Los Angeles Times
June 25, 2006 Sunday

BOOK REVIEW; Part R; Pg. 12
LENGTH: 1265 words

A Modest Proposal

The Most Democratic Branch: How the Courts Serve America
Jeffrey Rosen Oxford University Press: 238 pp., $25

David J. Garrow, David J. Garrow, a senior fellow at Homerton College, University of Cambridge, is the author of "Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade."

FORTY years ago, the U.S. Supreme Court under Chief Justice Earl Warren repeatedly wielded its judicial power to issue liberal rulings in dozens of important cases. At the time, the Warren court's most prominent critic was law professor Alexander M. Bickel, whose best-known book is "The Least Dangerous Branch."

Bickel's prominence stemmed in part from his frequent editorials in the New Republic criticizing judicial activism. He died in 1974. At the onset of the 1990s, Yale Law School graduate Jeffrey Rosen became the magazine's legal affairs editor while still in his 20s and energetically took up Bickel's cudgel. Over the last decade, through his prolific contributions to the New York Times, the Atlantic Monthly and other publications, as well as the New Republic, he has emerged as the nation's most widely read and influential legal commentator. \o7

\f7Like Bickel, Rosen has been a consistent and principled critic of judicial intervention in political battles irrespective of whether courts' rulings advance liberal or conservative causes. Thus he has repeatedly denounced the Supreme Court's ongoing constitutional protection of abortion rights while also vociferously attacking its resolution of the 2000 presidential election in Bush vs. Gore.

Now the author and constitutional law professor carries forward his critique of judicial power in a new book, whose title, "The Most Democratic Branch," directly echoes Bickel's. Although Bickel championed judicial self-restraint, emphasizing what he called "the passive virtues," Rosen argues that the long arc of American history consistently demonstrates that the Supreme Court best serves the country when the justices mirror popular preferences rather than contravene them.

For anyone respectful of the egalitarian spirit that influenced not only the Warren era but also a larger number of Supreme Court decisions from 1938 to recent rulings affirming gay rights, Rosen's argument seems dramatically contrarian. From the late 1930s until the triumph of Reaganism in the 1980s, most judicial scholars agreed that the court has two essential missions: to protect the fundamental rights of unpopular individuals whether they are religious dissenters or career criminals, and to ensure that minority groups such as African Americans and children born out of wedlock are not legally discriminated against.

From that perspective, the Supreme Court's 1954 rejection of racially segregated schools in Brown vs. Board of Education was a defining moment not only for civil rights but also for the court's role in society. Over the next two decades, lawyers pursuing a host of causes -- legislative reapportionment, welfare rights, free speech for antiwar activists and women's rights -- all reasoned that a high court courageous and outspoken enough to issue the Brown decision might well embrace the fundamental fairness of their claims too.

Brown is a mainstream ruling that every high-court commentator is obliged to endorse. But for the last 15 years, a small yet influential band of scholars has sought to downplay Brown's importance and to refute the idea that Brown is a model for today's jurists to emulate. Rosen eagerly embraces their conclusions, but his more far-reaching claim is that, in the long run, judicial restraint advances and preserves liberal goals more effectively than does Warren court-style activism.

Rosen asserts that "the vision of antidemocratic courts protecting vulnerable minorities against tyrannical majorities is, in some sense, a romantic myth." An experienced writer shouldn't use so vague a qualifier as "in some sense" with so sweeping a claim, but Rosen's argument is most vulnerable when he insists that never in history has the high court rendered an important and mostly unchallenged decision that was fundamentally out of step with public opinion, not even in Brown.

Given that 21 states enforced segregation statutes at the time of Brown, Rosen's contention that "the Supreme Court has followed the public's views about constitutional questions throughout its history" reflects a desire to tailor the historical record to fit his argument. That tendency is widespread among the new critics of judicial power, and it appears again when Rosen attacks Roe vs. Wade, the 1973 decision that struck down anti-abortion laws in 46 states.

The years immediately preceding Roe, just like those before Brown, witnessed a growing number of supportive judicial opinions as well as the emergence of majority national support for such a reform. But where Rosen portrays Brown as just one modest and natural part of a wider societal evolution, he insists that in Roe the court "unilaterally leaped ahead of a national consensus" so forcefully as to generate a backlash against abortion rights that otherwise would not have occurred.

But "The Most Democratic Branch" is not intended as a work of history; Rosen's goal is to convince readers that no matter what their political views, they should adopt his and Bickel's "tradition of bipartisan judicial restraint" and insist that "courts should play an extremely modest role in American democracy."

This may appeal most to registered Republicans, but Rosen is no conservative, and indeed he believes that "[b]y and large, liberals are winning the culture wars in the court of public opinion." That may eventually prove true for gay marriage and physician-assisted dying, but Rosen's insistence that "judges should defer to the views of the political branches and the states about constitutional issues in the face of intense opposition or uncertainty" is cold comfort to a woman seeking a late-term abortion or anyone who was outraged by Congress' intervention in the case of Terry Schiavo, the brain-damaged Florida woman whose feeding tube eventually was disconnected.

Perhaps the least persuasive part of Rosen's argument is his repeated call for judges to reflect and enforce "the constitutional views of the American people." He stresses that the court should

defer to the national majority's constitutional views, not the public's political views, but that distinction highlights the problem most starkly: How many Americans have "constitutional" beliefs about even the most high-visibility issues that confront the Supreme Court?

Rosen embraces public-opinion-poll results as evidence, but they hardly suffice. Two decades ago, for instance, Judge Robert Bork's nomination to the Supreme Court generated poll numbers showing that Bork's opposition to a constitutional right to privacy was rejected by a decisive majority of Americans. Such a privacy right might well encompass physician-assisted dying, which heavy majorities of poll respondents also consistently endorse, but Rosen firmly opposes any judicial recognition of a right to assisted suicide for the terminally ill.

Rosen's argument may have holes, but no theory of constitutional interpretation is perfect. He concedes that "Congress is increasingly reluctant to take responsibility for policy choices." Indeed, he confesses that "the Supreme Court in recent years has become increasingly adept at representing the views of the center of American politics," even better than Congress.

Yet even these telling acknowledgments fail to shake Rosen from his insistent faith that "judges should be reluctant to second-guess the decisions of elected legislators." This book is a significant polemic from an important writer, but only people deeply confident about the constitutional thoughtfulness of their elected legislators should follow Rosen down his primrose path of judicial self-abnegation. *

HOLDING COURT: Supreme Court justices Stephen Breyer, left, Ruth Bader Ginsburg, Clarence Thomas, John Paul Stevens and Chief Justice John G. Roberts should mirror popular thought, rather than gainsay it, says author Jeffrey Rosen, an outspoken advocate of judicial restraint. PHOTOGRAPHER: J. Scott Applewhite Associated Press