatory schools are statutorily prohibited from receiving federal tax-exempt status. The Court explicitly repudiated the Reagan administration's claim that the IRS lacked statutory authority to enforce a nondiscrimination requirement.⁸² At the same time, by recognizing "broad [IRS] authority" to administer the tax laws, *Bob Jones University* eschews judicial imposition of Carter-like standards.⁸³

Whether this type of court-directed policymaking is as effective or efficient as what politicians—left to their own devices—would have produced is subject to debate. Undoubtedly, elected government eventually would have adopted a nondiscrimination policy. Moreover, public outcry at both the Carter and Reagan initiatives helps explain judicial participation in and resolution of the tax-exemption controversy. Nonetheless, without judicial intervention, a remarkably different story would be told. Each step of this policymaking process was a by-product of judicial action. Courts either made policy contrary to IRS interpretations or provided an excuse for the IRS to advance civil rights interests. That the adverseness requirement was tossed aside in both *Green* and *Bob Jones University* in order to accomplish larger political ends did not deter the courts in this policymaking enterprise.

Another example of court policymaking contrary to elected branch wishes is the judicial establishment of diversity preferences for minorities competing for FCC broadcast licenses.⁸⁴ Prior to 1973, FCC civil rights enforcement focused on the elimination of pernicious discrimination by its license holders. This focus changed with *TV 9, Inc. v. FCC*, a 1973 D.C. Circuit decision requiring the Commission to provide a comparative preference to racial minorities in order to serve program diversity objectives.⁸⁵

TV 9 was an appeal of the FCC's refusal to value minority status in according a broadcast license. The Commission's position was that

80. See McCoy & Devins, *supra* note 72, at 463-64.

81. See *id.*

82. The Court held that tax-exempt institutions' operations must not be "contrary to a fundamental public policy" and that "there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice." *Bob Jones*, 461 U.S. at 592.

83. *Id.* at 596.

84. See generally Neal Devins, *Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight*, 69 TEX. L. REV. 125 (1990) (asserting that *Metro Broadcasting* demonstrates that claims of the ascendancy of a new Supreme Court era are premature).

85. 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974).

"[t]he 'Communications Act, like the Constitution, is color blind. What the Communications Act demands is service to the public . . . and that factor alone must control the licensing processes, not the race, color or creed of an applicant.'"⁸⁶ In other words, the FCC rejected the minority ownership-diversity programming nexus in 1973.

Through a certiorari petition filed by then Solicitor General Robert Bork, the FCC sought Supreme Court review of *TV 9*. Despite FCC claims that minority preferences "raise the most serious constitutional questions" and that the appellate court improperly substituted its judgment for that of the Commission,⁸⁷ the Supreme Court refused to hear the case. The Commission accordingly instructed its administrative law judges to afford comparative merit to applicants when minority owners were to participate in the operation of the station.

The Supreme Court ultimately resolved this issue, upholding this and other preferences in its 1990 *Metro Broadcasting v. FCC* decision.⁸⁸ Disregarding the judicial origins of the comparative preference, the Court rested its decision on the deference owed Congress because of its "institutional competence as the national legislature."⁸⁹ Congress, admittedly, has strongly backed these preferences for at least a decade.⁹⁰ Whether Congress or the FCC would have established the preferences without the *TV 9* decision is another matter. Without doubt, strong FCC opposition to *TV 9* shows that elected government was not about to adopt this preference in 1973.

Diversity preferences and the tax-exempt status of private schools, while important, pale in comparison to the transformative role played by the Supreme Court in employment discrimination. Here, Congress affirmatively delegated to the judiciary the task of specifying the reach of employment discrimination protections. The courts seized this opportunity and, in 1971, put into effect debatable statutory interpretations championed by civil rights interests and the Equal Employment Opportunity Commission. While court action was encouraged by Congress and advanced agency objectives, the Supreme Court was the indisputable lead actor in this saga.

The principal issue here is the Court's endorsement of disparate impact proofs of employment discrimination in *Griggs v. Duke Power*

86. *Mid-Florida Television Corp.*, 33 F.C.C.2d 1, 17 (1972) (quoting paragraph 872 of the Initial Decision).

87. Petition of the United States for a Writ of Certiorari at 12-14, 16-17, *TV 9*, (No. 74-31), reprinted in FISHER & DEVINS, *supra* note 31, at 296-97.

88. 497 U.S. 547 (1990).

89. *Metro Broadcasting*, 110 S. Ct. 2997, 3008 (1990).

90. See Devins, *supra* note 84, at 150-55 (citing lottery statutes containing diversity preferences, which were enacted by Congress in response to its findings that past racial and ethnic discrimination had resulted in a severe underrepresentation of minorities in the media).

Co.⁹¹ *Griggs* has been embraced as "a major instrument of social progress"⁹² and criticized both for its "halting and embarrassed" handling of the legislative history⁹³ and as a "one-sided pro-plaintiff ineasure."⁹⁴ The case remains controversial today; President Bush's failed attempt to characterize the Civil Rights Act of 1991 as a "quota bill" rested on the administration's repudiation of *Griggs*.⁹⁵

Griggs' centerpiece status, in large measure, is a by-product of Congress' 1964 decision to rely on the courts and not the EEOC to effect Title VII employment discrimination protections. Congress opted for a judicial model over an administrative model because it feared that the EEOC would abuse administrative "cease and desist" power.⁹⁶ Senator Everett Dirksen, a key Republican opponent to administrative enforcement, viewed "a new mission agency like the EEOC" as a "threat of potential harassment to employers."⁹⁷ During the course of negotiations with Democratic sponsors, Dirksen succeeded in statutorily limiting the EEOC's role to complaint processing. Enforcement was to take place in the courts principally through private individual suits and occasionally through "patteru or practice" suits filed by the Department of Justice.

Senate Republicans were also successful in limiting the sweep of employment discrimination protections. Amendment sponsors adopted clarifying amendments that rejected preferential treatment on the basis of racial imbalance, protected bona fide seniority systems, permitted the use of nondiscriminatory professionally developed ability tests, and restricted judicial relief to instances where an employer intentionally engaged in an unlawful employment practice.⁹⁸ Opponents of disparate impact proofs point to statutory language and statements by the 1964 bill sponsors indicating that the title requires "a showing of intentional violation . . . in order to obtain relief,"⁹⁹ that "the concept of discrimination . . . has no

91. 401 U.S. 424 (1971).

92. Alfred W. Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 CHI.-KENT L. REV. 1, 1-2 (1987) ("Few decisions in our time . . . have had such momentous social consequences.").

93. HOROWITZ, *supra* note 7, at 15. See generally Michael E. Gold, *Griggs' Folly: An Essay on the Theory, Problems and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429 (1985) (examining adverse impact theory of discrimination under Title VII and arguing that courts should return to narrower theory based on intent).

94. HERMAN BELZ, *EQUALITY TRANSFORMED: A QUARTER-CENTURY OF AFFIRMATIVE ACTION* 44 (1991).

95. See Neal Devins, *Groups v. Individuals*, 1992 PUB. INT. L. REV. 115 (reviewing BELZ, *supra* note 94).

96. See HUGH D. GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972*, at 146 (1990); George Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV. 688, 690-96 (1980).

97. GRAHAM, *supra* note 96, at 146.

98. See BELZ, *supra* note 94, at 25.

99. 110 CONG. REC. 12,723 (1964) (statement of Sen. Humphrey).

hidden meanings,"¹⁰⁰ and that the "[racial quota] bugaboo has been brought up a dozen times; but it is nonexistent."¹⁰¹ By contrast, proponents of disparate impact proofs suggest that this statutory language is ambiguous, especially since the 1964 Congress defeated amendments prohibiting discrimination "solely" on the basis of race, color, religion, sex, or national origin.¹⁰²

However one reads the legislative history, the judiciary's paramount role in defining Title VII is indisputable. *Griggs* critic Herman Belz argues that "[t]he judiciary made its own political judgments about . . . the need to revise the basic concepts of the Civil Rights Act to meet what it considered the public policy needs of the later 1960s and 1970s."¹⁰³ *Griggs* defender George Rutherglen, while recognizing that the judicial enforcement model is a by-product of Congress' "fear that the EEOC would enforce the statute too vigorously," sees the decision as a permissible exercise of the discretion that Congress granted the federal courts.¹⁰⁴

The judicial role in *Griggs* also illustrates how administrative agencies and federal courts can work in tandem. The EEOC relied on the judiciary to transform Title VII from what was—according to the NAACP's Jack Greenberg—a "weak, cumbersome, [and] probably unworkable" set of provisions, into "the best available weapon" in the civil rights arsenal.¹⁰⁵ Despite the 1964 Congress' explicit prohibition of EEOC-initiated litigation, the EEOC advised civil rights litigants and filed *amicus* briefs. In *Griggs*, the Commission argued that Title VII outlawed employer practices "which prove to have a demonstrable racial effect."¹⁰⁶ Although the EEOC recognized that its interpretation sought "to maximize the effect of the statute on employment discrimination without going back to Congress for more substantive legislation,"¹⁰⁷ *Griggs* approved this reading, in part, because of the principle of defer-

100. *Id.* at 7213 (joint memorandum of Sens. Clark and Case).

101. *Id.* at 6549 (statement of Sen. Humphrey). For a summary of these remarks and others, see GRAHAM, *supra* note 96, at 150-52.

102. See *id.* at 13,837-38. For an analysis of these failed amendments, see Rutherglen, *supra* note 96, at 713-20.

103. BELZ, *supra* note 94, at 43.

104. Rutherglen, *supra* note 96, at 696.

105. James Harwood, *Battling Job Bias: Rights Groups May Ask Stiffening of '64 Law's Employment Provisions*, WALL ST. J., May 28, 1965, at 1.

106. GRAHAM, *supra* note 96, at 249 (emphasis omitted) (quoting EEOC Commissioner Samuel Jackson). See generally *id.* at 244-50 (discussing EEOC's efforts to use statistical evidence and disparate impact theory to demonstrate discrimination).

107. That is how the Chamber of Commerce described the EEOC's argument in *Griggs*. Brief Amicus Curiae on Behalf of the Chamber of Commerce of the United States of America at 7, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (No. 124, 1970 Term) (quoting Alfred Blumrosen, *Administrative Creativity: The First Year of the Equal Employment Opportunity Commission*, 38 GEO. WASH. L. REV. 695, 702-03 (1970). Blumrosen was a participant in many EEOC policy determinations between 1965 and 1967.). The EEOC's administrative history supports this characterization. See GRAHAM, *supra* note 96, at 248-50.

ence to administrative interpretation.¹⁰⁸

Congress, the White House, and civil rights interests reexamined this judicial enforcement model shortly after *Griggs*. Surprisingly, in debates over 1972 amendments to Title VII, all sides ultimately agreed that the judicial enforcement model best served their interests. The Nixon administration, following the lead of Senate Republicans in 1964 but apparently oblivious to *Griggs* and other expansive interpretations, opposed the granting of cease and desist power to the EEOC in favor of an expanded judicial enforcement model.¹⁰⁹ Civil rights groups also supported the continued use of this model. Emphasizing the dangers of regulatory agencies becoming "captive" to the regulated industry, civil rights interests concluded that a weaker institutional framework (one in which the Commission did *not* have cease and desist authority) enables civil rights advocates to use federal courts "which are favorable to their demands."¹¹⁰

Congress followed suit and its 1972 amendments to Title VII fortified the judiciary's leadership role in defining employment discrimination protections. These amendments, while neither endorsing nor repudiating *Griggs*, strengthened judicial remedy authority and authorized EEOC-initiated litigation.¹¹¹ Furthermore, by endorsing the judicial enforcement model, Congress denied itself some of the traditional tools of oversight (for example, conformation, appropriations, legislative veto) in shaping the development of Title VII. Congress, instead, could only express its dissatisfaction with judicial decisionmaking by statutory amendment.

Congress and the White House continue to support judicial enforcement. In the late 1970s and early 1980s, efforts to amend Title VII were thwarted by both civil rights interests and the Republican right, for both sides thought that the courts would prove more receptive to their arguments than the Congress.¹¹² In 1991, a painful impasse between the White House and Congress over the burden of proof an employer bears in defending a disparate impact suit was resolved by deferring the matter

108. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971) ("The administrative interpretation of the Act by the enforcing agency is entitled to great deference.").

109. See BELZ, *supra* note 94, at 73; GRAHAM, *supra* note 96, at 420-49.

110. GRAHAM, *supra* note 96, at 431 (quoting Alfred Blumrosen); see also BELZ, *supra* note 94, at 76 ("The *New York Times* reflected the administration's success in winning over liberal opinion when it . . . praised the bill as a moderate alternative that sought to achieve 'nonpartisan enforcement of the law . . . through reliance on the courts [rather] than upon a politically appointed commission.'").

111. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (1982)).

112. See Steven Hofman, *Civil Rights: Stiffed from Both Sides*, WASH. POST, July 19, 1989, at A23.

to judicial resolution.¹¹³

The degree to which judicial enforcement of Title VII transformed the workplace is subject to debate. No one disputes that the gap between black and white male wages narrowed dramatically from 1965-1985. For some, however, Title VII is of little consequence in explaining this change; they argue that Title VII merely reinforced existing trends.¹¹⁴ Other skeptics are more timid, arguing that the evidence is unclear.¹¹⁵ For most, however, Title VII enforcement—especially *Griggs*—has significantly changed the workplace. Dramatic changes in minority and female opportunities during the 1970s and the market mechanism of employer incorporation of Supreme Court decisions into employment practices to stave off costly litigation both suggest that Title VII has played a significant role.¹¹⁶ Moreover, whether one views Title VII as marginal or magnificent, all agree that judicial enforcement has made a difference; the debate concerns how much of a difference.

The above discussion suggests an extraordinary judicial role in employment discrimination. Yet, this evidence can be turned around to depict the court as a subordinate player. After all, the judicial enforcement model reflects elected government preferences. Moreover, leading Supreme Court decisions generally reinforce EEOC interpretations. Finally, to the extent that Title VII—rather than preexisting national trends—altered employment practices, market mechanisms, not judicial decisions, provided the moving force.

This characterization may not be inaccurate but it distorts the truth. The truth is that courts operate in conjunction with—not in isolation from—elected government and market forces. That elected government prefers that the courts make policy does not mean that the courts do not make policy. Likewise, even though the argument may have been advanced by an agency, it is still the court which affirmatively puts it into effect. Moreover, what of the many instances where the courts reject EEOC interpretations? Finally, to say that market mechanisms effectuate court decisions is to say very little. After all, it is the court decision which prompts employers to incorporate potential liability in their employment decisions.

Title VII, diversity preferences, and the private school tax exemption controversy are powerful counterpoints to Rosenberg's efforts to

113. See Ruth Marcus, *Compromise on Civil Rights Bill Skirts Controversial Definition*, WASH. POST, Oct. 26, 1991, at A6.

114. See THOMAS SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY?* 133, 134 (1984); James P. Smith, *Race and Human Capital*, 74 AM. ECON. REV. 685 (1984).

115. U.S. COMM'N ON CIVIL RIGHTS, *THE ECONOMIC PROGRESS OF BLACK MEN IN AMERICA* 6 (1986) ("Existing research has not been able to assess fully the effects of specific civil rights programs and policies on the economic status of blacks.").

116. See Freeman, *Black Economic Progress After 1964: Who Has Gained and Why?*, in *STUDIES IN LABOR MARKETS* 247 (S. Rosen ed., 1981).

downplay the Court's impact. In all three areas, court interpretations redefined statutory language. While the elected branches both actively participated in this process and often encouraged judicial resolution of these issues, the policy directives nonetheless came from the courts. Moreover, court decisions in these areas—at least sometimes—rebuffed arguments made by the EEOC, the IRS, the FCC, and the Department of Justice. In these instances, only a statutory amendment could undercut the courts' interpretations. The two-year struggle over the Civil Rights Act of 1991 highlights the difficulty of legislative repeal.¹¹⁷ Despite these difficulties, elected government still preferred to give the courts the last word both on the private school tax exemption issue¹¹⁸ and the 1991 Civil Rights Act's dangling burden of proof issue. To say that the judiciary emerges as a key player in these three prominent civil rights dramas neither overstates the case nor calls into question the critical role played by the other branches. It simply recognizes that all three branches engage in an ongoing policymaking dialogue.

B. Gender

The women's rights movement is a story of political and social reform, not judicial reform. With few exceptions (most notably abortion), the courts left it to the legislative and executive branches to serve as the catalyst for change.¹¹⁹ The refusal of elected government to put into effect court decisions therefore does not explain the defeat of the Equal Rights Amendment ("ERA"), the persistence of the earnings gap, or the unequal consequences of divorce. Rosenberg is correct in recognizing the predominant role of political and social influences here. But as usual, his treatment of gender issues is unsatisfactory. He overstates judicial efforts to achieve equal rights only to blame the courts for failing to narrow the wage gap or otherwise change the position of women in society. More significantly, Rosenberg treats *Roe* as a non-event by discounting its precedential, political, and practical significance. While correct in placing the abortion issue in a broader social and political context, Rosenberg unnecessarily distorts the judicial role along the way. This distortion is especially clear when Rosenberg's own measures of judicial effectiveness are extended to the 1989 Supreme Court decision *Webster v.*

117. Amazingly, the 1991 Civil Rights Act overturned seven Supreme Court decisions. See Marcus, *supra* note 113 (front page story the day after Senate approval). For further discussion of statutory reversals, see FISHER, *supra* note 10, at 206-09, 255-70.

118. When the *Bob Jones University* case was before the Court, Congress—for the first time in four years—declined to authorize appropriations-based restrictions on IRS nondiscrimination enforcement so as to give the Supreme Court the "last word" on this issue. See 128 CONG. REC. 28,068-76 (1982); Devins, *supra* note 75, at 494-98.

119. See FISHER & DEVINS, *supra* note 31, at 302-32; JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN (1991).

*Reproductive Health Services.*¹²⁰*1. Equal Rights*

Not until 1971 did the Supreme Court strike down a law as improper gender discrimination.¹²¹ Prior to 1971, the judicial record for defending women's rights has been described as "ranging from poor to abominable."¹²² Rosenberg recognizes this, but suggests that the Court has been actively pro-women since 1971. For him, "the clear import of the [post-1971] decisions was that gender-based distinctions would seldom be accepted" (pp. 204-05), that "[a]dvocates of women's rights have 'won' quite a number of legal cases" (p. 212), and that judges and justices are "earnest[ly]" champions of women's rights (p. 226).

Rosenberg's assessment here is subject to question. First, increasing judicial scrutiny of gender classifications is a by-product of legislative reform. The push for the ERA was, in some measure, a response to judicial inertia. ERA proponent Martha Griffiths castigated the Supreme Court, claiming that there are "no worse legislators in this country than those sitting on the Supreme Court"¹²³ and that the ERA fight "is not a battle between the sexes . . . [but] a battle with the Supreme Court."¹²⁴ Representative Griffiths' rebuke was typical; others in Congress spoke of the "default of our judicial system,"¹²⁵ that "the courts have abrogated their responsibility,"¹²⁶ and that the ERA was necessary to "prod the courts into taking long-overdue action."¹²⁷ These efforts hit paydirt. While the ERA ultimately failed, the Supreme Court explicitly took the proposed amendment into account in *Frontiero v. Richardson*,¹²⁸ a 1973 decision in which the Court held—for the first time—that gender classifications were subject to heightened review. Since 1973, moreover, Supreme Court gender cases—even those upholding classifications—almost always invoke arguments advanced by ERA sponsors.¹²⁹ Indeed, the ultimate defeat of the ERA is sometimes attributed to the Court's *de facto* adoption of the Amendment obviating the need for an ERA.¹³⁰

120. 492 U.S. 490 (1989).

121. *Reed v. Reed*, 404 U.S. 71 (1971) (refusing to give effect to an Idaho statute which established an automatic preference for males when selecting executors of wills).

122. John D. Johnston, Jr. & Charles L. Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675, 676 (1971).

123. 117 CONG. REC. 35,296 (1971) (statement of Rep. Griffiths).

124. 116 CONG. REC. 28,004 (1970) (statement of Rep. Griffiths).

125. *Id.* at 28,028 (statement of Rep. Mink).

126. *Id.* at 28,023 (statement of Rep. Halpern).

127. *Id.* at 35,452 (statement of Rep. Bayh).

128. 411 U.S. 677 (1973) (holding unconstitutional a federal statute that required husbands of servicewomen to prove dependency before being granted dependency benefits, but granted such benefits automatically to wives of servicemen).

129. See Leslie F. Goldstein, *The ERA and the U.S. Supreme Court*, 1 RES. L. & POL'Y STUD. 145 (1987).

130. JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* 47 (1986) ("The fact that the ERA

Second, increasing judicial scrutiny of gender classifications has not proven a boon to women's interests in court. The Court seems quite willing to uphold "benign" classifications which reinforce gender stereotypes as well as classifications rooted in "real sex differences."¹³¹ The most notorious of these decisions, *Michael M. v. Superior Court*¹³² and *Rostker v. Goldberg*,¹³³ have spawned a "cottage industry"¹³⁴ of criticism for the Court's failure to consider "[t]he central and inevitable role of culture in determining the existence of most sex differences."¹³⁵ The judiciary has also refused to narrow the earnings gap by imposing "comparable worth" and other wage equalization measures.

Rosenberg's conclusion that "court-ordered change in women's rights has changed little" (p. 227) mistakenly suggests that judicial activism has failed to produce meaningful change.¹³⁶ The courts have not been active in the area of women's rights, and consequently the persistence of inequality cannot be characterized as a failed judicial experiment. Rosenberg seems to recognize the courts' diminutive role on the pay equity issue, noting that where "comparable worth policies have been instituted, they have been the result of collective bargaining and state government action, not litigation" (p. 208). Thus, while concluding that "the change that has occurred does not appear to be a result of judicial action" (p. 209), Rosenberg treats failed judicial activism and the failure of the courts to take the lead as one and the same. However, the failure of the courts to take the initiative, or to become involved at all, does not prove that the courts are incapable of bringing about social change.

would have had no significant immediate tangible impact on most women's lives dramatically influenced the ways that both pro- and antiforces thought about and argued for the ERA."); GILBERT Y. STEINER, CONSTITUTIONAL INEQUALITY: THE POLITICAL FORTUNES OF THE EQUAL RIGHTS AMENDMENT 36 (1985) ("With each such [Court] victory, some enthusiasts for the ERA los[t] interest.").

131. See Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913 (1983) (assessing Court treatment of issue); Neal E. Devins, *Gender Justice and its Critics*, 76 CALIF. L. REV. 1377, 1384-92 (1988) (book review) (summarizing feminist approaches); Nadine Taub, Book Review, 80 COLUM. L. REV. 1686 (1980) (highlighting the difficulty of distinguishing that which is benign from that which reinforces stereotypes).

132. 450 U.S. 464 (1981) (upholding California statute that makes males and not females criminally liable for violating the "statutory rape" law). For an analysis, see Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 413-29 (1984).

133. 453 U.S. 57 (1981) (upholding a federal statute that authorized the registration of males and not females for possible military service). For a discussion of recent legislative reforms, see FISHER & DEVINS, *supra* note 31, at 326-27.

134. This phrase, although originally used in a slightly different context, is borrowed from Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 983 (1984).

135. Freedman, *supra* note 131, at 947.

136. Cultural barriers identified by Rosenberg might well deflect court-ordered change, but this is not what Rosenberg argues.

2. *Abortion: Roe and Its Aftermath*

Supreme Court abortion decisions are grist for the Rosenberg mill. Rosenberg limits *Roe*'s significance, both at the time of decision ("[in 1973,] abortion was not a radical departure from current American beliefs, practices, and concerns" (p. 182)) and in the years following the decision ("[years where] opposition to abortion strengthened and grew" (p. 182)). In fact, Rosenberg depicts *Roe*'s import as especially limited since market forces ensured that the decision would reinforce existing abortion trends rather than lead to a backlash limiting abortion availability (pp. 195-201). There is some appeal to these controversial claims; political and market forces have indeed played an instrumental role in the abortion controversy. Rosenberg, however, overextends his data and his analysis. The Court's role may not be exclusive but it is pivotal.

Roe was controversial from the start. Rather than "a modest extension of a well-accepted right" (p. 181) to use contraceptives, *Roe* marked a radical departure, and ultimately resulted in the overturning of 46 state laws.¹³⁷ That nineteen states had liberalized criminal statutes governing abortion in the decade preceding *Roe* does not undermine the case's significance. Abortion reform efforts, while on the rise, typically involved the exemption of rape, incest, and medical necessity from criminal abortion statutes, not more far-reaching repeals of criminal abortion statutes.¹³⁸ Moreover, immediately before *Roe*, reform initiatives suffered surprising defeats in both Michigan and North Dakota.¹³⁹

Roe also made a difference. Statistics revealing the prevalence of pre-*Roe* abortions demonstrate that the rise of abortions is attributable to much more than a single Supreme Court decision. It is wrong to read anything more into these statistics, however. First, *Roe* helps explain the rise in the number of legal abortions from 586,800 in 1972 to 1,553,900 in 1980 (p. 180).¹⁴⁰ *Roe*'s checking of state power enabled market mechanisms to make economic abortions more readily available. For example,

137. See, e.g., CHARLES FRIED, *ORDER AND LAW* 72-81 (1991) (explaining "principled" distinction between Reagan administration endorsement of *Griswold* and disavowal of *Roe*); MICHAEL PERTSCHUK & WENDY SCHAEZEL, *THE PEOPLE RISING: THE CAMPAIGN AGAINST THE BORK NOMINATION* 257-58 (1989) (discussing the decision of the anti-Bork forces to focus on Bork's opposition to *Griswold*, not *Roe*); John H. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 926 (1973) (depicting *Roe* as a "strange case" for the Court to begin "second-guessing legislative balances"). For a depiction of *Roe* as a logical follow-up to *Griswold*, see LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 92-95 (1990).

138. See EVA R. RUBIN, *ABORTION, POLITICS, AND THE COURTS: ROE V. WADE AND ITS AFTERMATH* 11-29 (1987); TRIBE, *supra* note 137, at 39-51.

139. See John E. Jackson & Maris A. Vinovskis, *Public Opinion, Elections, and the "Single-Issue" Issue*, in *THE ABORTION DISPUTE AND THE AMERICAN SYSTEM* 64, 72 (Gilbert Y. Steiner ed., 1983).

140. Rosenberg suggests that *Roe* was little known at the time of decision. That may be—in part, because former President Johnson died the day *Roe* was decided and the U.S. withdrawal from Vietnam began within a few weeks of the decision. See JOHNSON & CANON, *supra* note 7, at 5. Yet, whether or not *Roe* was known, the ramifications of the case were known. Witness, as Rosenberg

the number of women who could not obtain an abortion shrunk from over 1,000,000 in 1973 to less than 600,000 in 1977.¹⁴¹ In freeing the market (especially in authorizing nonhospital abortions), *Roe* also helped diminish the psychological costs of the abortion procedure.¹⁴² Second (and relatedly), *Roe* has spurred changes in access to abortion in the most restrictive states (due to increased availability) and among poor women (due to increased affordability).¹⁴³ Third, the abortion procedure has become safer as a consequence of *Roe*. From 1963 to 1973, the abortion death rate was roughly 5.7 per million persons, with criminal procedures accounting for 75% of abortion deaths from 1940 to 1972.¹⁴⁴ After *Roe*, the number of maternal deaths fell from pre-*Roe* figures of 57 per year to 6 in 1974, 3 in 1976, and none in 1979.¹⁴⁵

The key to this impact, as Rosenberg rightly observes, is the availability of safe and economic abortion providers. Correspondingly, *Roe* is less important in jurisdictions where there are no abortion providers (pp. 192-93). For this reason, Rosenberg argues that the refusal of many hospitals to perform abortions suggests that *Roe* would have been ineffective had the Court approved hospital-only abortions (pp. 189-91, 198).¹⁴⁶ None of this suggests that the Court is ineffective, however. The Court *did* authorize nonhospital abortions, thereby staving off potential implementation problems.¹⁴⁷ More important, *Roe* created its own implementing market by creating a need for nonhospital abortion providers.

notes, the increased availability of abortion providers (pp. 196-97) and the continuing rise in legal abortions (p. 180).

141. See Jacqueline D. Forrest et al., *Abortion in the United States, 1976-1977*, 10 FAM. PLAN. PERSP. 271, 272 (1978).

142. See Brief for Amici Curiae American Psychological Association, National Association of Social Workers, Inc., and the American Jewish Committee in Support of Petitioners/Cross-Respondents in Nos. 88-1125, 88-1309 and in Support of Appellees in No. 88-805, *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502 (1990) (Nos. 88-805, 88-1125, 88-1309) (suggesting that adolescents do not typically lack the capacity to make sound health care decisions, including decisions about abortion).

143. See Susan B. Hansen, *State Implementation of Supreme Court Decisions: Abortion Rates Since Roe v. Wade*, 42 J. POLITICS 372, 379 (1980).

144. *Id.* at 378.

145. See Jesse H. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1, 185-86 (1984).

146. Rosenberg does not consider the possibility that—had *Roe* approved costly hospital-only abortions—market forces would have provided sufficient monetary incentives for many hospitals to perform abortions.

147. Rosenberg overlooks the fact that the Supreme Court establishes its own precedents. *The Hollow Hope* argues, instead, that judicial policymaking is constrained, in part, because courts ground their decisions in preexisting precedents (pp. 10-13). For example, *Brown* and *Roe* are depicted as slight extensions of existing doctrine and therefore subject to judicial resolution (pp. 72-73, 181-82). This characterization of *Brown* and *Roe* is subject to question. See TRIBE, *supra* note 137, at 39-51. More troubling, Rosenberg refuses to acknowledge that the Court—not special interests or elected government—chose to promulgate legislative standards in *Roe* and chose to defer to state government in *Brown*. Right or wrong, these decisions were made by the Court, and the measure of judicial impact should be predicated on what the Court did decide.

Not surprisingly, the suppliers shortly followed.¹⁴⁸ As Rosenberg recognizes: "In the wake of the Court decisions there was a sharp increase in the number of abortion providers" (p. 196). This self-implementing characteristic distinguishes *Roe* from *Brown*.¹⁴⁹ In *Brown*, the Court decision did not create its own market mechanism; instead, external incentives (federal funding prohibitions) were required to secure compliance from southern states which otherwise preferred one-race schools.¹⁵⁰

Roe's self-executing nature also helps explain the rise of the "right to life" movement and, with it, anti-abortion legislation. By providing women an unqualified abortion right in the first trimester of pregnancy, abortion rights advocates' principal objective had become a constitutional mandate. Consequently, rather than seeking to liberalize abortion, reform efforts were now the province of groups who sought to chip away at, if not destroy, *Roe*. By this measure, the greater *Roe*'s practical and symbolic importance, the more vociferous the anti-abortion movement.

If one measures a case's impact by the strength of the opposition, *Roe*'s landmark status is assured.¹⁵¹ From 1973 until 1989, 48 states passed 306 abortion measures,¹⁵² which varied in severity from nonobtrusive reporting requirements to parental and spousal consent laws. This degree of state activity in the face of *Roe*'s stringent trimester approach is staggering. The principal weapons of *Roe* opponents were attempts to make abortion less attractive through so-called "burden creation" strategies. These strategies included increasing the risks of undergoing an abortion (statutes forbidding a safe abortion method—saline amniocentesis—while permitting more dangerous abortion techniques); reducing accessibility to medical facilities that perform abortions (stat-

148. There was only a limited supply of abortion providers at the time of *Roe*, and it took more than a year for market forces to begin to make the abortion right available in many jurisdictions. See JOHNSON & CANON, *supra* note 7, at 7.

149. Supreme Court employment discrimination decisions, like *Roe* and unlike *Brown*, created their own implementing market. Through attorney fee provisions and backpay awards, employees and litigators have incentives to file suit against allegedly discriminatory employers. For a related argument, see Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 248-50 (1976). Relatedly, one of President Bush's principal objections to the 1991 Civil Rights Act's codification of *Griggs* was that employers would engage in "quota" hiring to stave off costly litigation. See Devins, *supra* note 95.

150. Correspondingly, agency enforcement of Title VI nondiscrimination prohibitions were subject to extensive political control whereas judicial enforcement of Title VII could only be checked by specific overruling legislation. See Devins, *supra* note 49, at 1741-43.

151. In the words of Judge Robert Bork: "Attempts to overturn *Roe* will continue as long as the Court adheres to it. . . . *Roe*, as the greatest example and symbol of the judicial usurpation of democratic prerogatives in this century, should be overturned." ROBERT H. BORK, *THE TEMPTING OF AMERICA* 116 (1990). That elected government seeks to minimize the effect of a Supreme Court decision suggests that Court action makes a difference. Rosenberg does not consider this possibility; instead, he cites state responses to limit *Brown* and *Roe* as evidence that Court action may well be counterproductive (pp. 156, 342).

152. See Glen Halva-Neubauer, *Abortion Policy in the Post-Webster Age*, 20 PUBLIUS 27, 32 (1990).

utes demanding that all abortions be performed in a hospital and zoning laws restricting the number of abortion clinics); increasing the cost of abortions (statutes requiring physician or pathologist involvement in abortion procedures); and establishing detailed pre-abortion procedures (statutes requiring women to be informed of the "medical risks" of abortion and to wait at least twenty-four hours after consenting to the abortion procedure).¹⁵³ During this period, however, the Supreme Court—through ten highly restrictive decisions—stymied most of these reform efforts.¹⁵⁴

The federal government also played a large role in the abortion dispute.¹⁵⁵ Before *Roe*, the federal government rarely involved itself in the ferocious battle between pro-life and pro-choice state activists. Indeed, in the decade before the decision, only ten abortion-related bills were introduced in Congress.¹⁵⁶ Since *Roe*, Congress has repeatedly tackled the abortion issue; during the decade after *Roe*, 500 abortion bills were introduced.¹⁵⁷ Congress' record here is a mixed one, having accepted numerous restrictions on federal abortion funding, prohibited the performance of abortions at military hospitals and federal penitentiaries, and funded pro-life counselling programs. However, efforts to statutorily repeal *Roe* by either defining life at conception or curtailing federal court jurisdiction in this area have been rejected.¹⁵⁸ Moreover, Congress has refused to act on two proposed constitutional amendments: one a "paramount human life" amendment that would outlaw abortion by extending constitutional protection to fetuses at the "moment of fertilization"; the other a "human life federalism" amendment which provided that "[t]he Congress and the several States shall have the concurrent power to restrict and prohibit abortions; *Provided*, That a law of a State more restrictive than a law of Congress shall govern."¹⁵⁹

Congress' reliance on appropriations-based policymaking in this area is hardly surprising. Appropriations measures are preferred over constitutional amendment and direct statutory repeals because they are easier to enact. A funding ban, moreover, leaves the right intact and hence appears a "moderate" response. As more than 200 members argued in a brief defending the funding ban, Congress' decision not to finance an activity that many find morally reprehensible does not necessarily call into question the correctness of *Roe*; instead, the decision not

153. See Albert M. Pearson & Paul M. Kurtz, *The Abortion Controversy: A Study in Law and Politics*, 8 HARV. J.L. & PUB. POL'Y 427, 433-43 (1985).

154. For a summary analysis of these decisions, see TRIBE, *supra* note 137, at 10-26.

155. See FISHER & DEVINS, *supra* note 31, at 212-32.

156. *Id.* at 212.

157. *Id.*

158. *Id.*

159. S.J. Res. 8, 98th Cong., 1st Sess. (1983), reprinted in 129 CONG. REC. S514 (daily ed. Jan. 26, 1983); S.J. Res. 110, 97th Cong., 1st Sess. (1981), reprinted in 127 CONG. REC. 21,383 (1981).

to appropriate is part of "the inviolable and exclusive power of the purse."¹⁶⁰ In *Harris v. McRae*,¹⁶¹ the Supreme Court approved these arguments and upheld the funding ban.

Congress, of course, is not the only elected branch interested in *Roe*. The executive branch, especially during the Reagan and Bush presidencies, has been extremely active in its efforts to restrict abortion. For example, Ronald Reagan, who claimed that "more than 15 million unborn children have had their lives snuffed out by legalized abortions,"¹⁶² used the full arsenal of weapons available to a president: judicial and administrative appointments, court briefs, legislative proposals, constitutional amendment proposals, and regulatory initiatives. The principal weapon in this attack against *Roe* was regulation; the most significant regulatory initiatives were prohibitions on fetal tissue research¹⁶³ and the so-called "gag order" prohibiting recipients of Title X funding from mentioning abortion as a method of family planning.¹⁶⁴ The Supreme Court upheld Title X family planning regulations in its May 1991 *Rust v. Sullivan* decision.¹⁶⁵

White House and congressional responses to *Roe* reveal the extraordinary range of options available to elected government in the face of a Supreme Court decision with which it disagrees. In the end, however, the fulcrum of elected branch activity has been at the margins and not at the heart of the *Roe* right. Direct repeal efforts have been rejected in favor of funding bans and regulations that prohibit the government from engaging in activities that directly or indirectly support the *Roe* right. By erecting a wall between the federal government and the *Roe* right, the elected branches have expressed their disapproval of *Roe* without engaging in direct battle with the judiciary. That *Harris v. McRae* and *Rust v. Sullivan* both upheld these elected branch responses reinforces the propriety of constitutional dialogues between the courts and elected government. Moreover, by upholding such elected branch responses to its decisions, the Court effectively reduces the pressure on elected government to respond to a Supreme Court ruling through the more drastic techniques of constitutional amendment or court stripping.

160. Brief of Rep. Jim Wright [and other Members of Congress] at 6, 14-15, 29, *Harris v. McRae*, 448 U.S. 297 (1980) (No. 79-1268), reprinted in FISHER & DEVINS, *supra* note 31, at 228.

161. 448 U.S. 297 (1980) (upholding a funding restriction that barred the use of Medicaid funds even for medically necessary abortions).

162. RONALD REAGAN, ABORTION AND THE CONSCIENCE OF THE NATION 15, 19-21 (1984), reprinted in FISHER & DEVINS, *supra* note 31, at 229.

163. See Michael Specter, *NIH Told to Stop Use of Aborted Fetuses*, WASH. POST, Apr. 15, 1988, at A1. The ban was instituted in 1988 by the Reagan administration and is supported by the Bush administration.

164. 42 C.F.R. § 59 (1991). For further discussion, see FISHER & DEVINS, *supra* note 31, at 221-23.

165. 111 S. Ct. 1759 (1991). For further discussion, see FISHER & DEVINS, *supra* note 31, at 223-25.

This ongoing tug and pull between elected government and the courts reveals that all parts of government work together (if not in tandem) in shaping constitutional values. On one hand, from 1973 to 1989, the Supreme Court's consistent reaffirmation of *Roe* in the face of direct state legislative challenges helped ensure the availability of affordable abortion providers. On the other hand, by approving indirect federal challenges in *Harris* and *Rust*, the Court recognized that elected government plays an important and appropriate role in the abortion arena.

Rosenberg's suggestion that *Roe* does not provide evidence of extra-judicial influence because political leaders did not rally behind the decision (pp. 234-35) is troublesome. That reform efforts sought to limit *Roe* speaks to the potency of Court action in this area. State repeal efforts could not withstand market mechanisms created by the Court. Congress favored indirect attacks over direct repeal in order to avoid a direct challenge to Supreme Court authority. Of course, as Rosenberg recognizes, nonjudicial influences play a critical role in shaping the abortion issue, but he is wrong to speak of "the lack of judicial and extra-judicial effects of Court decisions" (p. 265).

3. Webster: *The Changing Face of Abortion Politics*

The Supreme Court's 1989 decision in *Webster v. Reproductive Health Services* reveals the impossibility of seeking to isolate and measure the impact of court decisions. In approving fetal viability tests during the second trimester of pregnancy and thereby finding "the rigid *Roe* framework" unworkable,¹⁶⁶ *Webster* signaled a new era in abortion politics. But *Webster*'s signals are mixed and not readily subject to measurement. While a powerful argument can be made that *Webster*'s impact has been de minimis, Rosenberg's criteria can be readily manipulated to suggest otherwise. Considering the several instances where *The Hollow Hope* underestimated the judicial role, this finding is surprising indeed.

By such measures as news and magazine coverage, political activity, and increases in the membership and income of special interests, *Webster* appears a tremendous victory for the right-to-life movement. Magazine and news stories on abortion tripled from 1988 to 1989 (the year *Webster* was decided).¹⁶⁷ *Webster* also bolstered anti-abortion political activity. In the year following the decision, more than 350 anti-abortion bills were

166. 492 U.S. 490, 518 (1989) (plurality opinion) (upholding a Missouri statute prohibiting abortions in public facilities).

167. In a high-tech approximation of Rosenberg's method of counting entries in the Reader's Guide to Periodic Literature, I conducted a search on the NEXIS library of the LEXIS database. I searched the "Magazine" and "Major Papers" files, using the following search term:

introduced in 43 state legislatures.¹⁶⁸ This flurry of activity was not a short-lived phenomenon; during the first two months of the 1991 legislative year, 135 more anti-abortion bills were introduced.¹⁶⁹ Most significant, Pennsylvania, Utah, Guam, and Louisiana all enacted stringent anti-abortion measures.¹⁷⁰ *Webster* lay at the heart of these efforts; for example, Utah Governor Norman Bangester, in supporting a tough anti-abortion statute, commented that "[i]t's time to get this legislation before the courts so we can receive some definitive information as to what the state can do to more fully protect the sanctity and dignity of life."¹⁷¹ Finally, "pro-life" groups experienced growth in contributions and membership in the wake of *Webster*.¹⁷² By Rosenberg's measures, *Webster*'s "extra-judicial" impact appears quite significant.

Webster, no doubt, has advanced "pro-life" goals. By suggesting that state laws previously invalidated would now withstand constitutional muster, *Webster* empowered states to place greater restrictions on the abortion decision. *But* that empowerment is court-driven. With respect to changes in politics and attitudes, *Webster*'s principal beneficiaries are "pro-choice" interests. For example, the National Abortion Rights Action League increased its paid membership by fifty percent during the first six months of 1989, and saw its income surge from \$3.3 million a year to \$1 million a month.¹⁷³ Likewise, the National Organization for Women had its membership jump from 135,000 in 1988 to 252,000 in 1990.¹⁷⁴

Webster's ultimate impact on anti-abortion legislative reform efforts is also subject to question. Hundreds of anti-abortion measures were introduced after *Webster*, but in the two years following the decision,

Headline (Abortion) and date = X		
Date	# magazine stories	# stories, maj. papers
1986	22	300
1987	26	310
1988	47	611
1989	153	2362
1990	98	1849
1991	63	1821

168. Roberto Suro, *Backers Push Louisiana Abortion Bill Toward Supreme Court Test*, N.Y. TIMES, June 24, 1990, at A23.

169. *State Reproductive Health Monitor: Legislative Proposals and Actions*, ALAN GUTTMACHER INST., Feb. 1991, at i.

170. See FISHER & DEVINS, *supra* note 31, at 237-41. In *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), the Supreme Court upheld most but not all of the provisions of the Pennsylvania law. Because the laws in Utah, Guam, and Louisiana are stricter than the Pennsylvania law, it seems likely that those statutes will be struck down. See David G. Savage, *High Court Affirms Right to Abortion, but Allows Some Restrictions by States*, L.A. TIMES, June 30, 1992, at A1.

171. Maralee Schwartz, *Utah Enacts Abortion Limits, Prepares for Bitter Court Test*, WASH. POST, Jan. 26, 1991, at A2.

172. See Anne Kornhauser, *Abortion Case Has Been Boon to Both Sides*, LEGAL TIMES, July 3, 1989, at 1.

173. Carol Matlack, *Mobilizing for the Abortion War*, 28 NAT'L J. 1814, 1814-15 (1989).

174. NOW Factsheet (on file with author).

only four of these measures took effect.¹⁷⁵ Moreover, only states with a long history of enacting legislation challenging *Roe* gave serious consideration to new anti-abortion measures.¹⁷⁶ Knowing that "pro-choice" forces were "going to take names and kick ankles,"¹⁷⁷ many legislators decided that the political costs of supporting anti-abortion legislation were too great. Instead, as the Alan Guttmacher Institute concluded, "lawmakers stayed in the 'safe,' familiar, middle ground."¹⁷⁸

If anything, lawmakers switched allegiance from "pro-life" to "pro-choice" positions. In the two years following the decision, three states—Connecticut, Nevada, and Maryland—enacted legislation designed to protect a woman's right to an abortion even if federal constitutional guarantees failed.¹⁷⁹ Twenty-three members of Congress who previously supported abortion funding bans switched their votes.¹⁸⁰ The Republican party also moderated its anti-abortion position. First, the newly formed "Republicans for Choice" urged the dropping of a party plank opposing abortion. Thereafter, then party Chairman Lee Atwater described the GOP as a "big tent," open to all views on abortion.¹⁸¹ At the 1992 Republican convention, this "big tent" kept the anti-abortion party plank, but allowed pro-choice speakers to play a prominent role at the party's convention.¹⁸² Finally, abortion proved decisive in 1989 gubernatorial races in Virginia and New Jersey where pro-choice candidates Douglas Wilder and James Florio defeated anti-abortion candidates Marshall Coleman and James Courter.¹⁸³ Moreover, a 1990 Congressional Quarterly study found abortion to be "the most critical non-money issue" in 1990 gubernatorial races.¹⁸⁴

Webster, then, clearly changed the political landscape of abortion politics without prompting significant changes in abortion rights. Rather than suggesting that court opinions are of little consequence, however, this state of affairs bespeaks the importance of judicial action. By chang-

175. See FISHER & DEVINS, *supra* note 31, at 237.

176. See Halva-Neubauer, *supra* note 152.

177. 135 CONG. REC. H4928 (daily ed. Aug. 2, 1989) (statement of Rep. AuCoin).

178. *State Reproductive Health Monitor: Legislative Proposals and Actions*, ALAN GUTTMACHER INST., Dec. 1990, at i.

179. See FISHER & DEVINS, *supra* note 31, at 241-42.

180. See Beth Donovan, *Abortion's Changing Politics Keys House Turnaround*, 47 CONG. Q. WKLY. REP. 2020, 2022 (Aug. 5, 1989).

181. Ronald Brownstein, *Losing While Winning: The Abortion Albatross*, L.A. TIMES, Aug. 5, 1990, at M4; see also Beth Donovan, *New GOP Group Seeks to Erase Ban in Party Platform*, 48 CONG. Q. WKLY. REP. 1383 (May 5, 1990).

182. See *GOP Convention: Pro-Choicer to Speak, Caravan "Stalled,"* AM. POL. NETWORK ABORTION REP., Aug. 3, 1992; *Abortion Right Leaders Concede Defeat*, NAT'L JOURNAL'S CONGRESS DAILY, Aug. 17, 1992.

183. David Whitman et al., *The Abortion Hype*, U.S. NEWS & WORLD REP., Apr. 2, 1990, at 20.

184. Holly Idelson, *Budgets, Jobs and Abortion Are Big Issues in States*, 48 CONG. Q. WKLY. REP. 2840, 2840 (Sept. 8, 1990).

ing the calculus of anti-abortion proposals, *Webster* made right-to-life initiatives less likely to succeed. Instead, the *Roe*-created "status quo" has become the governing norm—despite the fact that *Roe* had earlier invalidated 46 state laws. In fact, the Supreme Court's 1992 reaffirmation of *Roe* in *Planned Parenthood v. Casey*¹⁸⁵ was explicitly grounded in the stare decisis effect of *Roe*.¹⁸⁶ While *Planned Parenthood* also reaffirmed *Webster*'s repudiation of the "rigid" trimester test,¹⁸⁷ its adherence to *Roe*'s "central holding"¹⁸⁸ further reveals the transformative power of judicial edicts. That this transformation of the status quo involves not just judicial action but also market conditions, elected government, and interest groups, is beyond dispute. The judiciary, however, is certainly a partner in this dynamic process.

III

CONCLUSION: REEXPLAINING *THE HOLLOW HOPE*

That there are instances where court opinions seem inconsequential cannot be denied. Supreme Court decisions limiting religious observance in the public schools and prohibiting the legislative veto, for example, are often disregarded. The public school cases demand that objecting students bear the fiscal and emotional toll of challenging school systems that would prefer to heed religious belief ahead of Supreme Court decisions. This price is quite high and consequently many religious practices remain unchallenged.¹⁸⁹ The legislative veto is a more dramatic, more surprising case, for the affected parties are Congress and the White House, rather than "backwater" school systems. Nonetheless, following the Supreme Court's 1983 repudiation of this device in *INS v. Chadha*,¹⁹⁰ more than 200 new legislative vetoes have been enacted and countless informal arrangements have been made between oversight committees and government agencies.¹⁹¹ The explanation for this widespread disobedience is that neither Congress nor the White House "wants the static model of separated powers offered by the Court. The inevitable result is a record

185. 112 S. Ct. 2791 (1992).

186. *Id.* at 2808-09.

187. See Kathleen M. Sullivan, *Packing the Court Is Harder than It Appears*, AM. LAW., Aug. 7, 1992, at 9.

188. *Planned Parenthood*, 112 S. Ct. at 2809.

189. See, e.g., KENNETH M. DOLBEARE & PHILLIP E. HAMMOND, *THE SCHOOL PRAYER DECISIONS* (1971); PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS* (1988); Robert H. Birkby, *The Supreme Court and the Bible Belt: Tennessee Reaction to the "Schempp" Decision*, 10 MIDWEST J. POL. SCI. 304 (1966); Choper, *supra* note 145, at 8-9; Frank J. Sorauf, *Zorach v. Clauson: The Impact of a Supreme Court Decision*, 53 AM. POL. SCI. REV. 777, 784-91 (1959). At the same time, school prayer and bible reading decisions were consequential, for many systems did alter their practices to comply with these Court rulings. See, e.g., WILLIAM K. MUIR, JR., *PRAYER IN THE PUBLIC SCHOOLS* (1967) (examining how Supreme Court decisions affected school officials in one school district).

190. 462 U.S. 919 (1983).

191. See generally FISHER & DEVINS, *supra* note 31, at 121-42.

of noncompliance, subtle evasion, and a system of lawmaking that is now more convoluted, cumbersome, and covert than before."¹⁹² That the Court repudiated the legislative veto hardly matters. With both sides benefitting from legislative veto arrangements,¹⁹³ market forces have simply driven them underground.

The legislative veto and religion cases share a common feature. Neither decision creates incentives for compliance. Compliance, instead, is a by-product of the implementing community. Consequently, when the implementing community resists, the judicial impact is muted. In other instances, however, elected government acts affirmatively in the face of a decision that is not self-implementing. The demand that tax-exempt organizations comply with nondiscrimination regulations and that broadcast licensing decisions take race into account are both the direct result of court action.¹⁹⁴ More significantly, federal desegregation efforts prompted southern school desegregation in the wake of widespread resistance to *Brown*.¹⁹⁵

Judicial influences are more pronounced when incentives for enforcement are a natural outgrowth of the opinion. Employers now incorporate Title VII rulings into their hiring and promotion practices in order to avoid litigation costs.¹⁹⁶ Likewise, health care providers responded to the extraordinary demand for nonhospital abortions in the wake of *Roe* by opening abortion clinics.¹⁹⁷ Elected government may strengthen these self-implementing decisions. For example, employment discrimination litigation pursued by the EEOC and Department of Justice quickened the pace of Title VII compliance. Elected government may also oppose self-implementing decisions, as occurred when anti-abortion funding restrictions prevented some poor women from seeking an abortion. Yet, unlike non-self-implementing decisions, where government resistance is extremely significant, self-implementing decisions can withstand governmental attack. Witness the abortion decision: despite the approval of the abortion funding ban in *Harris v. McRae*, abortion rates have remained stable.¹⁹⁸

192. FISHER, *supra* note 10, at 228.

193. See Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207 (1984).

194. See *supra* text accompanying notes 71-90.

195. See *supra* text accompanying notes 37-54.

196. See *supra* text accompanying notes 114-16.

197. See *supra* text accompanying notes 147-48.

198. See Kim Painter, '87 Abortion Rate Shows Decline from '80, U.S.A. TODAY, Apr. 25, 1991, at A3. The article cites a Guttmacher Institute Report that finds that while 29 out of every 1000 women had abortions in 1980, 27 out of every 1000 women had abortions in 1987. Because the number of women of childbearing age has increased, however, the overall number of abortions has been steady at 1.6 million per annum. Significantly, the study indicates that the abortion rate of women under 15 years old and of minorities between 15 and 19 years actually increased. In fact, the decrease can be attributed solely to a decrease in abortions for white women over 19 years old—those least likely to have been affected by the *Harris* decision.

Courts matter. They matter a lot. Sometimes their orders set in motion market mechanisms which guarantee their effectiveness.¹⁹⁹ Sometimes the threat of judicial action prompts either settlement or legislative initiative.²⁰⁰ Their opinions influence legislative deliberations²⁰¹ and change the status quo.²⁰² Occasionally, they trump agencies and interpose their normative views into the law. It may be that these influences sometimes result in unwise policy decisions and sometimes exceed the proper judicial role in our system of separated powers, but they *are* judicial influences nonetheless.

The Hollow Hope unduly discounts these judicial contributions. Courts are given inadequate credit for what they do, as well as too much blame for what they do not do.²⁰³ While Rosenberg does a masterful job of showing that courts do not effect change alone, he goes too far in refusing to recognize that the judiciary is actively involved in a partnership with elected government. His repeated broadsides at the judiciary sound a message of judicial irrelevance rather than one of limited governmental partnership.²⁰⁴

In some respects, Rosenberg's problem is one of articulation, not analysis. Instances where court opinions are made meaningful through market mechanisms or elected branch participation are recognized (pp.

199. See *supra* text accompanying notes 147-48 (judicial authorization of non-hospital abortions created market for their supply); see also *supra* text accompanying notes 114-16 (judicial enforcement of Title VII encouraged employers to change their hiring practices to avoid litigation).

200. Settlement agreements are extraordinarily important, for government agencies are sometimes willing to establish long term policy priorities through judicially entered consent decrees. See generally Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree*, 40 STAN. L. REV. 203 (1987) (describing such decrees and arguing that a president's policymaking discretion cannot be bargained away through them).

201. See *supra* text accompanying notes 39-49 (describing *Brown's* influence on civil rights legislation such as the 1964 Civil Rights Act and the Elementary and Secondary Education Act).

202. See *supra* Section II.B.3.

203. See *supra* text accompanying notes 30-54 (Rosenberg understates the political and social importance of *Brown* and ignores the controversial post-*Green* period); text accompanying notes 121-36 (Rosenberg's analysis of women's rights, in which courts played a relatively minor role, does not support the conclusion that courts are incapable of bringing about social change). *The Hollow Hope* also does not consider the Court's influence in furthering elected branch initiatives by upholding such conduct. For example, Jonathan Casper argues that post-1937 decisions upholding New Deal initiatives reveal the Court's role in "leading other groups and interests in society to come to grips with laissez-faire economic policy and the interests that supported it." Jonathan D. Casper, *The Supreme Court and National Policy Making*, 70 AM. POL. SCI. REV. 50, 62 (1976). Likewise, Charles Black has argued that the principal function of the Supreme Court is to legitimate elected branch initiatives by subjecting them to countermajoritarian judicial review. See CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT*, 37-53 (1960).

204. Robert Dahl explained some thirty-five years ago why the Supreme Court is not "simply an agent of the alliance." Robert A. Dahl, *Decision-Making in a Democracy: The Role of the Supreme Court as a National Policy-Maker*, 6 J. PUB. LAW 279, 293 (1957). For Dahl, although the Court cannot frustrate "the basic policy goals of the dominant alliance, the Court *can* make national policy. Its discretion, then, is not unlike that of a powerful committee chairman in Congress who . . . can, within . . . limits, often determine important questions of timing, effectiveness, and subordinate policy." *Id.* at 293-94.

30-36). But rather than acknowledge the judicial contribution here, these evidences of partnership are caricatured as "constraints" and "conditions" demonstrative of a de minimis judicial role. In other words, by seeking to isolate and measure the judiciary's contribution, these partnership influences are deemed evidence of impotence.²⁰⁵

Rosenberg's shortcomings can also be attributed to the ambitiousness of *The Hollow Hope*. Perceiving that existing scholarship on judicial influences is unsatisfying because "findings remain unconnected and not squarely centered on whether, and under what conditions, courts produce significant social reform" (p. 9), Rosenberg seeks to go boldly where no one has gone before. His problem—as others before him have recognized—is that "the repercussions of all government actions ramify indefinitely and interrelate with other phenomena, both public and private, many of which simply cannot be quantified and indeed often cannot even be identified."²⁰⁶ Supreme Court decisions "are part of a general milieu in which later events take place and part of a set of multiple causes of such events."²⁰⁷

Problems with *The Hollow Hope* do not mean that Rosenberg's concerns are without merit. Nonjudicial forces, whether political or social, are infrequently studied and grossly underestimated. Combined with inherent limits on the judiciary's power to manage reform, these nonjudicial forces suggest that social reform through litigation is a gamble. But these "constraints" speak to caution, not to the abandonment of court-initiated reform.

Ironically, what makes Rosenberg's recommendation of political reform especially appealing is that Rehnquist Court's rulings increasingly speak of the need to defer to elected government, and not because elected government disregards activist decision-making. Federal agency interpretations of vague statutory language are likely to be upheld because "substantial deference is accorded to the interpretation of the authorizing statute by the agency authorized with administering it."²⁰⁸ State action too is subject to less stringent inquiry, for the Court now appears unwill-

205. Although I have not attempted such a measurement, there is good reason to think that the legislative initiatives Rosenberg cites as important events would not measure well in isolation. As this Review Essay has shown, these initiatives are best understood as by-products of mutually dependent conduct.

206. Choper, *supra* note 145, at 7. Bob Katzmann likewise argues that policymaking is best thought of as "dynamic and complex, as 'a continuum of institutional processes [judicial, legislative, and administrative], sometimes acting independently, but often interacting in subtle and perhaps not always conscious ways . . .'" Robert A. Katzmann, *The Underlying Concerns, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY* 7, 12 (Robert A. Katzmann ed., 1988) (quoting ROBERT A. KATZMANN, *INSTITUTIONAL DISABILITY* 9).

207. STEPHEN L. WASBY, *THE IMPACT OF THE UNITED STATES SUPREME COURT* 32 (1970).

208. *Rust v. Sullivan*, 111 S. Ct 1759, 1767 (1991) (emphasis added). In upholding the Reagan gag order in *Rust*, the Court found it inconsequential that the Reagan regulation departed from Nixon, Ford, and Carter administration standards, noting that "[t]he court need not conclude that the agency construction [is the one] . . . the court would have reached if the question initially had

ing to strike down "a neutral, generally applicable regulatory law" irrespective of its effects on individual rights.²⁰⁹

Special interests have begun to alter their strategies in response to these rulings. The National Abortion Rights Action League recently informed its membership that "[c]learly Congress is our Court of Last Resort. All hope of protecting our constitutional right to choose depends upon our elected representatives in Congress responding to the will of the American people."²¹⁰ Other groups have also proclaimed Congress "our court of last resort" and concluded that the battle over the judiciary is now lost.²¹¹ Although there undoubtedly will be occasions where these groups turn to the federal courts,²¹² reform efforts in civil rights, the environment, privacy, and a host of other concerns will now target Congress, the executive, and the states.

Rosenberg's sobering account of the limits of judicial intervention will bolster this trend. To the extent that people expect too much from the courts, *The Hollow Hope's* pessimism is necessary, if not welcome. Rosenberg, however, goes too far. *The Hollow Hope* emphasizes the Court's dependence but hardly recognizes its influence. Rosenberg's conclusion that social change can rarely be advanced through court action is absolute, and therefore flawed. For Rosenberg, it does not matter whether the Court in power is the Warren Court of the 1960s or the Rehnquist Court of the 1990s—inherent limitations on the judicial power will control.

The Hollow Hope cannot substantiate this claim. Through a combination of incomplete analysis, questionable presumptions, and indirection, *The Hollow Hope* underestimates the sweep of the judiciary's contribution to social reform. The judiciary may now appear dormant, but it should not be written off.

arisen in a judicial proceeding." *Id.* (quoting *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.11 (1984)).

209. *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 880 (1990) (discussing religious rights); see also *Cohen v. Cowles Media Co.*, 111 S.Ct. 2513, 2518 (1991) ("generally applicable laws" do not infringe on free speech rights of the press). Further evidence that the *raison d'être* of the Rehnquist Court is validating governmental conduct is the Court's refusal to support challenges by "business" against government regulation. See Stephen Wermiel, *Decisions on Workplace Damages Provide Little to Hearten Business*, WALL ST. J., June 28, 1991 at A8.

210. FISHER & DEVINS, *supra* note 31, at 7.

211. See, e.g., Rev. Amos Brown, Remarks Before the Senate Judiciary Committee on the Nomination of Clarence Thomas to the Supreme Court (Sept. 20, 1991) (transcript available on Westlaw) ("We cannot lift [Clarence Thomas] up as a symbol on a court that is already stacked, thus rendering his one presence ineffective.").

212. If nothing else, court filings draw attention to an issue. For example, pro-choice forces made front page news recently when they demanded that the Supreme Court either reaffirm or abandon *Roe*. See Richard L. Berke, *Groups Backing Abortion Rights Ask Court to Act*, N.Y. TIMES, Nov. 8, 1991, at A1.