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HOW COURTS IMPLEMENT SOCIAL POLICY

Mark Tushnet*

Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (2d ed., U. Chi. Press 2008). Pp. 534. \$20.00.

Gordon Silverstein, *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics* (Cambridge U. Press 2009). Pp. 332. \$23.99.

The drama over the enactment of the Affordable Care Act¹ — health-care (insurance) reform — brings Mark Graber's variant² on Gerald Rosenberg's question to the forefront: Can *anyone* bring about social change? Rosenberg has published a second edition of his classic work, supplementing the first edition's treatment of civil rights and abortion in constitutional law with an analysis of the movement for same-sex marriage.³ By now Rosenberg's approach is familiar, with some common misunderstandings largely dissipated. Rosenberg is interested in the circumstances under which courts can (and cannot) bring about social change. True, he is skeptical about the proposition that those circumstances are common, but he does not offer “no” as the universal answer to his subtitle's question. Properly understood, Rosenberg's is a work in the literature on social-policy implementation. The questions Jeffrey Pressman and Aaron Wildavsky asked about economic development as implemented by federal and local bureaucracies,⁴ Rosenberg asks about other social policies as implemented by courts.

Gordon Silverstein pursues a similar inquiry, identifying patterns in the ways in which judicial-policy implementation interacts with policy choices made by other institutions.⁵ So, for example, courts sometimes engage in constructive interactions, as in environmental law, where they take statutory directives and push them toward more

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1. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

2. Mark A. Graber, *Does It Really Matter? Conservative Courts in a Conservative Era*, 75 *Fordham L. Rev.* 675 (2006).

3. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (2d ed., U. Chi. Press 2008).

4. Jeffrey L. Pressman & Aaron Wildavsky, *Implementation: How Great Expectations in Washington Are Dashed in Oakland; or, Why It's Amazing That Federal Programs Work at All, This Being a Saga of the Economic Development Administration As Told by Two Sympathetic Observers Who Seek to Build Morals on a Foundation of Ruined Hopes* (3d ed., U. Cal. Press 1984). Note the similar connotations of Pressman and Wildavsky's and Rosenberg's subtitles.

5. Gordon Silverstein, *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics* (Cambridge U. Press 2009). Disclosure: I wrote the following blurb for Silverstein's book: “A valuable contribution to the next generation of studies on constitutional politics. With well-chosen case studies and a useful analytical framework, Gordon Silverstein helps identify the whys, hows, and so-whats of interactions between politicians and judges in shaping public policy.”

expansive coverage, which Congress and the public generally endorse. And sometimes courts engage in destructive interactions, as in campaign finance, where the courts' constitutional interpretations routinely create large gashes in regulatory structures that might perhaps do something useful as enacted but that certainly cannot do so as restructured by the courts. Silverstein argues that these patterns arise in part because courts implement social policy *through law* rather than, for example, through bureaucratic directives, and that the legal form affects the resulting social policy.

Taken together, Rosenberg and Silverstein provide the template for a new generation of studies in the judicial implementation of social policy. By reviewing some of the standard criticisms of Rosenberg's work with respect to his new case study of same-sex marriage litigation, and critiquing some aspects of Silverstein's treatment of the distinctive impact of law on social policy, this review attempts to sketch some considerations that the new generation of studies should make analytic focal points.

Rosenberg concludes that "litigation as a means of obtaining the right to same-sex marriage has not succeeded"⁶ because "activists for same-sex marriage turned to courts too soon in the reform process,"⁷ moving "too far and too fast ahead of the curve."⁸ These conclusions are subject to criticisms similar to those leveled against the case studies in the first edition. First, they depend on a controversial criterion of success. Obviously litigation has not succeeded in obtaining the right to same-sex marriage nationwide, but why is that the (only) relevant criterion of success? Rosenberg "look[s] to the litigants and litigators," whose "self-stated goal is marriage equality," and concludes that, from that perspective, litigation achieved " 'one step forward, two steps back.' "⁹

Even from this perspective we might question Rosenberg's conclusion. Perhaps it would be better formulated as, "Litigation as a means of obtaining the right to same-sex marriage has not succeeded *yet*." That is, determining the appropriate time frame is crucial in any assessment of social-policy implementation. So, for example, we can be quite sure that a year after the Affordable Care Act's enactment, health-care insurance will not be available nearly as widely as its most fervent supporters hope. I doubt that we should then conclude, "Legislation as a means of obtaining wider access to health care has not succeeded." Rather, our conclusion should be "Too soon to tell" or "We'll see."¹⁰

So too, perhaps, with litigation to achieve same-sex marriage. It may be too soon to tell whether it will "succeed" according to the measure of success offered by today's litigators and litigants. And, as far as I can tell, Rosenberg has no purchase on identifying the appropriate time frame for evaluation.¹¹ Rosenberg emphasizes in his new material,

6. Rosenberg, *supra* n. 3, at 415.

7. *Id.* at 416.

8. *Id.* at 419.

9. *Id.* at 368.

10. Attributed respectively to Mao Tse-tung and to a Zen master by Gust Avrakotos in the film *Charlie Wilson's War* (Universal Pictures 2007) (motion picture).

11. A similar difficulty attends Silverstein's discussions of (1) efforts to get control over federal budgeting by means of a line-item veto, held unconstitutional by the Supreme Court in *Clinton v. City of New York*, 524 U.S. 417 (1998), but displaced by internal legislative rules known as PAYGO, then eliminated, then reintroduced, and (2) tobacco-regulation policy, the most recent episodes of which include the enactment of a

as he did in the first edition, that litigation to achieve social change interacts in complex ways with social movements (“in the streets”) and legislative and executive strategies. Identifying those interactions is exceedingly difficult, and Rosenberg’s methodological commitments are not well-suited to the task. Rosenberg uses media coverage - counting discussions of same-sex marriage in various publications, for example - and public opinion polls to see whether support for same-sex marriage is growing, and, perhaps more important, whether support for civil unions as an alternative to same-sex marriage is growing and, if so, whether that growth is attributable to the same-sex marriage litigation.¹² Rosenberg alludes to broader cultural trends - using the standard examples of *Will & Grace* and *Ellen DeGeneres* - but he does not purport to be a cultural analyst.¹³ His quantitative methods, though, are just too thin to discern cultural trends that might produce broader support for same-sex marriage, much less the influence that litigation might have on those trends.

Further, the “self-stated goal [of] marriage equality” is surely not the deepest goal even of those pursuing litigation seeking same-sex marriage.¹⁴ I assume that what they are after is equality for gays and lesbians in all social domains, of which marriage is only one.¹⁵ Litigation for same-sex marriage might be successful if it induces changes in other social domains such as employment. Indeed, “induces” might be too strong a word here. The litigation might be successful, according to this broader criterion, if it accelerates slightly ongoing processes of social change. Rosenberg offers his version of a backlash argument: litigation for same-sex marriage provoked a backlash in the form of the Defense of Marriage Act¹⁶ on the federal level and state constitutional amendments defining marriage in ways that preclude same-sex marriage. Thomas Keck has questioned the backlash thesis by expanding the scope of inquiry to include other domains of equality, and suggests that litigation for same-sex marriage might have had positive effects, from the perspective of those seeking equality for gays and lesbians, in those other domains.¹⁷ For what it is worth, I report my own sense that support for civil

federal statute and a partially successful constitutional challenge in *Lorillard Tobacco v. Reilly*, 533 U.S. 525 (2001). It is unclear to me at what point in time we should examine the “success” of these policies and the courts’ roles in the outcome. My instinct is to say that though we might not be able to measure success, we might be able to determine whether courts made policy development more complicated than it needed to be, although I confess to some puzzlement about exactly how to do so. The question is beyond my area of expertise, but I have serious doubts about whether there can be a defensible criterion for choosing the appropriate time frame within the conceptual or methodological framework to which Rosenberg is committed. This is not a criticism of Rosenberg’s work as such, but a caution about the limits of the frameworks he uses.

12. The thought is that civil unions might be a way station toward same-sex marriage (or, perhaps, that as civil unions proliferate, advocates of same-sex marriage will come to believe that civil unions are a fully adequate alternative to same-sex marriage for nearly everyone).

13. Rosenberg, *supra* n. 3, at 413.

14. *Id.* at 368.

15. I note the recent expansion of the relevant category to include bisexual and transgendered people. I know that there are legal issues associated with the marriage rights of such people (for example, may a man who has undergone sex-reassignment surgery marry a man?), but to this point they have been peripheral to the litigation efforts Rosenberg discusses. In any event, I lack sufficient familiarity with them to be able to address them in the context of Rosenberg’s discussion of same-sex marriage.

16. 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006). Both were enacted under the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

17. Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 L. & Soc’y. Rev. 151 (2009).

unions as the “centrist” position rose pretty dramatically once opponents of same-sex marriage saw that litigation for same-sex marriage might actually succeed. Rosenberg points out that disaggregating public opinion polls shows that demographics matter a lot: younger people support same-sex marriage and civil unions at a higher rate than older people.¹⁸ But, of course, those views do not come from nowhere, and it would not be surprising were further analysis to show that younger people’s views are more affected than older ones’ by reporting about litigation.¹⁹

Rosenberg starts with decisions by litigants and litigators and ends with the observation that “succumbing to the ‘lure of litigation’ appears to have been the wrong move.”²⁰ Here, I think, his instincts as a political scientist falter. His formulation assumes that choices - “moves” - were involved. And, of course, that is certainly true of individual litigants and their lawyers. It need not be true, though, of social-policy litigation associated with social movements because of a key institutional characteristic of courts: Anyone can bring a lawsuit, and courts have to decide the claims made in the lawsuits that come before them.²¹ The “social movement,” that is, may not be in a position to control the timing, pace, or even fact of litigation.²² Consider that Rosenberg begins his discussion of same-sex marriage with *Baehr v. Lewin*,²³ the first modern same-sex marriage case.²⁴ He quotes Evan Wolfson of the Lambda Legal Defense Fund, calling the decision “[a] breakthrough case.”²⁵ The way *Baehr* came about deserves attention for those interested in analyzing how courts implement social policy.²⁶ The Hawaii litigants were put in touch with Wolfson and Lambda by “mutual friends.”²⁷ Wolfson brought the case to his colleagues at Lambda, who declined to take the case. The Hawaiian litigants turned to a local lawyer, who filed the suit. Only after a loss at the trial level did Lambda join in the appeal.²⁸ Lambda, that is, did not choose to seek same-sex marriage in the courts; indeed, it chose not to. And, according to Wolfson, the decision to support the appeal was forced on Lambda: He told his colleagues, “Whatever

18. Rosenberg, *supra* n. 3, at 409-410.

19. Whether the litigation is immediately successful or not is not the key here: how people react to reports about the litigation is. A defeat in court might lead people to think that the courts were wrong, as appears to have happened, for example, in connection with the Supreme Court’s decision allowing states to take property with compensation for urban improvement projects. *Kelo v. City of New London*, 545 U.S. 469 (2005).

20. Rosenberg, *supra* n. 3, at 419.

21. They must do so subject to qualifications about justiciability and the like. I omit from my discussion the possibility that judges will take some cases more seriously because they appear to have support from within a social movement.

22. This point has come up recently in connection with litigation filed by Ted Olsen and David Boies challenging California’s constitutionalized ban on same-sex marriage on federal constitutional grounds. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

23. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

24. An earlier case, *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972), has had no significant impact on more recent litigation.

25. Rosenberg, *supra* n. 3, at 339 (quoting Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-community Critique*, 21 N.Y.U. Rev. L. & Soc. Change 567, 569 (1994)).

26. I rely on an interview with Wolfson reported in Daniel R. Pinello, *America’s Struggle for Same-Sex Marriage* 23-28 (Cambridge U. Press 2006).

27. *Id.* at 25.

28. *Id.* at 26.

you thought before, the world has just changed.”²⁹ And changed because of something over which Lambda had had no control.

Rosenberg’s central theme is that courts are sometimes constrained in their ability to implement social policy. The constraints arise from the courts’ institutional characteristics and, perhaps more importantly, from the fact that they are located within a broader political system including legislatures and executive officials who have the power to influence implementation. Rosenberg, though, is relatively inattentive to the institutional structure of litigation itself. In the United States, that structure includes rules allowing anyone adversely affected by a statute to challenge its constitutionality.³⁰ Robert Kagan’s treatment of adversarial legalism in the United States points the way to a more complete analysis of the issues associated with judicial implementation of social policy,³¹ but there is much more work to be done to supplement Rosenberg’s account, valuable as the latter is.

One of Gordon Silverstein’s central themes deals with what might be the key institutional characteristic of courts as policy implementers.³² For Silverstein, what matters is that judges implement policy through law. That they do so affects whether patterns of constructive or destructive interactions between courts and the other branches result. Why do different patterns arise? Silverstein identifies some institutional features that matter, such as whether the political branches are under divided or unified partisan control. So, for example, “as Congress itself becomes more bitterly divided and less capable of unified action, . . . the Court is more likely to become a staunch ally for some, and a clear enemy for others, making constructive patterns less and less likely.”³³ As this suggests, whether a constructive or destructive pattern emerges depends, as a first approximation, on the courts’ ideological sympathies for the legislation that comes before them. Campaign finance regulation was enacted pretty much over Republican objections, though some congressional Republicans signed on, some for purely cosmetic reasons. The legislation came before conservative courts, which blew holes in the regulatory structure. Law matters, but only on the margins. Silverstein uses the example of environmental legislation since the 1970s as a telling example. Congress enacted moderate environmental statutes; the courts interpreted their provisions aggressively; and Congress responded by endorsing and amplifying what the courts did.

Silverstein makes a broader claim, though. For him, law matters more centrally because courts make policy using tools different from those used by legislatures and executive bureaucracies - primarily, the tools of legal doctrine. Silverstein’s contribution to the study of courts as policy implementers is important and, as far as I know, an original one. I want to press some questions about it, in the hope that future studies will build on Silverstein’s work.

The first question: What is the excluded alternative to regulation by law? What is “policy” other than something embodied in law and its interpretation? Earlier I

29. *Id.*

30. Again, subject to justiciability and similar rules.

31. Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (Harv. U. Press 2001).

32. Silverstein, *supra* n. 5.

33. *Id.* at 273.

contrasted “law” with “bureaucratic rules,” but under contemporary U.S. law even bureaucratic rules are sometimes subject to challenge in court under the Administrative Procedure Act (“APA”).³⁴ The APA excludes some regulatory acts - so-called guidance documents, for example - from judicial examination, but of course there can be, and is, litigation over whether some apparently internal direction is a guidance document not subject to judicial examination or an agency rule disguised as a guidance document, which would be reviewable. And, more generally, it is hard to imagine a government operating “outside” of law.³⁵

The contrast term for “law,” then, must be something like “directives whose verbal formulation is such as to make it exceedingly unlikely that any litigant would find it worthwhile to pursue a judicial challenge to them.”³⁶ This has the advantage of directing our attention away from “law” and toward litigants’ incentives. It has the disadvantage of getting us into some rather deep jurisprudential water. Once incentives are in view, we have to think about the stakes of potential litigation. The willingness to challenge the directive will increase as the stakes rise. At some point, litigation will occur even if the litigant believes there to be a low probability of success. And, importantly, even low probability events sometimes occur. A litigant might win a high-stakes, low-probability case simply because of the luck of the draw: the case is randomly assigned to a judge at the tail of the distribution of judges’ views on the legal merits of the claim, and on appeal to a similarly skewed panel. More interesting, suppose judges are interested primarily in “getting the law right,” but secondarily in advancing some ideological interpretation of the law.³⁷ Some cases have high ideological stakes from the judges’ points of view, and they will be willing to do a lot more work in showing that the law properly interpreted favors their ideologically preferred position.³⁸ I agree with Silverstein that treating courts as policy implementers requires that we take law into account. Doing so, though, will require analysts to say something about the merits of the legal claims asserted - not whether the claims are right or wrong in some absolute sense, but how much conceptual work a judge concerned about both law and ideology would have to do to rule in a litigant’s favor.

Silverstein focuses on a different way in which law might shape judicial policy implementation. Law, Silverstein argues, is “path dependent.”³⁹ He uses the metaphor of a Scrabble board: the choices one player makes shape the way the board gets filled out.⁴⁰ Similarly, judicial decisions made at one time eliminate some alternatives that would otherwise be available later and open up new opportunities. I think this is wrong, for reasons related to my discussion of the work needed to achieve some ideological goals

34. Administrative Procedure Act, 5 U.S.C. §§ 500-596 (2006).

35. I exclude here the case of government actions conceded by all to be *contrary* to law.

36. I am not committed to the precise formulation, but only to the general idea. Silverstein glimpses the point when he contrasts “the black-and-white of what some thought and hoped was the clarity of law” with “the frustrating and prone-to-corruption gray of politics.” Silverstein, *supra* n. 5, at 44.

37. My argument here draws on Duncan Kennedy, *A Critique of Adjudication: Fin de Siècle* (Harvard U. Press 1997).

38. The cases in which the judicial stakes are high need not be those in which the stakes for litigants are high, although one would expect some degree of overlap.

39. Silverstein, *supra* n. 5, at 69-70.

40. *Id.* at 66.

through law. The easiest way to see the problem is to note that Silverstein overlooks the possibility that a judge seeking to reach a goal but obstructed by adverse precedent can almost always construct a workaround,⁴¹ although doing so may be more difficult with respect to some precedents than others. Our legal system is thick with doctrines, and creative judges aided by creative lawyers can show - within the accepted bounds of legal reasoning - how an apparently unrelated precedent actually empowers the judge to reach the sought-after goal even when the more apparently relevant precedent stands in her way.⁴² Or, to adapt Silverstein's Scrabble metaphor: The pattern of pieces on the board might seem to constrain, but only because we imagine the board to have only two dimensions. Introduce a third dimension (or more), and the constraints become markedly weaker. The third dimension is the workaround or the seemingly unrelated doctrine.

Silverstein's discussion of war powers shows that law may be different from direct policy analysis, but not because of path dependency. He shows how different presidents and judges have put forth different conceptions of the constitutional relationship between their power and congressional power over foreign affairs. The differences, Silverstein argues, arise from the different "default assumptions" the arguments make.⁴³ So, for example, Justice Robert Jackson's assumption was that the president's power was greatest when he acted in conjunction with Congress, somewhat less when Congress was silent, and least - possibly entirely absent - when the president's actions were inconsistent with clear congressional prohibitions.⁴⁴ Chief Justice Rehnquist, in contrast, treated congressional silence as the same as authorization,⁴⁵ and President George W. Bush's legal advisers asserted that the president had complete autonomy no matter what Congress had said.⁴⁶ Silverstein suggests that the Bush administration's position shows the importance of precedent, as its lawyers tried to defend it by explaining how that position was consistent with previous cases and practices. What is most striking to me, though, is that - with the possible exception of some of the most extreme claims about Congress's inability to prevent the president from torturing detainees - the Bush administration's claims were generally plausible enough to gain support from a fair number of judges. Silverstein concludes his analysis of the Supreme Court's treatment of cases arising out of the Bush administration's detention policies by saying that the cases show the Court "shap[ing] and constrain[ing] policy choices."⁴⁷ Yet, the Court's decisions as such had almost no effects whatsoever on the ground. Policy changed to the extent that it did, not because the Bush administration shifted its position in light of the Court's decision, but because Barack Obama was elected president.⁴⁸

41. I have discussed *legislative* workarounds, that is, mechanisms legislatures can use to achieve goals the reaching of which by the most direct route is barred by the Constitution's plain language or by the Supreme Court, in Mark Tushnet, *Constitutional Workarounds*, 87 *Tex. L. Rev.* 1499 (2009).

42. This is a standard legal realist point, and has not, in my view, been shown mistaken by scholars who have devoted a lot of energy in the attempt to do so.

43. Silverstein, *supra* n. 5, at 220-232.

44. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-638 (1952) (Jackson, J., concurring).

45. See *Dames & Moore v. Regan*, 453 U.S. 654 (1980).

46. See generally Jack L. Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration* (W.W. Norton & Co. 2007).

47. Silverstein, *supra* n. 5, at 242.

48. The Bush administration's constitutional positions may have played some role in Obama's election, though I doubt that it was a large one.

Yet, I am sure that Silverstein is right in saying, as one of his chapter titles has it, that “Law is Different,”⁴⁹ and right in saying that its difference affects policy outcomes. A formulation early in the book suggests a more promising line of analysis than path dependency: “[T]he way judges articulate, explain, and rationalize their choices . . . are distinctly different from the patterns, practices, rhetoric, internal rules, and driving incentives that operate in the elected branches and among bureaucrats.”⁵⁰ Focusing on rhetoric seems to me exactly right. This is not the place to develop the point in detail, but some remarks may help sketch the outlines of why law is different.

First, as Silverstein’s emphasis on precedent suggests, “law” is retrospective. Judges have to explain what they are about to do in part by showing that it is consistent with what other judges have done in the past. Legislators can justify what they propose in wholly prospective terms. We should not treat the distinction starkly: judges typically refer to the social as well as legal consequences they imagine would flow from one or another decision, and legislators typically explain that their proposals are logical developments of policy commitments made in the past. Still, the relative balance of prospective and retrospective arguments differs among institutions.

Second, “law” involves the enforcement of preexisting rights, whether those rights be constitutional, statutory, or common law. Law’s rhetoric focuses on what a claimant “has,” not what she needs or deserves.⁵¹ Law looks to the future only indirectly; legislative policy looks there directly. This gives social policy making through law - as defined above - a moderate status quo bias.

Third, law’s rhetoric pushes in an individualizing and possessory direction. Not that the idea of collective rights is foreign even to U.S. law, but rather that we have to justify collective rights - for example of Indian tribes or of language communities - with thicker, more complex arguments than we provide for rights of free expression. And the rhetorical model for rights is, as I have already hinted, that of ownership. Here too law’s rhetoric has a mild status quo bias.

More could of course be said in defense of these propositions. My point is only to indicate *how* an argument about law’s rhetorical tilt might help us understand the interactions between courts and legislatures that studies of the politics of law deal with.⁵² I am inclined to think that the methods of interpretive political science are likely to be more suitable in identifying this sort of tilt than are the kinds of case studies that Silverstein and Rosenberg develop. *Law’s Allure* and *The Hollow Hope* are important even so because they bring into view serious questions about the ways in which law matters to the judicial implementation of social policy.

49. Silverstein, *supra* n. 5, at 63.

50. *Id.* at 41.

51. The *locus classicus* for this proposition is Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353 (1978).

52. On the concept of “tilt,” see Wythe Holt, *Tilt*, 52 Geo. Wash. L. Rev. 280 (1984).