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**The Hollow Hope**  
*Can Courts Bring About  
Social Change?*



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larly Supreme Court decisions, may be powerful symbols, resources for change. They may affect the intellectual climate, the kinds of ideas that are discussed. The mere bringing of legal claims and the hearing of cases may influence ideas. Courts may produce significant social reform by giving salience to issues, in effect placing them on the political agenda. Courts may bring issues to light and keep them in the public eye when other political institutions wish to bury them. Thus, courts may make it difficult for legislators to avoid deciding controversial issues. Indirect effects are an important part of court power in the Dynamic Court view. Evidence for extra-judicial effects might be found in public-opinion data, media coverage, and in public and elite action supporting significant social reform. Both *Brown* and *Roe* are universally credited with producing important extra-judicial effects, from bringing attention to civil rights and sparking the civil rights and women's rights movement to persuading Americans that abortion is acceptable. Thus, in chapters 4 (civil rights) and 8 (abortion and women's rights) I develop a broad range of evidence to test these claims of salience and persuasion. The provocative and counter-intuitive findings of these chapters may surprise the reader.

In addition, I examine the question of whether significant social reform could possibly have occurred without court action. In chapters 5 (civil rights) and 9 (abortion and women's rights), I assess a host of social, political, and economic changes that could plausibly have led to significant social reform independent of court action. Strictly speaking, the question of which view of the Court is correct, of whether the courts can produce significant social reform, does not depend on developing a full-blown theory of change. That belongs in a study of what caused change rather than a study of whether the courts caused change. However, such a logically correct approach may leave the reader cold. Thus, if it turns out that there is little evidence of the courts' causal contributions in civil rights, or abortion, or women's rights, the reader may find solace in these two chapters.

Finally, in chapters 10 and 11, I briefly assess the applicability of the constraints and conditions developed in chapter 1 to environmental litigation, reapportionment, and reform of the criminal law. Chapter 12 summarizes and concludes. The aim of this book, then, is to make sense of competing claims about the role of courts in the American political system. The findings suggest that neither view of the Court is entirely correct and that a more careful and subtle approach is needed. But surprisingly, they also suggest that one of the views of the Court is much more powerful than the other.

# 1

## The Dynamic and the Constrained Court

What is the role of U.S. courts in producing significant social reform? When and under what conditions will U.S. courts be effective producers of significant social reform? When does it make sense for individuals and groups pressing for such change to litigate? What kinds of effects from court victories can they expect? Which view best captures the reality of American politics? Given the alleged success of the social reform litigation of the last four decades, and Americans' attachment to the Dynamic Court view, it is tempting to suggest that it *always* makes sense for groups to litigate. On the other hand, our attachment to the vision of the Constrained Court, as well as a knowledge of legal history, can suggest that courts can *never* be effective producers of significant social reform. But "always" and "never" are claims about frequency, not conditions. To fully understand the role of the courts in producing significant social reform, we must focus on the latter.

Many scholars have turned their attention to the questions this litigation activity raises. However, their findings remain unconnected and not squarely centered on whether, and under what conditions, courts produce significant social reform. Some writing has focused on the determinants of winning court cases rather than on the effects of court decisions. Galanter (1974), for example, asks "why the 'haves' come out ahead" and suggests that the resources and experience available to established and on-going groups provide an advantage in litigation. Similarly, Handler (1978), while exploring outcomes as well as the resources available to litigants, stresses the latter too. While these and similar works provide interesting theories about winning cases, that is a different question from the effects courts have on political and social change.

On the outcome side, there are numerous individual studies. Unfortunately, they tend to focus narrowly on a given issue and refrain from offering

hypotheses about courts and change.<sup>1</sup> More self-consciously theoretical case studies have examined admittedly non-controversial areas (Rebell and Block 1982), the need for federal pressure to improve race relations (Hochschild 1984), or have suggested so many hypotheses (one hundred and thirty-five of them) as to be of little practical help (Wasby 1970, 246–66). Finally, the extensive law review literature on institutional reform either lacks evidence or focuses on individual cases with little or no attempt to generate hypotheses.<sup>2</sup> While much of this work is well done, it does not address the larger question.

In the bulk of this chapter, I flesh out the two views. My aim is to make each view plausible, if not enticing. Then, critically examining evidence for their plausibility, I develop a set of constraints and conditions under which courts can produce significant social reform. These suggest that both views oversimplify court effectiveness.

### Structural Constraints: The Logic of the Constrained Court View

The view of courts as unable to produce significant social reform has a distinguished pedigree reaching back to the founders. Premised on the institutional structure of the American political system and the procedures and belief systems created by American law, it suggests that the conditions required for courts to produce significant social reform will seldom exist. Unpacked, the Constrained Court view maintains that courts will generally not be effective producers of significant social reform for three reasons: the limited nature of constitutional rights, the lack of judicial independence, and the judiciary's inability to develop appropriate policies and its lack of powers of implementation.

#### *The Limited Nature of Rights*

The Constitution, and the set of beliefs that surround it, is not unbounded. Certain rights are enshrined in it and others are rejected. In economic terms, private control over the allocation and distribution of resources, the use of property, is protected (Miller 1968). "Rights" to certain minimums, or equal shares of basic goods, are not. Further, judicial discretion is bound by the norms and expectations of the legal culture. These two parameters, believers in the Constrained Court view suggest, present a problem for litigators pressing the courts for significant social reform because most such

1. For example, see the studies excerpted and compiled in Becker and Feeley (1973). A more theoretical work, although unfortunately not focused on important political and social change, is Johnson and Canon (1984).

2. For representative examples, see Aronow (1980); Eisenberg and Yeazell (1980); Monti (1980); Note (1980); Note (1975).

litigation is based on constitutional claims that rights are being denied.<sup>3</sup> An individual or group comes into a court claiming it is being denied some benefit, or protection from arbitrary and discriminatory action, and that it is *entitled* to this benefit or that protection. Proponents of the Constrained Court view suggest that this has four important consequences for social reformers.

First, they argue, it limits the sorts of claims that can be made, for not all social reform goals can be plausibly presented in the name of constitutional rights. For example, there are no constitutional rights to decent housing, adequate levels of welfare, or clean air, while there are constitutional rights to minimal governmental interference in the use of one's property. This may mean that "practically significant but legally irrelevant policy matters may remain beyond the purview of the court" (Note 1977, 436). Further, as Gordon (1984, 111) suggests, "the legal forms we use set limits on what we can imagine as practical outcomes." Thus, the nature of rights in the U.S. legal system, embedded in the Constitution, may constrain the courts in producing significant social reform by preventing them from hearing many claims.

A second consequence from the Constrained Court perspective is that, even where claims can be made, social reformers must often argue for the establishment of a new right, or the extension of a generally accepted right to a new situation. In welfare rights litigation, for example, the Court was asked to find a constitutional right to welfare (Krislov 1973). This need to push the courts to read the Constitution in an expansive or "liberal" way creates two main difficulties. Underlying these difficulties is judicial awareness of the need for predictability in the law and the politically exposed nature of judges whose decisions go beyond the positions of electorally accountable officials. First, the Constitution, lawyers, judges, and legal academics form a dominant legal culture that at any given time accepts some rights and not others and sets limits on the interpretation and expansion of rights. Judicial discretion is bound by the beliefs and norms of this legal culture, and decisions that stray too far from them are likely to be reversed and severely criticized. Put simply, courts, and the judges that compose them, even if sympathetic to social reform plaintiffs, may be unwilling to risk crossing this nebulous yet real boundary.<sup>4</sup> Second, and perhaps more important, is the role of precedent and what Justice Traynor calls the "continuity scripts of the law" (Traynor 1977, 11). Traynor, a justice of the California Supreme Court for twenty-five years, Chief Justice from 1964 to 1970, and known as a judge open to new ideas, wrote of the "very caution of the judicial process" (1977, 7). Arguing that

3. Sometimes, however, court cases deal not in the language of constitutional rights but in the world of statutory interpretation. While many of the constraints suggested below are applicable here as well, when elected officials have acted to produce significant social reform, the conditions under which courts operate are dramatically changed.

4. As Diver (1979, 104) puts it, a "judge's actions must conform to that narrow band of conduct considered appropriate for so antimajoritarian an institution."

"a judge must plod rather than soar," Traynor saw that the "greatest judges" proceed "at the pace of a tortoise that steadily makes advances though it carries the past on its back" (1977, 7, 6). Constrained by precedent and the beliefs of the dominant legal culture, judges, the Constrained Court view asserts, are not likely to act as crusaders.

Third, supporters of the Constrained Court view note, as Scheingold (1974) points out, that to claim a right in court is to accept the procedures and obligations of the legal system. These procedures are designed, in part, to make it difficult for courts to hear certain kinds of cases. As the Council for Public Interest Law (CPIL) puts it, doctrines of standing and of class actions, the so-called political question doctrine, the need to have a live controversy, and other technical doctrines can "deter courts from deciding cases on the merits" (CPIL 1976, 355) and can result in social reform groups being unable to present their best arguments, or even have their day in court. Once in court, however, the legal process tends to dissipate significant social reform by making appropriate remedies unlikely. This can occur, McCann (1986, 200) points out, because policy-based litigation aimed at significant social reform is usually "disaggregate[d] . . . into discrete conflicts among limited actors over specific individual entitlements." Remedial decrees, it has been noted, "must not confuse what is socially or judicially desirable with what is legally required" (Special Project 1978, 855). Thus, litigation seldom deals with "underlying issues and problems" and is "directed more toward symptoms than causes" (Harris and Spiller 1976, 26).

Finally, it has long been argued that framing issues in legally sound ways robs them of "political and purposive appeal" (Handler 1978, 33). In the narrow sense, the technical nature of legal argument can denude issues of emotional, widespread appeal. More broadly, there is the danger that litigation by the few will replace political action by the many and reduce the democratic nature of the American polity. James Bradley Thayer, writing in 1901, was concerned that reliance on litigation would sap the democratic process of its vitality. He warned that the "tendency of a common and easy resort" to the courts, especially in asking them to invalidate acts of the democratically accountable branches, would "dwarf the political capacity of the people" (Thayer 1901, 107). This view was echoed more recently by McCann, who found that litigation-prone activists' "legal rights approach to expanding democracy has significantly narrowed their conception of political action itself" (McCann 1986, 26). Expanding the point, McCann argued that "legal tactics not only absorb scarce resources that could be used for popular mobilization . . . [but also] make it difficult to develop broadly based, multiissue grassroots associations of sustained citizen allegiance" (McCann 1986, 200). For these reasons, the Constrained Court view suggests that the nature of rights in the U.S. constrains courts from being effective producers of significant social reform. Thus,

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

### *Limits on Judicial Independence—The Institutional Factor*

As the colloquy between Justice Jackson and U.S. Attorney Rankin illustrates, reformers have often turned to courts when opposition to significant social reform in the other branches has prevented them from acting. Thus, much significant social reform litigation takes place in the context of stalemate within, or opposition from, the other branches. For courts to be effective in such situations, they must, logically, be independent of those other branches. Supporters of the Constrained Court view point to a broad array of evidence that suggests the founders did not thoroughly insulate courts or provide them with unfailing independence.<sup>5</sup>

To start, the appointment process, of course, limits judicial independence. Judges do not select themselves. Rather, they are chosen by politicians, the president and the Senate at the federal level. Presidents, while not clairvoyant, tend to nominate judges who they think will represent their judicial philosophies. Clearly, changing court personnel can bring court decisions into line with prevailing political opinion (and dampen support for significant social reform).<sup>6</sup> Thus, the Constrained Court perspective sees the appointment process as limiting judicial independence.

Judicial independence requires that court decisions, in comparison to legislation, do not invariably reflect public opinion. Supporters of the Constrained Court view note, however, that Supreme Court decisions, historically, have seldom strayed far from what was politically acceptable (McCloskey 1960, 223–24).<sup>7</sup> Rather than suggesting independence, this judicial unwillingness to often blaze its own trail perhaps suggests, in the words of Finley Peter Dunne's Mr. Dooley, that "th' supreme coort follows th' iliction returns" (Dunne 1901, 26).<sup>8</sup>

5. For a clear theoretical discussion of the notion of judicial independence, see Shapiro (1981), chapter 1.

6. In terms of producing significant social reform, the appointment process may be overemphasized. To the extent that the Constrained Court view is correct, appointing judges intent upon significant social reform won't lead to greater court contributions to it because the other structural constraints render courts impotent as producers of significant social reform. Thus, the appointment process only serves a negative role.

7. More specifically, comparing the Court's opinions with those of the public on issues in 146 decisions over the years 1935–1986, Marshall found consistency nearly two-thirds of the time (Marshall 1989, chap. 4). In the period 1969–84, all but two of the years of the Burger Court, the Court's opinions were consistent with the public's over 70 percent of the time (Marshall 1985).

8. In the wake of Mr. Dooley's comments, after the Supreme Court abruptly switched sides and upheld New Deal legislation, Felix Frankfurter wrote the following to Justice Stone: "I must confess I am not wholly happy in thinking that Mr. Dooley should, in the course of history turn out to have been one of the most distinguished legal philosophers" (quoted in O'Brien 1985, 22).

In at least two important ways, the Constrained Court view suggests, Congress may constrain court actions. First, in the statutory area, Congress can override decisions, telling the courts they misinterpreted the intent of the law. That is, Congress may rewrite a provision to meet court objections or simply state more clearly what it meant so that the courts' reading of the law is repudiated.<sup>9</sup> Second, although Congress cannot directly reverse decisions based on constitutional interpretations, presumably untouchable by the democratic process, it may be able to constrain them by threatening certain changes in the legal structure. A large part of the reason, of course, is the appointment process. But even without the power of appointment, the Court may be susceptible to credible threats against it. Historical review of the relations of the Court to the other branches of the federal government suggests that the Court cannot for long stand alone against such pressure. From the "Court-packing" plan of FDR to recent bills proposing to remove federal court jurisdiction over certain issues, court-curbing proposals may allow Congress to constrain courts as producers of significant social reform (Nagel 1965; Rosenberg 1985; cf. Lasser 1988).

American courts, proponents of the Constrained Court view claim, are particularly deferential to the positions of the federal government. On the Supreme Court level, the solicitor general is accorded a special role. The office has unusual access to the Court and is often asked by the Court to intervene in cases and present the government's position. When the solicitor general petitions the Court to enter a case, the Court almost invariably grants the request, regardless of the position of the parties.<sup>10</sup> The government is also unusually successful in convincing the Court to hear cases it appeals and to not hear those it opposes.<sup>11</sup> The solicitor general's access to the Court carries over to the winning of cases. Historically, the solicitor general (or the side the government is supporting when it enters a case as *amicus*) wins about 70 percent of the time (Scigliano 1971; Ulmer and Willison 1985). It appears that the federal government has both extraordinary access to and persuasive abilities with the Court (Ducat and Dudley 1985; Dudley and Ducat 1986).

9. Modern examples include *Grove City College v. Bell* (1984), which limited the fund cut-off provisions of Title IX. In the spring of 1988 Congress, over President Reagan's veto, enacted the Civil Rights Restoration Act which overturned the decision. A similar case occurred with *General Electric v. Gilbert* (1976), where the Supreme Court held that an employer's disability plan that excluded pregnancy from its coverage did not violate Title VII of the 1964 Civil Rights Act. Congress responded in 1978 by amending the law to prohibit such exclusion. More generally, in the period 1944–60, Congress rewrote courts' decisions fifty times (Wasby 1978b).

10. In the years 1969–83, the solicitor general petitioned to enter 130 cases without the consent of the parties. The Court granted access in 126 of those cases (97 percent) (Ulmer and Willison 1985).

11. While the Court agrees to hear, on average, about 7 or 8 percent of cases appealed to it (13 or 14 percent not including petitions from prisoners), the solicitor general's petitions are accepted almost three-quarters of the time. When the solicitor general opposes an appeal, the Court rarely accepts the case, doing so, for example, in only 4 percent of the cases during the 1969–83 period (Ulmer and Willison 1985).

That does not comport with notions of independence and a judicial system able to defy legislative and political majorities. Thus, the Constrained Court view's adherents believe,

Constraint II: The judiciary lacks the necessary independence from the other branches of the government to produce significant social reform.

### *Implementation and Institutional Relations*

For courts, or any other institution, to effectively produce significant social reform, they must have the ability to develop appropriate policies and the power to implement them. This, in turn, requires a host of tools that courts, according to proponents of the Constrained Court view, lack. In particular, successful implementation requires enforcement powers. Court decisions, requiring people to act, are not self-executing. But as Hamilton pointed out two centuries ago in *The Federalist Papers* (1787–88), courts lack such powers. Indeed, it is for this reason more than any other that Hamilton emphasized the courts' character as the least dangerous branch. Assuaging fears that the federal courts would be a political threat, Hamilton argued in *Federalist* 78 that the judiciary "has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments" (*The Federalist Papers* 1961, 465). Unlike Congress and the executive branch, Hamilton argued, the federal courts were utterly dependent on the support of the other branches and elite actors. In other words, for Court orders to be carried out, political elites, electorally accountable, must support them and act to implement them. Proponents of the Constrained Court view point to historical recognition of this structural "fact" of American political life by early Chief Justices John Jay and John Marshall, both of whom were acutely aware of the Court's limits.<sup>12</sup> President Jackson recognized these limits, too, when he reputedly remarked about a decision with which he did not agree, "John Marshall has made his decision, now let him enforce it."<sup>13</sup> More recently, the unwillingness of state authorities to follow court orders, and the need to send federal troops to Little Rock, Arkansas, to carry them out, makes the same point. Without elite support (the federal government in this case), the Court's orders would have been frustrated. While it is clear that courts can stymie change (Paul 1960), though

12. Having been the nation's first Chief Justice, Jay refused the position in 1801, telling President Adams that he lacked faith that the Court could acquire enough "energy, weight and dignity" to play an important role in the nation's affairs (quoted in McCloskey 1960, 31). And *Marbury v. Madison*, if nothing else, demonstrates Marshall's acute awareness of the Court's limits.

13. Supposedly made in response to the Supreme Court's decision in *Worcester v. Georgia* (1832).

ultimately not prevent it (Dahl 1957; Nagel 1965; Rosenberg 1985), the Constitution, in the eyes of the Constrained Court view, appears to leave the courts few tools to insure that their decisions are carried out.

If the separation of powers, and the placing of the power to enforce court decisions in the executive branch, leaves courts practically powerless to insure that their decisions are supported by elected and administrative officials, then they are heavily dependent on popular support to implement their decisions. If American citizens are aware of Court decisions, and feel duty-bound to carry them out, then Court orders will be implemented. However, proponents of the Constrained Court view point out that survey data suggest that the American public is consistently uninformed of even major Supreme Court decisions and thus not in a position to support them (Adamany 1973; Daniels 1973; Dolbeare 1967; Goldman and Jahnige 1976). If the public or political elites are not ready or willing to make changes, the most elegant legal reasoning will be for naught.

This constraint may be particularly powerful with issues of significant social reform. It is likely that as courts deal with issues involving contested values, as issues of significant social reform do almost by definition, they will generate opposition. In turn, opposition may induce a withdrawal of the elite and public support crucial for implementation. Thus, proponents of the Constrained Court view suggest that the contested nature of issues of significant social reform makes it unlikely that the popular support necessary for implementation will be forthcoming.

A second claim made by proponents of the Constrained Court view about courts effectively implementing decisions is that the legal system is a particular type of bureaucracy that has few of the advantages and many of the disadvantages of the ideal Weberian type. For example, important components of the Weberian bureaucracy include a hierarchical command structure, a clear agenda, little or no discretion at lower levels, stated procedures, job protection, positions filled strictly by merit, area specialization, and the ability to initiate action and follow-up. While on the surface the U.S. judicial system is hierarchical, has stated procedures, and provides job protection, closer examination under a Constrained Court microscope complicates the picture. For example, although orders are handed down from higher courts to lower ones, there is a great deal of discretion at the lower levels. Decisions announced at the appellate level may not be implemented by lower-court judges who disagree with them or who simply misunderstand them. Similarly, procedures designed to prevent arbitrary action may be used for evasion and delay. Further, unlike the ideal bureaucratic type, courts lack a clear agenda and any degree of specialization. Rather, judges and clerks go from case to case in highly disparate fields. This means that area expertise and planning, often crucial in issues involving significant social reform, are seldom present, making it uncertain that the remedy will be appropriate to the problem. In

terms of initiation and follow-up, the nature of the legal bureaucracy puts barriers in the way of courts. For example, courts cannot initiate suits but must wait for litigants to approach them. Because stated procedures must be followed, because courts have small staffs, and because the legal system requires individuals rather than courts to initiate proceedings, appellate courts may never know whether their decisions have been implemented. Follow-up is difficult because it may be years by the time appellate judges discover an incident (or pattern) of non-implementation, through a case working its way up to them. Finally, the insulated "above politics" position of courts limits judges in cutting deals and actively politicking in support of a decision. The distance between the ideal Weberian bureaucracy and the American judiciary is so large, proponents of the Constrained Court view might argue, that even if courts actively promote significant social reform, they cannot easily achieve the results their decisions command.<sup>14</sup>

Through the eyes of the Constrained Court view, the decentralized nature of the judicial system may constrain courts from producing significant social reform for several reasons. In a nutshell, the structure of courts opens the possibility for bias and misinterpretation to influence lower-court decisions. Further, the entrepreneurial nature of many lawyers makes it difficult for groups seeking significant social reform through the courts to present a coherent strategy. And the nature of the legal bureaucracy makes delay endemic. These claims merit brief attention.

The American judicial system vests considerable discretion in lower-court judges. Only rarely do appellate courts issue final orders. In almost all cases, they remand to the trial court for issuance of the final order. This leaves lower-court judges with a great deal of discretion. The objective judge will conscientiously attempt to follow the higher court's orders. However, misinterpretation of those orders, especially if they are vague, is possible. Further, the biased judge has a myriad of tools with which to abuse discretion. These include the "delay endemic to legal proceedings" (CPIL 1976, 355), narrow interpretation, and purposeful misinterpretation. In this kind of case, litigants must follow procedure and re-appeal the case to the higher court for help, further delaying change.

This structural aspect of the American judicial system, those in the Constrained Court camp argue, may pose a particular problem for litigants seeking significant social reform. Bias and misinterpretation aside, it may be difficult for groups seeking reform to present a coherent strategy. Access to the legal system can be gained in any one of hundreds of courts (in the federal

14. In an empirical study of four important cases, Horowitz supports this line of reasoning and concludes that effective implementation aimed at reforming institutions requires information and knowledge that judges don't have and political compromises that they ought not to make. See Horowitz (1977), especially chapters 2 and 7. Interestingly, a much less elaborate version of this argument was made in 1963 (Friendly 1963, 791-92). For a critical review of Horowitz, see Wasby (1978a).



system) by any one of hundreds of thousands of lawyers. In particular, as Cowan (1976), Tushnet (1987), and Wasby (1983, 1985) note, interest groups planning a litigation strategy may find themselves faced with a host of cases not of their doing or to their liking. There is no way to prevent other lawyers, individuals, and groups from filing cases. And if these cases are not well-chosen and well-argued, they may result in decisions that wreak havoc with the best-laid plans. Thus, groups are sometimes on the defensive, forced to disassociate themselves from the legal arguments of purported allies and sometimes even to oppose them.

Although in practice federal judges have life tenure, this does not mean they are free from constraints. In asking for significant social reform, litigants are asking judges to reform existing institutions. However, judges may be unwilling to take on this essentially non-judicial task. To the extent that lower-court judges are part of a given community, ordering massive change in their community may isolate them and threaten the respect of the court. Also, the judicial selection process for lower federal court judges, is designed to select people who reflect the mores and beliefs of the community in which the court sits (Chase 1972). Therefore, adherents to the Constrained Court view argue, it is unlikely that lower-court judges will be predisposed to support significant social reform if the community opposes it.

The opportunity for delay that is built into the judicial bureaucracy constrains courts in several ways. First, through constant appeals, motions, and the use of other procedures, parties under court order to implement significant social reform can gain time. For example, when threatened with a lawsuit over prison conditions, a state corrections director replied: "a lawsuit is twenty-six months away. We could buy some time" (Cooper 1988, 259). Second, parties opposed to change can initiate their own lawsuits, using the courts to challenge and invalidate legislative, administrative, or other judicial action. In the environmental field both Wenner (1982, 1988) and Hays (1986) note that industry has systematically relied on courts to delay change. For those opposed to reform, delay can allow for changes in political and economic conditions, leading to reversals of the ordered reform. Thus, the opportunity for delay inherent in the legal bureaucracy, believers in the Constrained Court view argue, makes courts poor institutions for producing significant social reform.

A further obstacle for court effectiveness, assert believers in the Constrained Court view, is that significant social reform often requires large expenditures. Judges, in general prohibited from actively politicking and cutting deals, are not in a particularly powerful position to successfully order the other branches to expend additional funds. "The real problem" in cases of other branches to expend additional funds. "The real problem" in cases of reform, Judge Bazelon wrote, "is one of inadequate resources, which the courts are helpless to remedy" (Bazelon 1969, 676). While there may be exceptions where courts seize financial resources, they are rare precisely be-

cause courts are hesitant to issue such orders which violate separation of powers by in effect appropriating public funds. Even without this concern, courts "ultimately lack the power to force state governments [or the federal government] to act" (Frug 1978, 792) because if governments refuse to act, there is little courts can do. They are unlikely to hold governors, legislators, or administrators in contempt or take other dramatic action because such action sets up a battle between the branches that effectively destroys any chance of government cooperation. Thus, judges are unlikely to put themselves in such no-win situations. Further, the "limits on government resources are no less applicable in the courtroom than outside of it" (Frug 1978, 788). As Frug asserts, "the judicial power of the purse will, in the final analysis, extend no further than a democratic decision permits" (Frug 1978, 794).

The claims of the Constrained Court view about the judiciary's lack of tools, and its dependence on others to implement its decisions, can be illustrated by one kind of significant social reform, the wholesale reshaping of bureaucracies. Recent work suggests that courts encounter particular difficulties when they try to reshape highly complicated institutions and bureaucracies.<sup>15</sup> For example, Frug contends that given the number of variables involved, these kind of institutions are "too complex to be administered under court orders" (Frug 1978, 789). Even supporters of the competence of courts note the importance of the complexity of large organizations to court effectiveness (Note 1977), and realize that litigation in such cases requires "some relatively elaborate rearrangement of the institution's mode of operation" (Eisenberg and Yeazell 1980, 468). More specifically, successful reshaping requires the acquiescence, if not the support, of administrators and staff. This presents several problems. First, without the support of political leaders, there is little incentive for administrators to risk their jobs to implement court orders. In the Alabama mental health litigation, for example, the acting superintendent of the Partlow facility was fired for cooperating with the plaintiffs during the remedy hearings (Cooper 1988, 195). In such cases, staff will be especially reluctant to help implement changes. In addition, rigid insistence on conformity to rules such as court orders "breeds distrust, destruction of documents, and an attitude that 'I won't do anything more than I am absolutely required to do'" (Christopher Stone, quoted in McCann 1986, 229-30). In other words, changes required by outsiders, such as courts, may be "strongly resisted" (Special Project 1978, 837) by administrators and staffs, who, as one study suggested, "have a practically limitless capacity to sabotage reform" (Diver 1979, 94). And if administrators and staffs don't act voluntarily, there is little judges can do. While courts do have the power to cite recalcitrant bureaucrats for contempt, the use of such coercive power tends to make martyrs out of resisters and to strengthen the resolve of others

15. Golann and Fremouw (1976); Harris and Spiller (1976); Kalodner and Fishman (1978); Note (1977); Special Project (1978).

to prevent change (Diver 1979, 99; Special Project 1978, 839). Thus, both administrators and staffs have to be won over by the judge for courts to be effective, and judges may not be in a very good position to receive such support. Such rearrangement is difficult for courts, the logic of the Constrained Court view suggests, because they lack the resources to gain adequate understanding of the intricacies of reform and the tools to insure compliance.

Another aspect of the Weberian ideal type involves specialization and expertise. It is plausible that courts' remedial decrees would be more effective if they took into account "the internal and external factors affecting bureaucratic behavior" (Note 1980, 537). Yet, even proponents of court competence realize that "no single judge" has "the resources, inclination, or the time to pursue this sort of detailed and extensive analysis" (Aronow 1980, 759). This analysis has been seconded by several activist judges. Judge Frank M. Johnson, for example, has written that "judges are trained in the law. They are not penologists, psychiatrists, public administrators, or educators" (Johnson 1981, 274). Similarly, Justice Traynor has pointed out that such analysis pulls judges far from their training: "A judge is constrained by training, experience, and the office itself not to undertake responsibilities that belong to the legislature" (Traynor 1977, 8). This means, Constrained Court view supporters claim, that judges often have incomplete knowledge of the resources available or of the power dynamics of the institution or bureaucracy that appears before them. A common result is that judicial reform decrees may lack a realistic sense of available resources. For example, in the *Wyatt* case, one of the principal attorneys for the plaintiffs demanding reform of Alabama's mental health facilities concluded that the standards adopted by the court required "staffing of the institutions with more professionals than there are in the State of Alabama" (Halpern 1976, 85). Similarly, Yudof suggests that "lawyers and judges frequently fail to distinguish between altering the behavior of an individual and altering the behavior of an institution" (Yudof 1981, 444). Thus, it has been suggested that "the realities of the institutional reform suit correspond neither to the talents of most judges nor to the attributes of traditional adjudication" (Kirk and Babcock 1981, 317).

It may also be the case that the effective implementation of significant social reform requires long-term planning and serious consideration of costs. Courts, it has been suggested, are not constituted to be effective at either of these. Judges, McCann suggests, are "largely bound to episodic case-by-case remedies for complex social problems at odds with the long-term supervisory capacities necessary for effective means-oriented planning" (McCann 1986, 226). Further, if "taking political reform seriously requires taking economics seriously as well" (McCann 1986, 164), then litigation may provide little help for two reasons. First, litigation, by its piecemeal nature, "discourages a comprehensive economic orientation" (McCann 1986, 168). Second, of course, judges are not trained economists, and litigators are limited to legal, rights-

oriented forms of argument, not economic analysis. Courts, it can be argued, are not structured to produce significant social reform. Thus, proponents of the Constrained Court view propose,

Constraint III: Courts lack the tools to readily develop appropriate policies and implement decisions ordering significant social reform.

To sum up, the Constrained Court view holds that litigants asking courts for significant social reform are faced with powerful constraints. First, they must convince courts that the rights they are asserting are required by constitutional or statutory language. Given the limited nature of constitutional rights, the constraints of legal culture, and the general caution of the judiciary, this is no easy task. Second, courts are wary of stepping too far out of the political mainstream. Deferential to the federal government and potentially limited by congressional action, courts may be unwilling to take the heat generated by politically unpopular rulings. Third, if these two constraints are overcome and cases are decided favorably, litigants are faced with the task of implementing the decisions. Lacking powerful tools to force implementation, court decisions are often rendered useless given much opposition. Even if litigators seeking significant social reform win major victories in court, in implementation they often turn out to be worth very little. Borrowing the words of Justice Jackson from another context, the Constrained Court view holds that court litigation to produce significant social reform may amount to little more than "a teasing illusion like a munificent bequest in a pauper's will" (*Edwards v. California* 1941, 186).

### Court Effectiveness: The Logic of the Dynamic Court View

The three constraints just presented are generated from the view of courts as unable to produce significant social reform. That view appears historically grounded and empirically plausible. Yet, on reflection, it has two main difficulties. First, it seems to overstate the limits on courts. After all, since the mid-twentieth century or so courts have been embroiled in controversies over significant social reform. Many lawyers, activists, and scholars have acted or written with the belief that the constraints are weak or non-existent and can easily be overcome. Indeed, the whole modern debate over judicial activism makes no sense if the Constrained Court view is correct. If courts are as impotent as the constraints suggest, then why has there been such political, academic, and judicial concern with the role of courts in modern America? Theory and practice are unaligned if the Constrained Court view is entirely correct. Second, examined carefully, its claim is that courts are *unlikely* to produce significant social reform; it does not deny the possibility. However, that doesn't help us understand when, and under what conditions, courts can



produce significant social reform. The Constrained Court view is not the complete answer.

The Dynamic Court view may help. It maintains that courts can be effective producers of significant social reform. Its basic thrust is that not only are courts not as limited as the Constrained Court view suggests, but also, in some cases, they can be more effective than other governmental institutions in producing significant social reform. As Aryeh Neier puts it, "[s]ince the early 1950s, the courts have been the most accessible and, often, the most effective instrument of government for bringing about the changes in public policy sought by social protest movements" (Neier 1982, 9). The constraints of the Constrained Court view, then, may oversimplify reality.

### *Political, Institutional, and Economic Independence*

Proponents of the Dynamic Court view argue that the Constrained Court view entirely misses key advantages of courts. At the most fundamental level, key to the Dynamic Court view is the belief that courts are free from electoral constraints and institutional arrangements that stymie change. Uniquely situated, courts have the capacity to act where other institutions are politically unwilling or structurally unable to proceed. For example, one of the great strengths of courts is the ability to act in the face of public opposition. Elected and appointed officials, fearful of political repercussions, are seldom willing to fight for unpopular causes and protect the rights of disliked minorities. Courts, free of such electoral accountability, are not so constrained. From civil rights to women's rights, from protecting the rights of the physically and mentally challenged to ensuring that criminal defendants are treated constitutionally, the courts have acted where other institutions have refused. Justice Brennan, concurring in a 1981 prison reform case, summarized this view: "Insulated as they are from political pressures, and charged with the duty of enforcing the Constitution, courts are in the strongest position to insist that unconstitutional conditions be remedied, even at significant financial cost" (*Rhodes v. Chapman* 1981, 359).

The ability of courts to act is particularly clear with issues of significant social reform. With such issues, entrenched interests often have the institutional base to prevent change in other political bodies. In civil rights in the 1950s, for example, as the colloquy between Justice Jackson and Assistant Attorney General Rankin reflects, the key position of Southern Democrats in Congress virtually insured that no civil rights legislation would be forthcoming. If change was to come, proponents of the Dynamic Court view argue, it could come only from the courts. Similarly, examining school desegregation in the years 1968–72, Hochschild argues that "were it not for the courts, there would be little reduction in racial isolation [in the public schools]" (Hochschild 1984, 134). And with re-apportionment, legislators from mal-apportioned districts had no incentive to reform the electoral system and vote

themselves out of office, until the courts acted. In other words, the Dynamic Court view proposes that courts are free from the obstacles that lead to "a partial failure of executive or legislative government institutions to do their jobs in a satisfactory and legal way" (CPIL 1976, 208).

A similar argument applies to bureaucratic and institutional change. Proponents of the Dynamic Court view suggest that insulation, institutional inertia stemming from routinized procedures, and group pressure make it difficult for non-judicial institutions to reform themselves. Looking at "entrenched bureaucracies," environmental lawyer Victor Yannacone saw "self-perpetuating, self-sufficient, self-serving bureaus [which] are power sources unto themselves, effectively insulated from the people and responsible to no one but themselves" (Yannacone 1970b, 185). Where there is little incentive to change, it is only an outside force such as a court, uninvolved in daily operations, that may have the will to force change. Organizations contemplating reform also must confront the desires of their constituencies. "In the face of pressures from many diverse constituencies and interests," Aronow writes, "it is unlikely that even public institutions headed by cooperative administrators will reform themselves without the outside coercive force of the court providing the impetus for specific change" (Aronow 1980, 751). Courts simply do not face such pressures. Court decisions will not adversely affect the court's ongoing relations with elected officials, interest groups, financial backers, and the like, whose cooperation is essential for getting work done, for the simple reason that courts are not structured to need or maintain such ongoing relations. Courts do not depend on carefully worked out institutional arrangements because they do not specialize in any one area. Unlike bureaucracies and large institutions, the parties they deal with vary from case to case. Here, too, courts are uniquely situated.

The "inadequacy" of the political process is an essential basis for the Dynamic Court view because "policy formulation in our society is too often a one-sided affair—a process in which only the voices of the economically or politically powerful are heard" (CPIL 1976, 8). In the legislative and executive branches, not all affected interests are heard and not all voices carry the same weight. The predictable result of this systematic exclusion of the "public" is that "government agencies cannot adequately represent all facets of the public interest" (CPIL 1976, 172). However, courts, it is contended, can rectify this exclusion because, "unlike the hierarchical statist view of entrenched elite rule, the judicial view guarantees the independence of citizen groups contending for influence within the adversary process" (McCann 1986, 116). Neither access nor influence depends on connections or position. Access to all affected interests is guaranteed by judicial rules, and influence depends on strength of argument, not political position. As William F. Butler of the Environmental Defense Fund put it, "all it takes is one person with a good legal argument that can convince a judge and that's that" (quoted in

McCann 1986, 208). The judiciary, with “no corrupting links to anyone,” affords “equality of both access and influence to citizens” more “completely” than any “other institutional form” (McCann 1986, 118, 116). And this means that it is able to respond to social reform claims of ordinary citizens where other institutions are not (Sax 1971, 57, 112, 231). As Justice Neely of West Virginia puts it, American courts alleviate the “more dangerous structural deficiencies of the other institutions of democratic government” and thus are the “central institution in the United States which makes democracy work” (Neely 1981, xiii, xi).

The underlying claim here of the Dynamic Court view is that access and influence are not dependent on economic and political resources. The kind of professional lobbying that is required to be effective in influencing bureaucracies or enacting legislation is not necessary for winning court cases. Groups lacking key resources can use courts not only directly to change the law but also to strengthen their voices within the other branches of government and authoritatively present their positions. Thus, proponents of the Dynamic Court view claim, courts offer the best hope to poor, powerless, and unorganized groups, those most often seeking significant social reform.

The judicial process may also provide a powerful forum for gathering and assessing information. In contrast to legislative and bureaucratic proceedings, wide participation in legal proceedings makes it likely that the full range of relevant information will be brought to bear on the final decree. Where crucial information is being withheld, or is hard to obtain, the judicial process of discovery, supported by the coercive powers of the court, may help bring it to light. Further, the adversarial process insures that information will be rigorously assessed before it takes the status of “fact.” Thus, as Chayes points out, the information that the Court has “will not be filtered through the rigid structures and preconceptions of bureaucracies” (Chayes 1976, 1308). Judges, then, are in a strong position to act. As Cavanagh and Sarat put it, it is “difficult to see how any other institutional actor [than the judge] is better equipped to become informed of the ramifications of comparable decisions” (Cavanagh and Sarat 1980, 381–82).

Influence accompanies access in legal proceedings because judges must respond to legal arguments and provide reasons for their opinions. Unlike in other institutions, arguments cannot be ignored or dismissed without discussion. Judges, in contrast to elected or other appointed officials, cannot easily duck the tough issues. Further, judges are limited by the Constitution, statutes, and precedent in the kind of responses they can make. A judge’s dislike or disapproval of actions provides insufficient grounds to support a legal decision. This means, of course, that the positions of unpopular and politically weak groups, denied access to and influence with administrative, executive, and legislative branches, must be taken seriously by the courts.

To sum up, proponents of the Dynamic Court view assert that courts have

the ability to act when other institutions won’t, because judges are electorally unaccountable and serve with life tenure. Unencumbered by electoral commitments and political deal-making, and protected from recrimination, they can act to fulfill the constitutional mandate. Thus, as Fiss puts it, courts can produce significant social reform because the judicial office is “structured by both ideological and institutional factors that enable and perhaps even force the judge to be objective—not to express his preferences or personal beliefs, or those of the citizenry, as to what is right or just, but constantly to strive for the true meaning of the constitutional value” (Fiss 1979, 12–13). Courts, then, can provide an escape from the pathologies of rigid bureaucracies, ossified institutions, and a reluctant or biased citizenry.

### *Courts as Catalysts—Indirect Effects of the Dynamic Court*

In striving for the “true meaning of the constitutional value,” courts base decisions on principle. Unlike legislatures or executives, courts do not act out of calculations of partisan preference. This means, proponents of the Dynamic Court view suggest, that courts can point the way to doing what is “right.” They can remind Americans of our highest aspirations and chide us for our failings. Courts, Bickel suggests, have the “capacity to appeal to men’s better natures, to call forth their aspirations, which may have been forgotten in the moment’s hue and cry” (Bickel [1962] 1986, 26). For Rostow, the “Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar” (Rostow 1952, 208). Bickel agrees, viewing courts as “a great and highly effective educational institution” (Bickel [1962] 1986, 26). In the Dynamic Court view, the courts have important indirect effects, educating Americans and heightening their understanding of their constitutional duty.

Court decisions also have indirect effects, proponents of the Dynamic Court view suggest, through dramatizing issues and spurring action. Courts can provide publicity for issues and serve as a “catalyst” for change (Halpern 1976, 75). Where the public is ignorant of certain conditions, and political elites do not want to deal with them, court decisions can “politicize issues that otherwise might have remained unattended” (Monti 1980, 237). This may put public pressure on elites to act. Indeed, litigation may “often” be “the best method of attracting public attention to institutional conditions and of publicly documenting abuses” (Neier 1982, 29). By bringing conditions to light, and showing how far from constitutional or statutory aspirations practice has fallen, court cases can provide a “cheap method of pricking powerful consciences” (Note 1977, 463).<sup>16</sup> Thus, litigation “serves as a catalyst, not a usurper, of the legislative process” (Sax 1971, 157). This ability to dramatize may be particularly effective with custodial institutions such as hospitals, pris-

16. A small sampling of such claims includes Halpern (1976, 75); Handler (1978, 209); and Scheingold (1974, 9).

ons, and mental institutions where court cases have brought inhumane conditions to light.<sup>17</sup> As Sax puts it, "courts can be used to bring matters to legislative attention, to force them upon the agendas of reluctant and busy representatives" (Sax 1971, xviii).

In addition, court action may invigorate and encourage groups to mobilize and take political action (Scheingold 1974, 131, 148; McCann 1986, 108). In both civil rights and women's rights, for example, the federal courts are often seen as having served this role. As Yannacone told a conference audience:

Every piece of enlightened social legislation that has come down in the past 50 or 60 years has been preceded by a history of litigation (applause) in which trial lawyers somewhere around the country have forcibly focussed the attention of the legislature on the inadequacies of existing legislation (Yannacone 1970a, 77).

Thus, proponents of the Dynamic Court view assert that judicial decisions have important extra-judicial effects.

Another way in which courts may indirectly produce significant social reform is by facilitating negotiations. As an external force un beholden to involved interests, courts are free to act. They can provide a neutral forum where parties can work out their differences. Also, the threat of litigation can serve as a "basic political resource" (Grossman and Sarat 1981, 89). That is, rather than expend money, time, and energy defending against a lawsuit and countering the publicity it generates, parties may find it more palatable to negotiate. Without the threat of lawsuits, Cavanagh and Sarat suggest, many institutions would "never get to the bargaining table" (Cavanagh and Sarat 1980, 405). Where institutions are incapable of internal reform, and there is ineffective public or interest group-pressure, courts may provide a prod.

For the proponents of the Dynamic Court view, then, courts have powerful indirect effects. Their politically neutral position allows them to teach Americans about the meaning of their constitutional obligations. Court decisions can change opinions, generate media coverage, and inspire action. They can provide the necessary nudge to start the reform process. In other words, they have a unique and important kind of potency.

### *Evolving Procedures*

Much of the Constrained Court view's plausibility comes from Constraint III, the courts' supposed lack of implementation powers. Contrary to this view, however, proponents of the Dynamic Court view assert that not only are courts in a unique position to act, but they also have the "demonstrated ability to evolve new mechanisms and procedures" to cope with the complexities of significant social reform litigation (Cavanagh and Sarat 1980, 373).

17. Halpern (1976, 75); Harris (1976, 57); Neier (1982, 29); Note (1975, 1349-50).

One such mechanism is court appointments of special masters to fill in many of the courts' structural weaknesses. Special masters can survey and gather information, talk with interested parties, hold hearings, conduct investigations, draft and float potential remedial decrees, and generally serve as the eyes and the ears of the judge (Aronow 1980). In other words, they can perform many duties helpful to finding an agreeable solution, duties that would appear unseemly if performed by the judge. They are able to do this, Aronow maintains, while retaining "court-like detachment and independence" (Aronow 1980, 766). Aronow and others argue that to the extent that courts have lacked tools to effectively implement remedial decrees in the past, the problem is well on the way to being solved.

Other changes, it is suggested, that have allowed courts to overcome the obstacles suggested by the Constrained Court view include the court's retention of jurisdiction, the creation of monitoring commissions, and the active engagement of the judge (Chayes 1976; Fiss 1979). These steps are designed to allow the court to closely follow the implementation process. If court decrees are not being implemented, or if unforeseen circumstances render parts of decrees inappropriate, these mechanisms allow for speedy correction. For example, if judges retain jurisdiction, then any of the parties can immediately return to court if the decree is not being implemented or if changing circumstances require its modification. Similarly, monitoring commissions can inform the judge of implementation progress and alert the court to the need for further action. And, of course, the mere availability of these tools can influence the behavior of the parties. With these kind of tools readily at hand, possibly recalcitrant parties may think twice before violating remedial decrees. Even with the uncertainties of institutional reform litigation, courts can create effective tools.

### *Empirical Support*

Several recent studies provide empirical support for many of the Dynamic Court view's claims. Hochschild, for example, concludes that in the case of educational institutions, "many criticisms of judges' capacity to reform institutions are unsubstantiated" (Hochschild 1984, 140). A similar defense of judicial competence is reached by Cavanagh and Sarat in their study of cases dealing with debtors and tenants, intimate or ongoing relationships, and reform of large and complex institutions (Cavanagh and Sarat 1980). Understanding the Dynamic Court claim to be that courts are least likely to be successful in such cases, they find courts competent and effective in dealing with them. Similarly, a 1982 study by Rebell and Block examined sixty-five randomly selected federal court cases dealing with education during the years 1970-77 (Rebell and Block 1982). They found that "basic compliance with court orders predominated overwhelmingly over instances of either intentional or unintentional noncompliance" (Rebell and Block 1982, 65). The authors

went on to examine educational issues in New York and Colorado in which both courts and state legislatures were active. Comparing the capacity of the two institutions, they found that courts were in many ways better equipped to be effective than were the state legislatures. They concluded: "Our data largely rebutted the criticism that the judiciary lacks the resources, expertise, or comprehensive perspective needed to implement educational reform successfully" (Rebell and Block 1982, 210).<sup>18</sup>

The Dynamic Court view provides a powerful alternative to the view of courts as the "least dangerous branch." Pointing to pathologies in the other branches, it places courts in a unique position to act. Acknowledging, perhaps, that the Constrained Court view was accurate at the Founding and for part of American history, it maintains that great change has occurred over the last few decades and that courts now have the tools to effectively produce significant social reform. Unlike the Constrained Court view, it is congruent with judicial activism and the modern use of the courts to produce significant social reform. While courts cannot solve all problems, the Dynamic Court view does see them as powerful and effective, unconstrained by the concentrations of power and bureaucratic inertia that stymie self-initiated change in the other branches.

### *Empirical Problems*

Yet for all their plausibility and surface appeal, and their seemingly accurate description of recent litigation, attempts to ground the Dynamic Court view empirically are not entirely satisfying. Unfortunately, studies of the sort referred to above neither completely validate it nor are particularly helpful in constructing hypotheses about courts' effectiveness in producing significant social reform. Often, they either focus on unrepresentative time periods, or on unimportant and noncontroversial cases, or they overstate their findings. In addition, many of the studies that support the Dynamic Court view are theoretical rather than empirical. They mistake what conceivably could happen with what actually has happened. Further, the empirical studies tend to examine only one case. The problem here, from the Constrained Court perspective, is that given the constraints on judges imposed by court rules and the legal culture, it is the rare judge who will become so actively engaged. Although the Dynamic Court view may be correct, the empirical evidence offered in its support does not seal the case.

Without going into much detail, there are several problems with the studies mentioned above. Hochschild's study, for example, picks a short and unrepresentative four-year period in which to assess claims of judicial competence (see chapter 2). Cavanagh and Sarat, on the other hand, pick cases that don't address the issue of court effectiveness in reforming institutions.

18. For case-study literature that explicitly tests and rejects Donald Horowitz's argument that was part of Constraint III, see Fair (1981); Reedy (1982); Youngblood and Folse (1981).

Their evidence is based on cases made difficult not by the resistance of complex institutions but by individuals in complex and emotionally difficult situations. When they do discuss institutional reform cases (what they call extended impact cases), their discussion is theoretical rather than factual.

Somewhat similarly, Rebell and Block's often revealing study excludes cases that involved desegregation. As a result, in their words, "many of the remedial tasks presented by our sample of educational policy cases were relatively straightforward" (Rebell and Block 1982, 212). For example, 42 percent of the cases dealt with "[r]egulation of student appearance, speech, and conduct" (Rebell and Block 1982, 21), hardly the kind of issues that require wholesale rearrangement of institutions. Not surprisingly, although they found compliance in most of their cases, those requiring complex and far-reaching decrees were exceptions (Rebell and Block 1982, 66). Even in their skewed sample, courts did not do very well in overcoming Constraint III. In the cases studied, for example, they report that "not all potentially affected groups seek to participate, and even these groups who do participate do not present a broad spectrum of strongly diverse perspectives to the courts" (Rebell and Block 1982, 39-41). Further, they found judges, when faced with issues of analyzing social facts, in most instances utilized "avoidance techniques" so as not to deal with the information (Rebell and Block 1982, 50). Consequently, "in only 19 [of 65 cases] did the courts scrutinize social fact evidence in order to reach their conclusions" (Rebell and Block 1982, 53). Their study, then, tells us little about the competency of courts to address and reform institutions in non-trivial ways.<sup>19</sup>

With special masters, again, actual case studies do not bear out claims on behalf of the Dynamic Court view. For example, introducing an edited compilation of seven studies of school desegregation, Kalodner concludes that "Masters have seldom if ever been effective in the effort to find a solution that is both acceptable and constitutional" (Kalodner 1978, 9). Reviewing the use of masters in six school desegregation cases, Kirp and Babcock explicitly reject Aronow's optimistic conclusions (Kirp and Babcock 1981, 395). Fi-

19. Rebell and Block's findings about the comparative role of courts and legislatures are also not entirely on point. Focusing on hearings and debates, they found legislatures' fact-finding and analytic abilities to be limited when compared to the courts. However, unlike in courts, much of the gathering and assessment of evidence, and much of the persuasion and analytic reasoning, does not take place on legislative floors. Often, it occurs in offices, over the telephone, and in meetings with various interested parties. Judges are generalists and all the information they are likely to have comes from briefs and oral argument. Legislators, on the other hand, build up expertise in select areas. Committee members are often equally or better informed about the ramifications of proposed legislation, its factual and legal basis, and alternatives to it, than are witnesses appearing before them. Committee hearings and floor debates are much less attempts at fact-gathering and persuasion than they are forums for position-taking and record-building. In other words, comparing the actual conduct of a court case with a legislative hearing or debate is to misconstrue the nature of the legislative process. Thus, Rebell and Block are ironically correct when they conclude, for example, in their Colorado legislature study, that legislative hearings "primarily served a showcase function" (Rebell and Block 1982, 194).

nally, a lengthy and detailed study of institutional reform litigation points out that under court rules the use of special masters must "be the exception and not the rule. Consequently, there cannot be reference to masters as a matter of course" (Special Project 1978, 808). While special masters may be helpful in some cases, overall their record of use appears of limited effectiveness. And the crucial question of under what conditions special masters will be effective is left unanswered.

The Dynamic Court view, then, though in large part an effective retort to the unbending constraints of the Constrained Court view, does not get us very far in understanding the conditions under which courts can produce significant social reform. While its logic of independence and equal access makes good sense, its lack of generalizable empirical support is unhelpful. In sum, while courts may be more effective in producing significant social reform than the constraints of the Constrained Court view allow, the Dynamic Court view does not definitively demonstrate when, and under what conditions, court efficacy can be found.

### Conditions for Court Efficacy

The thrust of the Dynamic Court view is that its competitor oversimplifies reality by understating court effectiveness. However, it appears that the Dynamic Court view likewise oversimplifies, by overstating court effectiveness. Further, the views appear to be in conflict. For example, the Dynamic Court view proposes court action in the face of hostile or inert political institutions while the constraints of the Constrained Court view tell us that in such situations success is least likely. Along with conflict, however, each view appears to convey something of the truth. On an intuitive level, opposition from political elites is not conducive to court effectiveness. On the other hand, judicial isolation from many pressures allows courts to act when other institutions wish to but cannot. Surely it is naive to expect courts to be able to solve political and economic problems that the other branches cannot. But it appears equally short-sighted to deny that since mid-century courts have played an important role in producing significant social reform. It may well be that while each view captures part of the truth, neither is fine-grained enough to capture the conditions under which courts can effectively produce significant social reform.

Combining the two views may point the way to finally understanding these conditions. For example, there would be no conflict between the two views if courts were effective producers of significant social reform when there was general political and popular support for change but institutional blockage. That is, there may be conditions under which the constraints of the Constrained Court view, even if generally correct, can be overcome and courts can produce significant social reform. In the remaining part of this

chapter, I suggest that this is the case; the constraints of the Constrained Court view generally limit courts, but when political, social, and economic conditions have become supportive of change, courts can effectively produce significant social reform.

Winning court cases is, of course, the first step toward courts producing significant social reform. In order to maximize chances of winning, the rights constraint must be overcome. What this means is that litigation for significant social reform must be gradual. Since judges are gradualists, small changes must be argued for before big ones. Although this requires a lengthy strategy for change, unless litigators can find strong precedents on which to base their claims, Constraint I suggests that cases demanding significant social reform will be losers.

Overcoming the judiciary's unwillingness to step far from the political mainstream is also difficult. When, however, there is political support for significant social reform, litigation may make sense. Unfortunately, there are no hard-and-fast rules for determining the existence of such support. However, there are several circumstances that provide good evidence that court decisions ordering significant social reform will be well received. One such circumstance is when legislation supportive of significant social reform has been enacted and courts are asked to interpret it. Another is when the executive branch is supportive of the claims of reformers. Cases in which the federal government is willing to appear as *amicus* on the side of significant social reform may be good opportunities for litigation. The appearance of the federal government not only reassures the court that the reform demanded has support, but also suggests that the executive is at the very least not opposed to implementing an affirmative decision.<sup>20</sup> A more nebulous bit of evidence is congressional support for interests similar to those reform litigators are suggesting. If legislation is being seriously considered, or debated, dealing with similar issues, courts need not fear adverse reactions from the Congress. At these times legal arguments are most likely to overcome Constraint II and find a receptive judicial audience.<sup>21</sup>

Even if the rights that significant social reform litigators are demanding are well-grounded in precedent, and there is elite support for such outcomes, there still remains the courts' lack of implementation powers (Constraint III). In many ways this is the most difficult constraint to overcome. For court decisions supporting significant social reform to be effective, a myriad of people need to be supportive. If there is political and popular support, Constraint III can be overcome. When there is such support, the people who need to change their behavior to make the decision a reality may be willing to do

20. Government support in litigation does not guarantee such support in implementation. Civil rights is a perfect example. See discussion in chapters 2 and 3.

21. Public opinion surveys most likely do not provide sufficient evidence of elite political support because public support does not necessarily translate into such elite support.



so. Often, many people will be already so acting and all court action does, in effect, is to remove any threat of legal action against them.<sup>22</sup> Somewhat more subtly, it is in these conditions that many of the claims of the Dynamic Court view may be validated. For example, when strong or widespread opposition to court orders is missing, parties to controversies may be more likely to respond to efforts at serious negotiation. Under such conditions, court orders may serve to overcome inertia and prod parties to the bargaining table. Similarly, when elite and public opinion generally supports court decisions, they may be effective in mobilizing people to effectively implement the decision. When public opinion has started to change, or is open to the possibility of change, it is possible that court opinions can help speed that change along. As Rebell and Block put it, "in situations where the parties (and the public) are inclined to cooperate (or at least to avoid strong resistance), courts are capable of fashioning effective relief" (Rebell and Block 1982, 214). Coercive powers won't be necessary, for the willingness to change will predate court action. Courts, then, may be effective producers of significant social reform when their decisions are announced in a political context of broad elite and popular support for the issue or right in controversy. Thus, when there is a general political climate in favor of significant social reform, Constraint III can be overcome.

Overcoming the three constraints will not automatically lead to significant social reform. As proponents of the Dynamic Court view argue, strategically placed elites, inert bureaucracies, and special interests may work to prevent change. Thus, in addition, certain conditions must be present. The first condition under which court decisions requiring significant social reform are likely to be implemented is when incentives are offered along with the decision. If there is some reward for implementation, those whose cooperation is essential may be willing to go along. The type of inducement can vary. One of the oldest, and most effective, inducements is money. Where, for example, on a national level, Congress provides money to those states, institutions, or bureaucracies which implement court decisions, local politicians or bureaucrats may be willing to do what the court orders. When opposition is fierce, of course, money may be of little help. But the less opposed the key parties are, the more the temptation of government dollars may overcome resistance to implementing court opinions.

Money is not the only form of inducement. Both elites and the public may be willing to implement court decisions if the benefits of so doing are clear. Benefits may include actions of private parties. For example, developers or industry may condition new projects or moves to new areas on implementation of court decisions. Here, too, if opposition to court-ordered change

22. It is not clear in such cases that the courts are producing significant social reform. Rather, it seems, they are merely allowing reform behavior to continue.

is strong, parties whose cooperation is essential may be willing to forgo the benefits. Again, inducements work only when parties have at least some willingness to go along. Thus,

Condition I: Courts may effectively produce significant social reform when other actors offer positive incentives to induce compliance.

The other side of benefits is, of course, costs. If the refusal to implement court decisions has high costs, implementation will be more likely. In cases of significant social reform, courts, acting alone, may not have sufficient tools to provide benefits, or impose costs, that would serve to induce compliant behavior (Constraint III). However, if the failure to implement decisions results in legislative or administrative action that imposes costs, then court decisions have a better chance of being implemented. This requires political support for the decisions, in the form of action imposing costs for non-compliance, and a belief on the part of key actors that implementing the decision is less objectionable than bearing the costs of non-implementation. Here, too, the loss of money, either public or private, as a result of non-implementation, can be an effective inducement. Thus,

Condition II: Courts may effectively produce significant social reform when other actors impose costs to induce compliance.

Another condition that may allow courts to produce significant social reform is when decisions can effectively be implemented through the market, side-stepping Constraint III. That is, if existing institutions do not have to change for change to occur, such change is more likely. If individuals or groups are both free and able to create their own institutions to implement court decisions, then the inability of courts to effectively reform existing institutions will not prevent change from occurring. In effect there will be two sets of institutions in existence; an older set that refuses to implement the decision and a newer one that does implement it. Court decisions of the significant social reform type will be implemented, in other words, if supporters can create institutions to do so. When the courts either refuse to allow market forces to act, or when, as in school desegregation, there is no realistic market alternative, this condition is not relevant. Thus,

Condition III: Courts may effectively produce significant social reform when judicial decisions can be implemented by the market.

A final condition that allows courts to be effective producers of significant social reform occurs when officials and administrators use court orders as a tool for leveraging additional resources, or as an excuse or cover for acting. One way in which this can be done is by affected officials relying on court orders to request increased funding from the legislature. Court orders, Diver suggests, give a manager "a powerful ally in his unending quest for additional



funds" (Diver 1979, 71; Stickney 1976, 33; Note 1980, 517). While administrators may resent court attempts to challenge their professional judgment and interfere with the running of their institutions, they may see a silver lining in the clouds. For example, Dr. Stonewall Stickney, Commissioner of the Department of Mental Health for the State of Alabama, and the named defendant in a massive suit against the state in Judge Johnson's court (*Wyatt v. Stickney*), wrote to his counsel: "At present the court appears to be our only avenue to adequate funding" (Stickney 1976, 36). Similarly, Justice Powell, concurring in *Milliken v. Bradley* (1977, 293), saw that the parties to the case "have now joined forces apparently for the purpose of extracting funds from the state treasury." Where defendants are willing to reform their institutions, they can parlay court orders into demands for additional funding.

In a related way, court orders can be used to leverage other resources. "It is perhaps the case," a law-review note suggests, that state administrators can "rely on the courts to pressure the legislatures and impose needed reforms" (Note 1977, 430). While it is of course possible to ignore such pressure, there are costs involved. The appearance of violating a court order is not one legislators usually relish. Thus, a court order can provide "sympathetic operating officials a powerful lever with which to pry loose cooperation from intransigent policymakers" (Diver 1979, 81, emphasis added). Such orders can also be used to entice resisting staff members and others to support reform. In the Alabama mental health litigation, for example, Dr. Stickney found that the court's orders enabled him to "'stand up' to staff members, members of the community, and politicians who objected to actions he took as Superintendent" (Note 1975, 1368). Sympathetic and reform-minded administrators, while nominally the defendants, can use court intervention to implement reforms they have been unable to convince others to go along with.<sup>23</sup> Court orders give administrators who wish to make reforms an additional tool for obtaining the necessary support and resources.

Finally, court orders can simply provide a shield or cover for administrators fearful of political reaction. This is particularly helpful for elected officials who can implement required reforms and protest against them at the same time. This pattern is often seen in the school desegregation area. Writing in 1967, one author noted that "a court order is useful in that it leaves the official no choice and a perfect excuse" (Note 1967, 361). While the history of court-ordered desegregation unfortunately shows that officials often had many choices other than implementing court orders, a review of school desegregation cases did find that "many school boards pursue from the outset a course designed to shift the entire political burden of desegregation on the

23. According to a participant in many school desegregation cases, such a course is often urged on school administrators to win their support for desegregation. Incorporating reforms in court orders offers them a chance to make changes they have been unable to win approval for on their own (author's conversation with Gary Orfield).

courts" (Kalodner 1978, 3). This was also the case in the Alabama mental health litigation where "the mental health administrators wanted [Judge] Johnson to take all the political heat associated with specific orders while they enjoyed the benefits of his action" (Cooper 1988, 186). Thus,

Condition IV: Courts may effectively produce significant social reform by providing leverage, or a shield, cover, or excuse, for persons crucial to implementation who are *willing to act*.

Before summing up, it is important to assess what the conditions suggest about the role of the courts in the American political system. They suggest that court decisions are neither necessary nor sufficient for producing significant social reform. They are not necessary because much reform takes place outside of the judicial system and because courts lack independence (Constraint II). They are not sufficient because courts lack effective tools for implementation (Constraint III) and require the existence of particular conditions (Conditions I-IV). Without the presence of at least one of the conditions, court decisions will not produce significant social reform. On the other hand, if Constraints I and II and III are overcome, and at least one of the conditions is present, then courts may effectively produce significant social reform.

Returning to the two views of the role of the courts that framed this chapter, this analysis suggests that the Constrained Court view more closely approximates the role of the courts in the American political system. While the conditions suggest that courts can be effective producers of significant social reform, capturing part of the Dynamic Court view, they also suggest that this occurs only when a great deal of change has already been made. For only when there has been political, social, and economic change will Constraints I, II, and III be overcome and at least one of the conditions be present. Overall, then, the conditions and constraints suggest that U.S. courts, and their role in the American political system, are much less exceptional than is generally thought.<sup>24</sup>

To sum up, the discussion suggests that the conditions enabling courts to produce significant social reform will seldom be present because courts are limited by three separate constraints built into the structure of the American political system:

- 1) The limited nature of constitutional rights (Constraint I);
- 2) The lack of judicial independence (Constraint II);
- 3) The judiciary's lack of powers of implementation (Constraint III).

24. In his classic historical study of the Supreme Court, McCloskey, too, concludes that the Court has been effective only when it has "operated near the margins rather than in the center of political controversy, when it has nudged and gently tugged the nation, instead of trying to rule it" (McCloskey 1960, 229). See also Handler (1978); Grossman (1970). Where this work differs from those cited is that it shows why this is the case.

However, when certain conditions are met, courts can be effective producers of significant social reform. These conditions occur when:

- 1) Overcoming Constraint I, there is ample legal precedent for change;  
*and*,
- 2) Overcoming Constraint II, there is support for change from substantial numbers in Congress and from the executive; *and*,
- 3) Overcoming Constraint III, there is either support from some citizens, or at least low levels of opposition from all citizens; *and*, either
  - a) Positive incentives are offered to induce compliance (Condition I);  
or,
  - b) Costs are imposed to induce compliance (Condition II); or,
  - c) Court decisions allow for market implementation (Condition III);  
or,
  - d) Administrators and officials crucial for implementation are willing to act and see court orders as a tool for leveraging additional resources or for hiding behind (Condition IV).

It is now time to turn to the data and see how well the views, constraints, and conditions fare.

## PART 1

# Civil Rights