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REVIEW ESSAY

Dynamic, Regressive, or Obstructionist Courts? What Kinds of Hopes for Judicial Review

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GERALD ROSENBERG. *The Hollow Hope*. 3rd ed. Chicago: University of Chicago Press, 2023.
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Abstract

There has long been debate about the capacity of the US Supreme Court to achieve "progressive" social change. Recent decisions of the court also point to a new worry for American progressives: the court may not only have a limited capacity to drive such change. In some cases, it may actively stand in the way of such change or help reverse it. This invites us to rethink when, or under what conditions, courts are likely to be effective in driving change—whether in a positive, dynamic, or else more obstructionist or regressive direction.

Introduction

In 2023, in *Dobbs v. Jackson Women's Health Organization*, the US Supreme Court reversed nearly forty years of precedent upholding a constitutional right of access to abortion.[1] The effects of that ruling are also still being felt, and assessed, across the United States today. What, however, does the ruling say about the long-running debate about the role of the US Supreme Court—and courts generally—in driving social change and, specifically, "progressive" social change? On one view, the *Dobbs* ruling is likely to have a widespread impact on women's lives and, especially, on the lives of young and poor women living in "red" states. But, on another, long advanced by court skeptics, it is likely to have only quite modest effects. The argument here is that *Roe v. Wade* itself

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[1] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).

in 1973 did little to expand actual access to abortion on the ground, and, hence, its overruling is likely to have limited impact on such access.[2]

One of the most prominent advocates of this "constrained court" view is Gerry Rosenberg. In his seminal work, *The Hollow Hope*, Rosenberg (2023) amassed a rich array of social scientific evidence to argue that a wide range of high-profile court rulings, including *Roe v. Wade*, had limited impact. And Rosenberg offered a clear challenge to those with a more "dynamic court" view or one that placed greater faith in courts as agents of "progressive" social change: under what specific conditions, he asked, could one expect courts to be willing and able to deliver such change? It is thus fortuitous that, at the same time the US Supreme Court chose to overrule *Roe*, we have a third edition of the *Hollow Hope*, offering an assessment by Rosenberg of the significance of this important jurisprudential shift by the Supreme Court in *Dobbs*. Rosenberg's preliminary assessment is also, as we could predict, entirely consistent with the constrained court view: *Dobbs*, he argues, is unlikely materially to change access to abortion in the United States.

There are, however, powerful voices pointing the other way: US and comparative scholarship emphasizes that, even though courts may be constrained actors, they are still powerful ones in a range of cases, including for those seeking to achieve social change. It is also notable that *Dobbs* itself reflects a perception among American conservatives that the decisions of the US Supreme Court matter in areas such as abortion, including when it comes to practical legal outcomes on the ground. And while this may reflect certain biases and pathologies in American legal thought, it could also be treated as important confirmation of the "dynamic court" view.

Noting the support within the United States and elsewhere for the dynamic court view, however, does not suggest that it will always, or even usually, fit empirical reality. First, the preconditions for this view are not always—or even usually—in existence in many constitutional democracies. Second, when these conditions are absent, courts may not only be constrained in their capacity to advance positive change, but they may also actively limit or obstruct it or even become active instruments of dismantling previous change. The existence of "qualified hope" for social change must therefore also be seen with clear eyes, which remain alert to the possibilities and dangers of an obstructionist and regressive form of judicial review.

Concepts and Definitions

The starting point for Rosenberg's (2023) analysis of the US Supreme Court is a distinction between two broad ideal types or conceptions of the court's role: "the dynamic court" view of courts as effective agents of social change and the "constrained court" view, which emphasizes the limits on courts as agents of such change. Another important part of Rosenberg's analysis is a call for greater attention to the necessary preconditions for each view to hold or to play out in practice. For instance, Rosenberg points to three broad potential constraints on court-led social change: (1) the bounded nature of constitutional rights; (2) limits on the independence of the judiciary from the other branches of government; and (3) limits on the tools that courts have "to develop appropriate policies and implement decisions" (17–28). Conversely, he suggests that the

[2] *Roe v. Wade*, 410 U.S. 113 (1973).

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challenges of implementing judicial orders are likely to be overcome when one or more of four conditions are met: (1) when non-court actors offer positive incentives to induce compliance; (2) when non-court actors impose costs to induce compliance; (3) when judicial decisions can be implemented by the market; or (4) where courts can provide "leverage, or a shield, cover, or excuse, for persons crucial to implementation who are willing to act" (41–43).

Rosenberg also places particular emphasis on examining the role of courts as agents of "progressive" social change. Why? Because at least in the United States, constitutional liberals or progressives have traditionally been the leading proponents of the dynamic court view. It is also important to note, however, that the notion of "progressive" legal or constitutional change may vary over time. And it may also be subject to disagreement: the notion of "progress," for instance, is notoriously contested and open to differing interpretations based on whether one prioritizes economic or environmental concerns. The same could also be said for constitutional developments.

Tracking the usage of Rosenberg (2023) himself, I use the term "progressive" as effectively synonymous with the political commitments of the Democratic party and its supporters, including commitments to equality and freedom, as Democrats understand those ideas—specifically, commitments to same-sex marriage, broad, legal access to abortion, and race-conscious policies aimed at overcoming historical race-based discrimination. In 2024, this could also be viewed (based on a 2023 Pew Research Center survey of areas of concern to Democrats and Republicans) as a commitment to: eradicating gun violence, promoting the affordability of health care, addressing the threat posed by climate change, and tackling systemic racism and drug addiction (Pew Research Center 2023).

The Constrained Court View

The mid-twentieth century in the United States marked a range of apparent victories for progressives before the US Supreme Court, including the decisions of the court in *Brown v. Board of Education* in 1954 (ordering the desegregation of American public schools); *Griswold v. Connecticut* in 1965 (recognizing a constitutional right of access to contraception); and *Roe v. Wade* in 1973 (upholding women's right of access to abortion).[3] The 1990s and early 2000s also extended those gains into the domain of LGBTQIA+ rights. In *Romer v. Evans* in 1996, the court held that gays and lesbians were protected from laws expressing pure animus toward them or, at the very least, laws that excluded them from ordinary access to the political process.[4] In *Lawrence v. Texas* in 2003, the court held that the state of Texas could not criminally prohibit consensual intercourse between adult gay men.[5] And in *Obergefell v. Hodges* in 2015, the court held that the Constitution guaranteed same-sex couples the right of access to civil marriage on terms of equality with opposite-sex couples.[6] It is this apparent role as a "dynamic" court—helping drive progressive social change—that has long been the

[3] *Brown v. Board of Education*, 347 U.S. 483 (1954); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe*, 410 U.S.
[4] *Romer v. Evans*, 517 U.S. 620 (1996).
[5] *Lawrence v. Texas*, 539 U.S. 558 (2003).
[6] *Obergefell v. Hodges*, 576 U.S. 644 (2015).

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focus of Rosenberg's work. Indeed, a central focus of the most recent edition of the *Hollow Hope* is the court's role in advancing LGBTQIA+ rights, and what this tells us about the capacity of the court in general to drive progressive social change.

In short, Rosenberg (2023, 555–56) tells us that *Obergefell* is not only an unusually powerful example of where the court did help drive change but also to a far lesser degree than many observers think—that is, that the court's role in this context was largely to accelerate pre-existing trends and make them truly nation-wide rather than drive change in any more fundamental sense. In addition, Rosenberg argues that court's role in this context fits the pattern he has long identified as necessary for court-led social change. In the context of LGBTQIA+ rights, Rosenberg argues, there was ample precedent to rely on and a strong and growing degree of public and elite support. Indeed, *Obergefell* was decided in conditions of growing public and elite support for gay rights so that, effectively, the court in this context "did what it does best with significant social reform; acknowledged majority and elite opinion and brought outliers up to the national standard" (555).

For Rosenberg, the lessons of the *Hollow Hope* on abortion are similarly clear: *Roe v. Wade* did not materially increase the rate of legal abortions in the United States nor the distribution of abortions across states. Rosenberg reports a steady rise in the rate of legal abortions starting two to three years before *Roe* (that is, in the early 1970s), and this trend continued for approximately two decades afterwards. The trend, however, was modest, and legal abortions remained much higher in blue compared to red states, where *Roe* should have made the biggest difference in unlocking legal access to abortion in the face of resistance from officials (Rosenberg 2023, 266). Abortion rates also began to fall only modestly in the early 1990s as opposition to, and restrictions on, abortion grew and after *Planned Parenthood v. Casey* in 1992 expressly permitted states to impose a wider range of restrictions on pre-viability abortions (261–65, 291–92).[7]

Progressives might still argue that *Roe* mattered for who was able to access abortions (for example, the access of poor and young women rather than older, wealthier women). As the fourth section of this article notes, there is also a range of scholars who have suggested that Rosenberg constructs too demanding a test for "success" in this context, downplaying the court's role in continuing the upward trend in abortion access. But on Rosenberg's account, overturning *Roe* should not have been expected to lead to material changes in the overall number of legal abortions—or live births—in the United States. Indeed, Rosenberg (2023, 322–23) draws on his constrained court hypothesis to suggest that the effects of *Dobbs*, like *Roe*, may in fact ultimately be quite modest. The high degree of public support for access to abortion means that several states have already acted to guarantee rights of access to abortion and funding for poor women (335–38), and large corporations have done the same for employees in terms of funding for inter-state access to abortion (336). And, for Rosenberg, the role of the market in the provision of abortions means that clinics in some blue states have already expanded their operations (329), and a range of providers are helping ensure access to pharmaceutical abortions (338).

[7] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

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As the next section explores, however, there are a range of important challenges to Rosenberg's account, both within the United States and comparatively, which might cast doubt on this relatively sanguine view of the impact of *Dobbs.*

The Counter-Evidence: Comparatively and Pre- and Post-*Dobbs*

The first and second editions of the *Hollow Hope* attracted a large number of responses and reviews, and while these reviews consistently praised the seriousness and value of Rosenberg's data and methods (see, for example, Stumpf 1993; Hall 2009), several leading scholars have questioned the strength of his conclusions. Mark Tushnet (2010), for example, questions Rosenberg's time frame and yardstick for judging success. Social change may be uneven, iterative, and long rather than short term in nature and still count as meaningful and important. Malcolm Feeley (1992) likewise notes that change may still be significant, even if it falls short of its proponents' hopes or expectations. Kim Lane Scheppele (1992) highlights the importance of the amplification of ongoing trends and political counterfactuals. How do we reliably predict what might have occurred but for court intervention? And how should we view the significance of increased access, even if it is simply the continuation—and acceleration—of an ongoing trend? Malcolm Langford (2021) makes a similar point in the context of courts' role in expanding access to social rights: assessing impact in this context necessarily involves a complex set of counter-factual judgments.

Ronald Kahn (1993, 461), Susan Lawrence (1992, 813), and Peter Schuck (1993, 1785) separately question the degree to which Rosenberg overlooks the interaction or "dialogue" between the court and the political branches. In assessing court impact and effectiveness, it seems mistaken to look at the impact of the court alone. Instead, we should consider how it influences the behavior of Congress, state legislatures, and executive branch officials, and how their actions then shape the enjoyment of constitutional rights on the ground (Helfer and Voeten 2014). Finally, scholars such as Michael McCann (1992, 722) noted the limits to Rosenberg's attempts to capture the full range of "indirect" effects to court decisions, including their consciousness-raising benefits for individuals and social movements and mobilizing effects for civil society. A striking feature of the third edition of the *Hollow Hope* is its attempt to capture and assess the scope of indirect effects of this kind. Rosenberg (2023, 30), for example, examines media and public attention to key issues and finds limited support for the McCann view in this context. But this may under-state these effects in a social or non-traditional media context. There is also an important argument that court decisions can have powerful effects in shaping the identity, self-perception, and sense of possibility among previously marginalized groups (Guinier and Torres 2014) and can serve as a "focal point" for the organization of social movements seeking to find ways to coordinate their efforts and membership (Landau 2013; Brierley 2019).

Other recent research further underscores the importance of organizations and social movements in enforcing constitutional norms. Adam Chilton and Mila Versteeg (2018), for example, find that formal constitutional rights guarantees have a limited effect on a range of outcome variables (in ways that are reminiscent of Rosenberg's claims about courts but on an even more global scale). But the exception is where there are organizations with a clear incentive to enforce particular rights. And while Chilton and Versteeg focus on organizations that pre-exist constitutional guarantees, other

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scholars in comparative constitutional studies point to the iterative relationship between constitutions, courts, and social movement formation (Neumayer 2005; Simmons 2009; Epp 2010; Landau 2013; Brierley 2019). And effects of this kind are a lot more difficult to measure in aggregate terms or without careful ethnographic study of particular social movements (Langford 2014).

Similarly, one of the potential roles of courts is to alter who has access certain rights and entitlements, either geographically or across race, class, or other lines. For instance, one view of the US Supreme Court's rights-based jurisprudence is that it serves to expand access to rights (such as contraception or abortion) within conservative or "outlier" states (Strauss 2009, 878). Courts may also expand access to rights for economically vulnerable groups, such as the poor or even, in some contexts, the middle class (Brinks and Gauri 2014; Landau and Dixon 2019, 120). The same argument applies to young and otherwise socially vulnerable individuals: courts in this context can and do fill gaps, or help counter "blind spots" in the coverage of existing laws and policies, to the benefit of socially marginalized groups (Berry 2007). And while Rosenberg (2023, 574) and scholars such as Chilton and Versteeg (2018) seek to grapple with these distributional effects, they do so imperfectly and in ways that may therefore downplay some of the virtues of judicial review from a progressive perspective.

Another consideration is that the effectiveness of court decisions may vary according to how they are framed. In exploring the factors necessary for a dynamic court view to hold, Rosenberg focuses on factors "external" to courts themselves. But there is a growing body of comparative work suggesting that how courts reason, and especially how they craft their remedies, can impact the chances of successful implementation of court decisions (Landau 2014; Dixon 2007, 2023; Langford 2019, 69). For instance, in cases involving attempts by courts to prompt state action, strong remedies, involving concrete deadlines and ongoing monitoring, will often be important (Dixon 2007; Rodriguez-Garavito 2010). Hence, the failure of weaker, more delayed, or non-coercive forms of judicial intervention to prompt change cannot be viewed as evidence of the general validity of the constrained court view. In many ways, this dovetails with the more US-focused critique of the *Hollow Hope*, which emphasizes the importance of "dialogue" or interaction among the various branches of government in assessing patterns of constitutional change (see Lawrence 1992; Kahn 1993; Schuck 1993). But it gives that critique a more specific cast: it suggests that the extent of social change that courts can achieve is linked to how they reason and the skill with which they combine strong and weak forms of review (Dixon 2023).

There is likewise a growing comparative literature suggesting the promise, as well as the limits to, courts as agents of democratic stabilization or preservation. Constitutional courts, for instance, have responded to threats to democracy through a range of bold judicial decisions, including decisions disqualifying presidential candidates and invalidating proposed constitutional amendments. Efforts of this kind were certainly not a "silver bullet" against the risk of democratic decline or abusive constitutional change (Landau 2013; Dixon and Landau 2015, 2021). If they have enough time in office and popular and elite support, would-be authoritarians can generally side-step almost all legal constraints, including those imposed by courts. Courts, therefore, can at best serve as a form of "speed bump" on, or deterrent against, certain forms of abusive constitutional change, which under the right

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conditions can alter the longer-term trajectory of constitutional politics in a country (Landau 2013; Dixon and Landau 2015, 2021; see also Bugaric 2019; Roznai 2020).

But this kind of role is still of enormous consequence. And, in some countries, it is linked to a broader role for courts in driving progressive, as well as pro-democratic, change. This does not directly contradict Rosenberg's core hypothesis. Recall Rosenberg's identification of constraints on court-led social change. These conditions imply that, to achieve change, courts must be able to draw on some existing degree of support in existing constitutional modalities of argument, public or elite support, and tools and support structures for implementation. The existing research in India suggests that often social change is linked to Rosenberg's preconditions or constraints being satisfied (Rosenberg, Krishnaswamy, and Bail 2019a; Jacobsohn 2022). For instance, in the context of *People's Union for CL v. Union of India* in 2001, a decision of the Supreme Court of India ordering the nation-wide roll-out of a lunch program for Indian students, Rishad Chowdhury and I have suggested that the Supreme Court was able to play a meaningful role in promoting the expansion of the program, in part because of broader political and social movement support and supportive legal and political precedents (Dixon and Chowdhury 2019).[8] Similar findings have been made in Colombia and South Africa (Dugard and Langford 2011).

In my own work, I point to similar preconditions as necessary for successful democracy-reinforcing review by courts on a global scale (Dixon 2023). Further, while far from the norm, I suggest that these conditions are present in a meaningful number of constitutional democracies worldwide (170). In part, this helps explain how and why constitutional courts in countries such as Colombia and Brazil have been successful in high-stakes attempts at "democratic hedging" or democratic preservation in the face of risks of authoritarian resurgence or backsliding (Issacharoff 2011). Indeed, there is good evidence that courts can both accelerate positive change and slow down undesirable change, where they enjoy broad public support or at least limited opposition and there is a sufficiently supportive political and legal culture. Rosenberg (2023, 287), himself, notes this in the *Hollow Hope*, and scholars such as Lee Epstein, Jack Knight, and Olga Shvetsova (2001, 128) have advanced a sophisticated account of the "tolerance interval" for judicial review, which highlights the role of elite attitudes in the success of court-led social change. We arguably lack a clear account of the relative importance of popular versus elite attitudes in this context. There are also important questions about the willingness of courts to engage in review of this kind and how this relates both to the necessary degree of judicial independence for democracy-enhancing review (Dixon and Landau 2021) and legal-cultural understandings of the role of courts (Roux 2009).

But the research we do have arguably gives a somewhat different cast to the overall claim made by Rosenberg: instead of pointing to courts as a hollow hope for progressives, it suggests that they are perhaps closer to a source of what Rishad Chowdhury and I labelled a form of "qualified hope" in certain settings (Dixon and Chowdhury 2019; see also Rosenberg, Krishnaswamy, and Bail 2019a; Jacobsohn 2022). It also points to a range of other potential factors or conditions as relevant (Jacobsohn 2022).

[8] *People's Union for CL v. Union of India*, Case no. 196, 2001.

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The pre- and post-*Dobbs* experience in the United States could also be read as an important challenge to the constrained court view. One hundred days after *Dobbs*, the Guttmacher Institute (2022) determined that sixty-six clinics across fifteen US states have ceased to provide abortion care. In addition, medical professionals now perceive the risk of prosecution to be higher in clinics, preferring to only provide care in hospital settings (Human Rights Institute 2023, 6). Certainly, many political progressives and conservatives have publicly rejected Rosenberg's view and acted in ways that show either a sincere or at least strategic commitment to the dynamic court view. US Vice President Kamala Harris (2023) described the decision of *Dobbs* as creating "a healthcare crisis in America . . . [where] women . . . [will] suffe[r] under the consequences of these laws." Conversely, following the decision, one prominent conservative lawyer made it clear that he and other conservatives saw *Dobbs* as saving lives: "A year from now," he suggested, "there will be infants going from milk to soft foods because *Dobbs* triggered laws and shuttered clinics on Friday and not Monday . . . they'll learn to walk, catch fireflies, fall in love, comb grey hair, because of appointments cancelled last Friday. Not just by good fortune but—for the first time in generations—by legal right" (Girgis 2022).

Indeed, it is clear that, for some time, American conservatives have viewed the court as both dynamic and misdirected and devoted considerable political energy to redirecting the court away from that path. The current composition of the court is a product of the efforts of a well-organized group of conservative lawyers, who for several decades have been intent on ensuring that Republican presidents nominate only committed "originalist" judges, with little sympathy for a dynamic court view. That group—largely organized under the umbrella of the "Federalist Society"—has also substantially increased its power and influence over time (Southworth 2008; Hollis-Brusky 2019). From its relatively small beginnings in 1982, the society now has over forty thousand members and a large network of lawyers and judges who owe their appointment to its support (People for the American Way Foundation 2002). It has played an increasing role in the process of judicial nomination and confirmation.

There are several explanations for this, which do not undermine the weight of Rosenberg's claim. One possibility is that many lawyers and legal scholars are reluctant to accept Rosenberg's findings because of what it means for the relevance of their own work. Lawyers have certainly been more reluctant than political scientists to accept Rosenberg's findings (Schultz and Gottlieb 1996), and some scholars attribute this to personal career concerns (Feeley 1992, 758; Powe 1992, 1640). Rosenberg (2023, ch. 13) himself notes the appeal of myths of court power and relevance for lawyers. And Richard Delgado (2008, 147) notes the degree to which, for both lawyers and non-lawyers, the faith in courts to deliver justice in individual cases may spill over to their attitudes toward its role in broader structural reform.

Another possibility might lie in the siloed nature of law as a discipline (see Samuel 2009). There has long been a divide between American law schools and social science faculties, and while scholars such as Rosenberg have consistently sought to bridge that divide both in their scholarship and teaching (Powe 1992, 1639), they have inevitably done so with mixed success. The rise of "originalism" in US law schools has also further discouraged deep engagement with social science as compared to history as a discipline (Sunstein 2023). Other explanations are more asymmetric—that is, they explain why conservatives, rather than progressives, might continue to hold the

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dynamic court view in contexts such as abortion. Compared even to when the *Hollow Hope* was published, Americans are far more polarized in what they read and the media and commentary they consume (Dimock and Wike 2020). The *Hollow Hope* was always a book that spoke most directly to political liberals (Feeley 1992, 747), even though it was funded by a conservative foundation (Delgado 1993, 1134). And while conservatives in the past might have been curious to understand what leading liberal intellectuals were thinking, this may be less true today than before.

Another potential explanation could be that American conservatives have gained electorally from a belief among voters that overturning *Roe* would materially change outcomes on abortion in America or actually save (fetal) life, even though it is likely not true, and many have known that to be the case. Rosenberg certainly documents several instances in which conservatives have gained from the perception of the US Supreme Court as a dynamic court. In the context of LGBTQIA+ rights, for example, the *Hollow Hope* notes the ways in which Karl Rove and the Republican party establishment deliberately sought to use the specter of same-sex marriage as an issue that could drive conservative voter turnout and support (Rosenberg 2023, 484–86). Rosenberg (2023, 313, 331) also notes the salience of abortion in support for Republican presidential elections since 2000 (313, 331) and the widespread view, so aptly expressed by Lucas Powe Jr (2009, 311) in this context that *Roe* was a "gift that ke[pt] on giving—to Republicans."

Rosenberg places these developments in the context of the forces that can lead to backlash against the court and, hence, the pressure for even the most dynamic courts to become constrained in their impact (Krislov 1992, 370; Brazelton 2016, 84). Michael J. Klarman (1994) has also written powerfully about this same form of backlash and its effects on American constitutional practice (see also Graber 2011, 37). But one could equally place this story within a narrative about why conservatives have continued to maintain a myth of a dynamic Supreme Court. Another interpretation of these actions, however, would see them as providing important—albeit indirect—support for the dynamic court view. At the very least, it suggests that a large number of legal and political minds in the United States have accepted the dynamic court view as the correct one. And there is a well-established principle pointing to the epistemic value of the judgments of "many minds" (Posner and Sunstein 2006, 161). According to this principle, as the number of independent decision makers increases, so too does the probability that their collective decisions or views will be epistemically reliable (Dixon and Posner 2011).

Dynamic versus Obstructionist or Regressive Courts

Of course, *Dobbs* was not the only decision handed down by the US Supreme Court in 2023 that disappointed political progressives. In *New York State Rifle Assoc v. Bruen* in 2022, the court held that to pass muster under the Second Amendment, states must show that gun control measures are consistent with "historical tradition" surrounding gun regulation.[9] In doing so, the court rejected the approach of lower courts, allowing states to defend even non-traditional measures as reasonable and, hence, greatly restricted the scope for innovative public safety measures, including

[9] *New York State Rifle Association v. Bruen*, Case no. 20-843 (U.S. June 28, 2022).

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New York style restrictions on permits to carry firearms in public. And in *Students for Fair Admissions v. President and Fellows of Harvard College* in 2023, the court held that any form of race-based classification must survive the most demanding forms of strict scrutiny.[10]

Decisions of this kind were also deeply disappointing to political progressives but in a different way from *Dobbs.* The US Supreme Court, in these cases, was not simply a limited or constrained vehicle for progressive social change. It could be viewed as playing an active role in obstructing such change (the "obstructionist court" view) or helping reverse it (the "regressive court" view), depending on whether one looks backward or forward in time. *Bruen* in 2022, for example, further limited the scope for states and localities to adopt gun control measures aimed at protecting public safety.[11] Hence, it led a range of blue and purple states to pause efforts to expand gun control. But it also cast doubt on a range of existing gun control measures in ways that led at least four red states to pass laws allowing residents to carry concealed weapons without a permit (Edelman 2023).

The same could be said for decisions, such as *Students for Fair Admissions*, which increased the obstacles to racial diversity in universities and the electoral process. The court's decision made it harder for universities to adopt new measures designed at promoting racial diversity in their entering class (making it an "obstructionist" court). But it also forced universities to reverse prior policies advancing progressive aims—for example, the use of race as a "plus" factor in admissions (making the decision "regressive" in nature). Rosenberg (2023, 6–7) explicitly notes the possibility of this kind of obstructionist role for the court by connecting the idea of an "obstructionist" court to previous periods in the court's history, including the Lochner court era. The US Supreme Court during this period was notorious for its obstructionist stance: in the face of progressive-era attempts to improve American living and working conditions, the court insisted on the primacy of the property and contract rights of businesses under the Due Process Clause of the Fourteenth Amendment. And in the face of congressional attempts to regulate a range of social harms, the court adopted a narrow, formalistic view of Congress's power under the Commerce Clause, which largely defeated these efforts at reform. Worse still, when the Great Depression struck and President Franklin Delano Roosevelt sought to pass measures designed to promote economic recovery, the court continued to obstruct these efforts through this same mix of Substantive Due Process and Commerce Clause reasoning. It was only in 1937, with the threat of court-packing by Roosevelt and the famous "switch in time that saved nine"—the shift in stance by Justice Owen Roberts—that the court adopted a more flexible, democratically "responsive" approach to progressive economic regulation (Dixon 2023).

In the rest of the world, the court's *Lochner*-era obstructionist stance also continued to reverberate for decades to come, causing progressive constitutional drafters across the globe to adopt constitutional language deliberatively designed to avoid the perils of *Lochner*-style substantive due process reasoning (Choudhry 2004). For example, in India, the drafters of the 1950 Constitution studiously avoided

[10] *Students for Fair Admissions v. President and Fellows of Harvard College*, Case no. 20-1199 (U.S. June 24, 2023).

[11] *Bruen*, Case no. 20-843.

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adopting a right to liberty, lest it be interpreted by the Supreme Court of India in a Lochneresque vein (Choudhry 2013). Likewise, in Canada, the drafters of the 1982 *Canadian Charter of Rights and Freedoms* chose to enshrine a right to freedom and security of the person that was carefully aimed (if ultimately not successfully so) at limiting the scope for substantive due process reasoning (Hogg 1990).[12]

Yet Rosenberg (2023, 7) suggests that patterns of obstruction, at least, are amply addressed by others, and, hence, his prime focus is on the limits of the court as an agent for progressive change (see, for example, Dahl 1957; McCloskey 1960). This focus, however, is increasingly hard to square with the most recent decisions of the US Supreme Court as well as with developments in many areas of constitutional law that began well before even the second edition of the *Hollow Hope* was published. For instance, in 1995, in *United States v. Lopez*, the court asserted new limits to Congress's power under the Commerce Clause as a basis for striking down attempts to regulate the possession of guns in schools.[13] And, in 2000, in *United States v. Morrison*, the court extended this logic to invalidate aspects of the Violence against Women Act.[14] The court also began to develop new freestanding federalism doctrines in the form of an "anti-commandeering" principle, which the court held limited the capacity of Congress to regulate nuclear waste[15] and to enlist local officials in the enforcement of federal gun regulations (in the form of the interim enforcement of background check requirements under the Brady Handgun Violence Prevention Act.[16]

The US Supreme Court also began during this period to cast doubt on key aspects of its earlier equal protection jurisprudence. Most notably, it began to impose increasingly stringent limits on the scope for higher education institutions to adopt race-conscious admissions policies, first by requiring individualized consideration of race as a factor in admissions[17] and then by limiting deference to higher educational institutions on the question of how far race-conscious policies were necessary to achieve the goal of educational diversity.[18] In addition, the court limited the scope for the Department of Justice to impose pre-clearance requirements on the drawing of electoral districts by states with a history of race-based discrimination[19] while, at the same time, declining to impose constitutional limits on partisan gerrymandering.[20]

One of the key questions raised by Rosenberg in the *Hollow Hope* involved the conditions necessary for a dynamic court view to hold. But a related, and now seemingly equally pressing, question is about when and how courts will succeed in engaging in obstructionist and regressive forms of judicial review. Does the success of an obstructionist court, for example, depend on Rosenberg's conditions for court

[12] *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11; *Tremblay v. Daigle*, [1989] 2 S.C.R. 530.

[13] *United States v. Lopez*, 514 U.S. 549 (1995).

[14] *United States v. Morrison*, 529 U.S. 598 (2000); Violence against Women Act, September 13, 1994, 108 Stat. 1796.

[15] *New York v. United States*, 505 U.S. 144 (1992).

[16] *Printz v. United States*, 521 U.S. 898 (1997); Brady Handgun Violence Prevention Act, November 30, 1993, 107 Stat. 1536.

[17] *Gratz v. Bollinger*, 539 U.S. 244 (2003).

[18] *Fisher v. University of Texas*, 579 U.S. 998 (2016).

[19] *Shelby County v. Holder*, 570 U.S. 529 (2013).

[20] *Gill v. Whitford*, 585 U.S. 6 (2018); *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

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dynamism? That is, does it depend on the barriers that courts erect being accompanied by positive incentives for compliance, and costs for non-compliance, on the part of non-court actors or court decisions acting as "leverage, or a shield, cover, or excuse, for persons crucial to implementation who are willing to act" (Rosenberg 2023, 41–43). One might expect that there is at least some degree of cross-over here. After all, as I foreshadow in the introduction, one person's "progressive" vision could be another's vision of decline or decay. And there are good reasons to think that blocking change requires political support, even if not the same degree as is required to implement widespread social change.

Does the success of a regressive court depend on similar factors? Perhaps, for instance, it is no coincidence that efforts to overrule the practical effects of *Roe v. Wade* in Texas have involved legislation that grants private actors the power and incentive to enforce limits on access to abortion.[21] Private actors may recover a minimum of ten thousand US dollars per performed abortion and are not required to demonstrate individual injury (Woolhandler 2023, 655). Another factor may be the degree to which a prior court order was in fact implemented, and, hence, there is the potential for burdens of inertia to affect a judicial attempt to reverse it (compare Dixon 2023).

And what is the significance in this context of social versus economic or political reliance on prior court decisions? For instance, in *Planned Parenthood v. Casey*, decided just over thirty years before *Dobbs*, the court famously suggested that reliance was a crucial factor in upholding the "central finding" in *Roe* and that the Constitution protects a woman's right of access to abortion. The reliance in question was also a mix of social, economic, and political in nature. That is, the court held that *Roe*'s central holding should be upheld in part because "for two decades ... people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail." In addition, the court noted that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." But the same factors might also inform the degree of resistance to a regressive court ruling. Decisions on which people have come to rely, for example, may also be more likely to see a popular defense in the name of judicial attempts at repeal or regression: this is certainly one way of reading the widespread protests against *Dobbs* and attempt to override it both by state legislative change and state court rulings and state-based constitutional amendment (Landau and Dixon 2022; Murray and Shaw 2024).

Finally, are there differences in the willingness of certain political actors to push back against what they perceive to be obstructionist or regressive court rulings? Some scholars suggest that Democrats may be more reluctant than Republicans to engage in certain forms of "constitutional hardball" (Fishkin and Pozen 2018). This might also affect their willingness to pass legislation that attempts to evade or limit the effect of (what for progressives are clearly) obstructionist or regressive rulings when conservatives have often been quite willing to do the same for "dynamic" court rulings. Others suggest that it may be easier for courts to enliven intolerance than

[21] Texas Heartbeat Act, March 11, 2021, S.B. 8, 87th Leg., R.S., ch. 1.

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tolerance and, hence, achieve regressive as opposed to more dynamic, inclusive forms of change. However, the degree of this potential constitutional "asymmetry" remains an open question (Fishkin and Pozen 2018).

Conclusion

We may not live in a time where many Americans are inclined to ponder whether the US Supreme Court can still act as an agent of progressive social change. And for that reason, some readers may be inclined to think that the *Hollow Hope* is no longer addressed to the most central questions of our time. But there is still a question of whether the Supreme Court might be able to play other roles—both negative and positive—in the protection or erosion of constitutional democracy and the extent to which courts elsewhere can do the same. Focusing on the preconditions for successful judicial review is thus an enduring question that is of interest to constitutional lawyers and scholars worldwide. In that context, the *Hollow Hope* could be considered an invitation—for us to consider more carefully when and how it is that courts can maintain either a dynamic, obstructionist, or regressive role in social change, and what if anything that tells us about our hopes for constitutional judicial review more generally.

Judicial review is certainly no silver bullet against the dangers of democratic erosion or for delivering on the promise of social change. But nor is it likely as ineffective as skeptics suggest. Indeed, the best comparative evidence seems to be that courts are a source of "qualified hope" for those seeking to curb the excesses and failings of majoritarian politics. But it can cut two ways for democracy. In many countries today, we are arguably witnessing a new display of the power of courts to drive change but not in a direction that is welcomed. Given this, the key question for scholars in the next decade may no longer be whether courts have the power to drive change but, rather, when and how that power can be channeled toward democratic rather than anti-democratic or illiberal ends.

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