COURTING DISASTER: LOOKING FOR CHANGE IN ALL THE WRONG PLACES

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I. INTRODUCTION

What role can courts play in furthering Progressive social change? For generations of both law school students and political liberals, courts have been understood as powerful producers of Progressive social change. Starting with the civil rights cases of the mid-twentieth century, and spreading to the issues raised by women's groups, environmental groups,

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political reformers, gay rights supporters, and others, Progressive forces in the United States have increasingly turned to courts to produce the changes they seek. In many cases they have won. American courts seemingly have become important producers of political and social change. Cases such as *Brown v. Board of Education*,[1] *Roe v. Wade*,[2] and *Lawrence v. Texas*,[3] to name just three, are heralded as having produced major Progressive change. Interestingly, such litigation has often occurred when the other branches of government have failed to act. This suggests that courts can produce Progressive change even when the other branches of government are inactive or opposed. In times of Conservative domination of the elected branches of governments, litigation can seem very attractive to Progressives. It holds out the possibility of protecting minorities and defending liberty in the face of opposition from the democratically elected branches. Progressives see activist courts, then, as playing an important role in the American scheme.[4]

As powerful as the belief in the Progressive potential of courts to help the relatively disadvantaged may be, it is a historically odd idea. Traditionally, courts in the U.S. have protected privilege. Throughout U.S. history and until the second half of the twentieth century, Progressives, for the most part, understood this and avoided litigation when possible. They understood that judges, and the courts in which they served, were dedicated to preserving the status quo and unequal distributions of power, wealth, and privilege. They understood that Progressive social change could only come from legislation and social movements. However, since roughly the mid-twentieth century, particularly during the Warren and Burger Courts, this was forgotten. Progressives increasingly turned to litigation and pointed to great victories in cases such as *Brown* as proof that the role of the courts in the U.S. political system had changed. They were wrong.

This brief Article expands on these two main points. First, it reviews the Court's historical record as a defender of privilege in the areas of civil rights, civil liberties and dissident speech, and economic rights. Second, it argues that the great legal victories to which Progressives point as proof of the efficacy of litigation did not, for the most part, produce the change they

1. Brown v. Bd. of Educ., 347 U.S. 483 (1954).
2. Roe v. Wade, 410 U.S. 113 (1973).
3. Lawrence v. Texas, 539 U.S. 558 (2003).
4. This belief is developed in more detail in GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991), particularly in the introductory chapter.

wanted. Further, such litigation mobilized opponents, creating additional obstacles for change. Forgetting the lessons of history, the Progressive agenda was hijacked by a group of elite, well-educated, and comparatively wealthy lawyers who uncritically believed that rights trump politics and that successfully arguing before judges is equivalent to building and sustaining political movements. This Article concludes that Progressives have failed to understand the limits of litigation when they have won and have forgotten the historic role of the judiciary as a defender of status quo and unequal distributions of power, wealth, and privilege. The political left's flirtation with litigation is fundamentally flawed.

II. THE SUPREME COURT'S HISTORIC MISSION TO PRESERVE THE STATUS QUO AND UNEQUAL DISTRIBUTIONS OF POWER, WEALTH, AND PRIVILEGE

The following pages briefly sketch the historic role of the Court as a protector of privilege in the areas of civil rights, civil liberties and dissident speech, and economic rights.[5] While this Article paints with a broad brush, these substantive areas of law, and the cases noted, are illustrative of the conservative role the Court has played throughout U.S. history. The only minority the Court has consistently protected throughout U.S. history is wealthy white men.

A. *Civil Rights*

For most of U.S. history the Supreme Court has supported and reinforced racial discrimination against non-whites. This is an unpleasant fact that most citizens do not know and most lawyers ignore. While the cases are legion, three stand out: *Scott v. Sandford*,[6] the *Civil Rights Cases*,[7] and *Plessy v. Ferguson*.[8] They merit brief discussion.

The main issue in *Dred Scott*, in 1856, was the citizenship status of a slave under federal law.[9] Dred Scott, a slave, brought suit in federal court arguing that because he had been in states and territories that prohibited slavery, he was now free.[10] Sandford, the slave owner, denied that Dred

5. Obviously there are other areas that could have been selected as well, including gender.

6. Scott v. Sandford (*Dred Scott*), 60 U.S. (19 How.) 393 (1856).

7. The Civil Rights Cases, 109 U.S. 3 (1883).

8. Plessy v. Ferguson, 163 U.S. 537 (1896).

9. *Dred Scott*, 60 U.S. (19 How.) at 400.

10. *Id.*

Scott could bring suit, arguing that as a slave he was not a citizen entitled to call upon the jurisdiction of the federal courts.[11] The Supreme Court agreed.[12] Writing for the Court, Chief Justice Roger Brooke Taney held that African-Americans were not intended to be "citizens" in the Constitution.[13] They were not "part of the people" and "had no rights which the white man was bound to respect."[14] African-Americans, as a matter of constitutional law, were simply "ordinary article[s] of merchandise."[15]

The Court's decision, as horrific as it appears to modern sensibilities, reflected both the prevailing racist beliefs and legal understandings of the time. As Professor Graber has carefully shown, the decision was in accord with "[v]irtually every state court that ruled on black citizenship," the views of four U.S. Attorney Generals who had issued opinions on the question, and "the leading northern treatise on jurisprudence, James Kent's *Commentaries on American Law*."[16] Politically, the decision was in accord with the policies of "the dominant Jacksonian coalition"[17] and "Republican legislators in New York and Ohio who in the wake of *Dred Scott* did make a show of support for black citizenship were almost immediately voted out of office."[18] As the women's right crusader Susan B. Anthony sadly acknowledged, the decision was "but the reflection of the spirit and practice of the American people, North as well as South."[19] The Court simply reflected the racist understandings of the times.

The *Dred Scott* decision was overturned by the adoption of the Fourteenth Amendment.[20] The three post-Civil War Amendments made slavery unconstitutional,[21] prohibited the states from denying people "the equal protection of the laws[,]"[22] and guaranteed the right of citizens to

11. *Id.*
12. *Id.* at 404–05.
13. *Id.* at 404, 454.
14. *Id.* at 407.
15. *Id.*
16. Mark A. Graber, *Desperately Ducking Slavery:* Dred Scott *and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 281–82 (1997).
17. *Id*. at 283.
18. *Id*. at 284.
19. *Id.* at 285 (internal quotation marks omitted).
20. U.S. CONST. amend. XIV, § 1; Oliver v. Donovan, 293 F. Supp. 958, 967–68 (E. D. N.Y. 1968).
21. U.S. CONST. amend. XIII, § 1.
22. *Id.* amend. XIV, § 1.

vote regardless "of race, color, or previous condition of servitude."[23] As the Court noted in the *Slaughter-House Cases*,[24] decided in 1872, only a few years after the adoption of the three Civil War Amendments, they had "a unity of purpose"—the protection of the newly freed slaves.[25] "[T]he one pervading purpose found in them all," the Court wrote, is "the freedom of the slave race."[26] They were dedicated to "the protection of life, liberty, and property, without which freedom to the slave was no boon."[27]

Although this language suggested that the dark days of constitutionally-sanctioned racism were at an end, any such thoughts were quickly put to rest in the *Civil Rights Cases* of 1883. At issue was a challenge to the Civil Rights Act of 1875 which, in Section 1, prohibited race-based discrimination in public places such as hotels, restaurants, and theaters.[28] Despite the passage of the Civil War Amendments, and despite the fact that seven of the Justices had been appointed by Presidents Lincoln and Grant and only two members of the Court were Southerners, the Court struck down the Act by a vote of 8–1.[29] The Court held that the Fourteenth Amendment only applied to action by the State, not to the private action of individual business owners.[30] Because almost all businesses in the U.S. were privately owned, the decision meant that the federal government lacked the power to prohibit racial discrimination in most aspects of people's lives. Only Justice Harlan dissented, writing that the Court's opinion was based on "grounds entirely too narrow and artificial" that sacrificed "the substance and spirit" of the Civil War Amendments.[31] Justice Harlan argued in essence that when businesses serve the public they are amenable to public regulation.[32]

In gutting the Civil War Amendments, the Court's majority opinion went out of its way to express annoyance with African-Americans for seeking guarantees of nondiscrimination:

23. *Id.* amend. XV, § 1.
24. The Slaughter-House Cases, 83 U.S. 36 (1872).
25. *Id.* at 67–68.
26. *Id.* at 71.
27. *Id.*
28. The Civil Rights Cases, 109 U.S. 3, 9 (1883).
29. *See id.* at 26 (indicating that of the nine Justices on the Court, Justice Harlan was the sole dissenter).
30. *Id.* at 23–26.
31. *Id.* at 26 (Harlan, J., dissenting).
32. *Id.* at 55–56.

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws . . . .[33]

Although the case was decided less than two decades after the abolition of slavery, and a mere fifteen years after the adoption of the Fourteenth Amendment, the Court made it clear that the Constitution preserved white privilege and condemned African-Americans to second-class status. The constitutional support for racial discrimination was further strengthened in *Plessy v. Ferguson*,[34] decided in 1896. At issue in *Plessy* was the constitutionality of a Louisiana law requiring railroads to segregate passengers by race.[35] Given the holding of the *Civil Rights Cases* that the Fourteenth Amendment was concerned with state action, and the open and ongoing creation of an apartheid system in Louisiana and other Southern states, it should have been easy for the Court to hold the law unconstitutional. The Court did find the case easy; it upheld the constitutionality of the law by a vote of 7–1.[36] The Court reasoned that even though the case involved state action, there was an important distinction between political and social equality.[37] The Fourteenth Amendment, the Court held, was aimed at political equality, not social equality, arguing that "it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality."[38] Then, in disingenuous language, the Court claimed that laws requiring racial segregation "do not necessarily imply the inferiority of either race to the other."[39] In what can only be seen as a deeply dishonest denial of reality, the Court wrote:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.[40]

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33. *Id.* at 25.
34. Plessy v. Ferguson, 163 U.S. 537 (1896).
35. *Id.* at 540.
36. *Id.* at 540, 552.
37. *Id.* at 544.
38. *Id.*
39. *Id.*
40. *Id.* at 551.

Again, it was Justice Harlan who explicitly noted the Court's racism. Arguing segregation laws were based on white beliefs in racial superiority, he poignantly wrote: "The thin disguise of 'equal' accommodations . . . will not mislead any one, nor atone for the wrong this day done."[41] Once again, the Court had supported white privilege.

While it is true that in the twentieth century the Court backed away from giving constitutional commendation to racial discrimination, it did so only with hesitation and often in cases which affected only small numbers of people. For example, in a series of cases the Court struck down segregation in graduate and professional schools.[42] To this day, the Court has never explicitly overruled *Plessy v. Ferguson.*[43] It was not until 1954, eighty-six years after the enactment of the Fourteenth Amendment, that the Court invalidated racial segregation in public schools with the *Brown* decision. Yet, as discussed below, the decision was not implemented.[44] Further, the Court backed off its mandate in l974 in *Milliken v. Bradley*[45] where it disallowed a desegregation remedy that included suburbs as well as cities "even though there was extensive proof of official actions producing segregation and no viable solution within largely nonwhite and poor central city school systems."[46] Moreover, in a series of cases at the end of the twentieth century, the Court found no constitutional limitations on the re-creation of segregated schools as long as such segregation was not explicitly required by state laws.[47] As Orfield and Lee concluded, the U.S.

41. *Id.* at 562 (Harlan, J., dissenting).

42. *See* McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637, 642 (1950); Sweatt v. Painter, 339 U.S. 629, 636 (1950); Sipuel v. Bd. of Regents, 332 U.S. 631, 632–33 (1948) (per curiam); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 340–41 (1938).

43. The Court came close in *Brown*, rejecting any language in *Plessy* to the contrary about the negative effects of segregation on African-American school children. Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954).

44. *See* discussion *infra* Part III.A.

45. Milliken v. Bradley, 418 U.S. 717 (1974).

46. GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 9 (2006), http://www.civilrightsproject.harvard.edu/research/deseg/Racial_Transformation.pdf.

47. *See* Missouri v. Jenkins, 515 U.S. 70, 100–01 (1995) (holding that the educational components of desegregation plans could be cancelled even if they had not yet produced educational progress); Freeman v. Pitts, 503 U.S. 467, 492–93 (1992) (permitting school districts to dismantle desegregation plans even though integration had not been achieved); Bd. of Educ. v. Dowell, 498 U.S. 237, 248 (1991) (establishing the policy of terminating desegregation plans and returning to segregated neighborhood schools after a period of years). For a collection of new research on

is witnessing "[t]he resegregation of blacks . . . [which] appears to be clearly related to the Supreme Court decisions in the l990s permitting return to segregated neighborhood schools."[48]

B. *Civil Liberties and Dissident Speech*

Despite the majestic language of the First Amendment and the existence of judicial review, historically, the Supreme Court has seldom protected political dissent.[49] Only in those rare instances when dissidents were supported by large segments of the elite did the Court provide any protection.[50]

From the founding of the United States in 1789 (and the adoption of the Bill of Rights in 1791) until the later part of the twentieth century, the Supreme Court provided little protection to political dissidents. Government at all levels repeatedly and consistently silenced speech critical of their actions with the approval of the Court. U.S. history is full of examples, such as: the Alien and Sedition Acts, the Civil War, the repression associated with the First World War, the subsequent decades of silencing of labor and left-wing activists, and the Cold War.[51] In examining the pre-World War I judicial history of political repression, David Rabban noted that "[t]he overwhelming majority of prewar decisions in all jurisdictions rejected free speech claims, often by ignoring their

resegregation, see SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? (John Boger & Gary Orfield eds. 2005); GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., *BROWN* AT 50: KING'S DREAM OR *PLESSY'S* NIGHTMARE? (2004), http://www.civilrightsproject.harvard.edu/research/reseg04/brown50.pdf.

48. ORFIELD & LEE, *supra* note 46, at 4.

49. Gerald N. Rosenberg, *The Sorrow and the Pity: Kent State, Political Dissent, and the Misguided Worship of the First Amendment*, *in* THE BOUNDARIES OF FREEDOM OF EXPRESSION & ORDER IN AMERICAN DEMOCRACY 17, 21–22 (Thomas R. Hensley ed., 2001).

50. *Id.* at 32–33.

51. There is literature that records this history. *See, e.g.*, ROBERT JUSTIN GOLDSTEIN, POLITICAL REPRESSION IN MODERN AMERICA: FROM 1870 TO 1976 (rev. ed., Univ. of Ill. Press 2001) (1978); PAUL L. MURPHY, WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES (1979); RUSSEL B. NYE, FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY 1830–1860 (1963); WILLIAM PRESTON, JR., ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS 1903–1933 (1963); LEON WHIPPLE, THE STORY OF CIVIL LIBERTY IN THE UNITED STATES (1927); David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L. J. 514 (1981).

existence."[52] His study found a "pervasive hostility"[53] to political dissent and a "tradition of judicial hostility to free speech"[54] led by the Supreme Court. Indeed he found that "[n]o court was more unsympathetic to freedom of expression than the Supreme Court."[55]

Consider, for example, that the great free speech opinions of Justices Holmes and Brandeis, in cases like *Abrams v. United States*,[56] *Gitlow v. New York*,[57] and *Whitney v. California*,[58] were either concurrences or dissents in which convictions for speech critical of the government were upheld. As Rabban points out:

> [These and similar decisions] during and immediately after World War One were neither a temporary aberration from a libertarian tradition nor the consequence of an initial encounter with the First Amendment. The wartime and postwar decisions were depressingly similar to their prewar antecedents. They continued an existing tradition of hostility to free speech claims . . . .[59]

The Court's lack of protection for critical speech continued during the Cold War. In 1951, the Court upheld conspiracy convictions of the national leadership of the American Communist Party in *Dennis v. United States*.[60] The evidence supporting their convictions was their teaching of the classic works of Marxism[61]—many of which are assigned readings at colleges and universities across the country.[62] Government indictments and judicial convictions of lower-level officials continued into the early 1960s.[63]

The Cold War repression, to which the Supreme Court lent its legitimacy, is all the more telling when compared to the treatment political dissidents received in other democratic nations. The United Kingdom,

52. Rabban, *supra* note 51, at 523.

53. *Id*.

54. *Id.* at 589.

55. *Id.* at 523.

56. Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

57. Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting).

58. Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

59. Rabban, *supra* note 51, at 558; *see generally* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997).

60. Dennis v. United States, 341 U.S. 494, 516–17 (1951) (plurality opinion).

61. *Id.* at 497–98.

62. *See id.* at 583 (Douglas, J., dissenting).

63. *See, e.g.*, Noto v. United States, 367 U.S. 290 (1961); Scales v. United States, 367 U.S. 203 (1961); Yates v. United States, 354 U.S. 298 (1957).

France, and Australia all dealt with issues of domestic subversion and communism during the Cold War years. In comparison to the United States, none of the three countries had a full-fledged First Amendment, and neither the United Kingdom nor France had a tradition of judicial review whereby courts could invalidate the acts of the other branches of government. Further, both the United Kingdom and France were "weaker militarily and economically" than the United States, and, in terms of "proximity," both were closer to the Soviet Union.[64] Yet, despite these differences, all three countries did a substantially better job of protecting political dissent than did the United States. Indeed, the U.S. treatment of political dissent in the Cold War years stands out among western democratic nations, being characterized by Dahl as a "deviant case"[65] and, more bluntly by Shapiro, as "pathological."[66]

In the 1960s and 1970s, while government at all levels took steps to harass civil rights and antiwar activists, the Court became somewhat more protective of political dissent.[67] However, the level of protection must not be overstated. It was also the case that the federal government engaged in massive surveillance of the lawful political actions of countless Americans, and the Supreme Court upheld the program in 1972 in *Laird v. Tatum.*[68] Those who publicly dissented against the war in Vietnam, and even those who did not—such as parents, relatives, and friends of protesters—ran the risk of government surveillance and harassment.[69] One must also remember that it was not until 1965 that the U.S. Supreme Court first invalidated a congressional act on First Amendment free speech grounds.[70]

64. *See* Herbert H. Hyman, *England and America: Climates of Tolerance and Intolerance—*1962, *in* THE RADICAL RIGHT 227, 231 (Daniel Bell ed., 1963) (writing about the United Kingdom, but his statements apply to France as well).

65. Robert A. Dahl, *Epilogue* to POLITICAL OPPOSITIONS IN WESTERN DEMOCRACIES 387, 391 (Robert A. Dahl ed., 1966).

66. MARTIN SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 109 (1966).

67. *See generally* ROSENBERG, *supra* note 4 (examining social change in the 1960s and 1970s and both the courts' role and governmental reactions).

68. Laird v. Tatum, 408 U.S. 1 (1972); *see generally Developments in the Law: The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1133, 1133 (1972) (discussing the extent of government surveillance).

69. *See* INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94–755, at 165–82 (1976) (discussing the overbroad scope of domestic intelligence gathering by the federal government).

70. Lamont v. Postmaster Gen., 381 U.S. 301, 307 (1965) (invalidating an act requiring addressees to affirmatively notify post office of their desire to receive foreign communist political propaganda).

And, of course, historically, the First Amendment was entirely useless in protecting the speech rights of African-Americans.[71]

Given the Court's historic support of governmental repression of dissident speech, how did criticism of the Vietnam War flourish, and how has muted criticism of the War in Iraq been protected? The answer is that both elites and regular citizens were divided over both wars, increasing the political costs of repression. When elite elected officials and media organizations (such as *The New York Times* and the *Washington Post*) take up the cause of political dissent it is likely to be better protected than when such elite support is missing. In such situations there will be both fewer governmental attempts at repression and less judicial support for them. This suggests, however, that it is political support, not judicial action, which protects political dissent.

Perhaps no case more powerfully and poignantly illustrates the Court's unwillingness to protect even the most fundamental civil liberties and civil rights as *Korematsu v. United States*.[72] In this World War II era case, the Court upheld the conviction of Mr. Korematsu for remaining in a military control area in violation of an executive order requiring all persons of Japanese ancestry on the West Coast be evacuated from the area.[73] As commentators have repeatedly pointed out, none of the 112,000–120,000 people subject to the order, including approximately 70,000 U.S. citizens, were charged with a crime.[74] No evidence was presented that they had violated any laws and no hearings were held. Yet they were all shipped to what were in essence prisoner-of-war camps, where they remained throughout the war. It is hard to imagine a more blatant violation of civil liberties. Indeed, in 1988 Congress agreed, enacting legislation giving all living survivors of the camps a $20,000 payment.[75] In addition, Congress offered an apology: "For these fundamental violations of the basic civil liberties and constitutional rights of these individuals of Japanese ancestry, the Congress apologizes on behalf of the Nation."[76]

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71. *See, e.g.*, *Dred Scott*, 60 U.S. (19 How.) 393, 417 (1856) (declining to extend the privileges and immunities of citizens to African-Americans because "it would give them the full liberty of speech in public and in private upon all subjects").

72. Korematsu v. United States, 323 U.S. 214 (1944).

73. *Id.* at 215–16.

74. *See* PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 2–3 (1982); PETER IRONS, JUSTICE AT WAR 297 (1983); Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 496–97 (1945).

75. 50 U.S.C. app. § 1989b-4 (2000).

76. 50 U.S.C. app. § 1989a(a) (2000).

As with civil rights, this brief history shows that historically the Court has supported repressive majorities against vulnerable minorities. Civil liberties have only been protected when there was more than a minimum of elite and popular support for them. Looking to the Court to protect core freedoms has not worked historically. Elliott Richardson put the point well, writing more than half a century ago:

> The great battles for free expression will be won, if they are won, not in courts but in committee rooms and protest-meetings, by editorials and letters to Congress, and through the courage of citizens everywhere. The proper function of courts is narrow. The rest is our responsibility.[77]

C. *Economic Regulation*

Throughout much of U.S. history the Court has been no friend of working people. Until the Court's capitulation in 1937 to democratic forces, it regularly and steadfastly sided with capital against labor, employers against employees, and with the wealthy against everyone else. In particular, at the end of the nineteenth century, it accepted the conservative call to read the Constitution to limit the power of government. This history is reasonably well-known. Consequently, this discussion is very brief.

In an 1886 book, Christopher Tiedeman, a professor of law at the University of Missouri, argued that the Constitution severely limited the power of government to regulate the economy.[78] In the Preface he described the threat the wealthy faced, attacked democracy as tyranny, and called upon the Court to protect conservative wealth and power:

> Governmental interference is proclaimed and demanded everywhere as a sufficient panacea for every social evil which threaten[s] the prosperity of society. Socialism, Communism, and Anarchism are rampant throughout the civilized world. The State is called on to protect the weak against the shrewdness of the stronger, to determine what wages a workman shall receive for his labor, and how many hours daily he shall labor. . . .

77. Elliott L. Richardson, *Freedom of Expression and the Function of Courts*, 65 HARV. L. REV. 1, 54 (1951).

78. CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES vi–vii (1886).

> Contemplating these extraordinary demands of the great army of discontents, and their apparent power, with the growth and development of universal suffrage, to enforce their views of civil polity upon the civilized world, the conservative classes stand in constant fear of the advent of an absolutism more tyrannical and more unreasoning than any before experienced by man, the absolutism of a democratic majority.
>
> The principal object of the present work is . . . to awaken the public mind to a full appreciation of the power of constitutional limitations to protect private rights against the radical experimentations of social reformers . . . .[79]

The Court accepted the invitation. Largely through a constricted reading of the Commerce Clause, and an expansive reading of the Due Process Clause of the Fourteenth Amendment (which the Court had been unwilling to do to protect African-Americans), the Court stymied Progressive change for nearly half a century. For example, it invalidated the federal income tax in *Pollock v. Farmers' Loan & Trust Co.* in 1895.[80] It prohibited Congress from outlawing child labor in two cases in 1918 and 1922.[81] It denied that either Congress or the states had the power to regulate working hours[82] or provide for a minimum wage.[83] It prohibited Congress from requiring railroads to provide pensions[84] and disallowed both Congress and the states from outlawing "yellow dog" contracts (contracts prohibiting union membership as a condition of employment).[85] It took the Great Depression and the threat of FDR's Court-packing plan, backed by enormous Democratic majorities in Congress, to break the Court's protection of wealth from governmental regulation.

In civil rights, civil liberties and dissident speech, and economic regulation, the Court steadfastly protected privilege. Progressives crusaded against it. In fairness, however, the Court was not consistently

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79. *Id.* at vi–viii.

80. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 583 (1895).

81. Child Labor Tax Case, 259 U.S. 20, 44 (1922); Hammer v. Dagenhart, 247 U.S. 251, 276 (1918).

82. Carter v. Carter Coal Co., 298 U.S. 238, 315–17 (1936); Lochner v. New York, 198 U.S. 45, 64 (1905).

83. Morehead v. New York, 298 U.S. 587, 618 (1936); Adkins v. Children's Hosp., 261 U.S. 525, 560–62 (1923).

84. R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330, 374 (1935).

85. Coppage v. Kansas, 236 U.S. 1, 26 (1915); Adair v. United States., 208 U.S. 161, 179 (1908).

that much worse than the other branches. The point is that it was no better, and as discussed in the next section, even when the Court became less hostile to Progressive causes, its decisions were not fully implemented—if implemented at all.

III. THE ILLUSION OF PROGRESS

An obvious response to the discussion of the historic role of the Court as a protector of privilege is that history is not destiny. Merely because the Court has acted in defense of privilege for most of its history does not mean it is destined to always so act. Indeed, many people believe the role of the Court fundamentally changed in the post-World War II era. The Court, many claim, became a great defender of the relatively disadvantaged.

While history may not determine the future, structural constraints limit it.[86] That is, it is more likely than not that the Court will consistently, over time, support conservative outcomes. This is the case for four main reasons. First, the appointment process means that federal judges, and particularly Supreme Court Justices, must be broadly acceptable. Presidents are unlikely to nominate radical Progressives and the Senate is even less likely to confirm such nominees. This is because Progressives lack the political support that would make their appointments broadly acceptable. Second, the Constitution is a conservative document. It protects private control over the allocation and distribution of resources. It does not provide for basic Progressive rights such as employment, health care, decent housing, adequate levels of welfare, or clean air. Third, the Court is constrained from pushing too far ahead of the positions of the other branches because it needs their support to implement its decisions and is susceptible to sanctions. Fourth, the Court lacks the power to implement its decisions. Thus, even if it overcomes the first three constraints and issues an opinion that furthers the Progressive agenda, that decision is unlikely to be implemented. This point is illustrated with brief discussion of three important cases.

86. See ROSENBERG, *supra* note 4, at 9–41 for further development of this argument.

A. *The Victory That Wasn't:* Brown v. Board of Education[87]

Brown v. Board of Education may be the most well-known and widely celebrated case in Supreme Court history.[88] In declaring that racial segregation of public schools was unconstitutional, the Court repudiated its prior, pro-segregation approach to the Constitution. This was clearly for the good but the question for Progressives is whether *Brown* made a difference in ending race-based segregation in public schools in particular, and racial discrimination more broadly. The answer is no.

On the most straight-forward level, public schools remained segregated after *Brown*. A decade after *Brown* virtually nothing had changed for African-American students living in the eleven states of the former Confederacy that required race-based school segregation by law. For example, in the 1963–1964 school year, barely one in one hundred (1.2%) of these African-American children was educated in a non-segregated school.[89] That means that for nearly ninety-nine of every one hundred African-American children in the South a decade after *Brown*, the finding of a constitutional right changed nothing.[90] Change did come to the South, but that occurred only after the Congress acted—providing monetary incentives for desegregation and threatening to cut off federal funds if segregation was maintained.[91]

More subtly, there is little or no evidence that supports the claims that *Brown* gave civil rights salience, pressed political elites to act, pricked the consciences of whites, legitimated the grievances of blacks, or inspired the activists of the civil rights movement. What *Brown* did do was energize civil rights opponents and channel resources away from building the civil rights movement.[92] In the wake of *Brown*, resistance to ending segregation increased in all areas, not merely in education but also in voting, transportation, and the use of public places. *Brown* "unleashed a wave of

87. Brown v. Bd. Of Educ., 349 U.S. 294 (1954).

88. For an extensive exploration of *Brown*'s lack of efficacy, see ROSENBERG, *supra* note 4, at 42–169.

89. Gerald Rosenberg, *Substituting Symbol for Substance: What Did* Brown *Really Accomplish?*, PS: POLITICAL SCIENCE & POLITICS 205, 205, Apr. 2004, at 205.

90. *Id.*

91. *Id.* at 205–06.

92. *Id.* at 207.

racism that reached hysterical proportions."[93] By stiffening resistance to civil rights and raising fears before the activist phase of the civil rights movement was in place, *Brown* may actually have delayed the achievement of civil rights.

Litigation may also have delayed the achievement of civil rights by channeling resources toward litigation and away from political organizing. Progressive reformers always have scarce resources. There was great hostility over both fundraising and tactics between the NAACP and the groups that led the activist wing of the civil rights movement. As Martin Luther King, Jr. complained: "to accumulate resources for legal actions imposes intolerable hardships on the already overburdened."[94]

In sum, *Brown*'s constitutional mandate that racial segregation in public schools end confronted a culture opposed to that change. The American judicial system, constrained by the need for both elite and popular support, was unable to overcome this opposition.

B. *The Decision That Didn't:* Roe v. Wade[95]

In many ways *Roe* fared better than *Brown*. That is, the number of legal abortions increased in the years following *Roe*—though at a slower rate—both numerically and percentage-wise, than in the years immediately preceding the decision. But they did so unevenly, with abortion services widely available in some states and virtually unobtainable in others. What explains both the increase in the number of legal abortions and the uneven availability of the constitutional right *Roe* proclaimed?

The number of legal abortions increased after *Roe* because there was public support for legal access to abortion, and demand for the service. A national abortion repeal movement was flourishing with widespread support among relevant professional elites and rapidly growing public support. By the eve of the Court's decisions, eighteen states had reformed their restrictive abortion laws to some degree. Indeed, in 1972, the year before the decision, there were nearly 600,000 *legal* abortions performed in the U.S.[96] To the extent that *Roe* increased women's access to legal

93. ADAM FAIRCLOUGH, TO REDEEM THE SOUL OF AMERICA: THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE AND MARTIN LUTHER KING, JR. 21 (1987).

94. MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 157 (1963).

95. Roe v. Wade, 410 U.S. 113 (1973). For an extensive exploration of *Roe*'s mixed record of efficacy, see ROSENBERG, *supra* note 4, at 175–201.

96. ROSENBERG, *supra* note 4, at 180 tbl.6.1.

abortion it did so because a grass-roots political movement had won many legislative victories and had dramatically influenced both elite and public opinion.

On the other hand, *Roe* faced the same problem as *Brown*—the existing institutions necessary to implement the decisions (hospitals in the case of abortion) refused to do so. Indeed, the overwhelming majority of both public and private, short-term, non-Catholic hospitals, have *never* performed an abortion.[97] Like public schools and desegregation, the existing institutions ignored the law. Constitutional rights were protected under law, but denied in practice. However, in *Doe v. Bolton*,[98] the companion case to *Roe*, the Court struck down Georgia's requirement that all abortions be performed in accredited hospitals.[99] This allowed market forces to meet the demand for abortion services by opening abortion clinics. Pro-choice activists, feminists, and doctors, who wanted to expand their practices, were relatively free to respond to the demand. Clinics could and did open to implement the decision.

The problem with market mechanisms is that they implement rights unevenly. This is principally because they are dependent on local beliefs and culture. In places where political leaders or large segments of the population oppose abortion, it is less likely that such clinics will open. Thus, the availability of abortion services varies widely across the country. Considering that the Court has held that women have a fundamental constitutional right to obtain abortions, the drawbacks to the market mechanism as a way to implement constitutional rights are important. The availability of a market mechanism can help implement Court decisions, but cannot guarantee them.

In addition to only providing limited access to legal abortion, *Roe*, like *Brown*, appears to have strengthened the losers in the case—the anti-abortion forces—and weakened the winners. The fledgling anti-abortion movement grew enormously after *Roe* and the pro-choice movement that had been able to change laws in eighteen states collapsed. One of the results of the collapse was the lack of pressure on local institutions to provide abortion services. This history suggests that if *Roe* is overturned there may be a massive mobilization of pro-choice forces. While at least some states may prohibit abortion, these are likely to be states where, under *Roe*, abortion services are virtually impossible to obtain.

97. *Id.* at 190.
98. Doe v. Bolton, 410 U.S. 179 (1973).
99. *Id*. at 194.

In sum, the finding of a constitutional right to terminate a pregnancy has not guaranteed access to abortion for women. It derailed the pro-choice movement and energized its opponents. As the executive director of a Missoula, Montana, abortion clinic destroyed by arson in 1993 put it: "It does no good to have the [abortion] procedure be legal if women can't get it."[100]

C. *The Opinion That Backfired:* Goodridge v. Department of Public Health[101]

Goodridge, perhaps more than any other modern case, highlights the folly of Progressives turning to litigation in the face of legislative hostility. In *Goodridge*, the Supreme Judicial Court of Massachusetts held that the state could not deny marriage licenses to same-sex couples.[102] This decision followed an earlier decision of the Hawaii Supreme Court that the state's refusal to recognize same-sex marriages, absent a compelling justification, violated the state constitution's guarantee of equal protection of the laws,[103] and a decision of the Vermont Supreme Court that essentially forced the Vermont legislature to enact civil unions.[104]

The result of these judicial victories has been nothing short of disastrous for the right to same-sex marriage. The people of Hawaii effectively overturned their court's decision by constitutional amendment. Then, in 1996, the U.S. Congress passed the so-called Defense of Marriage Act denying all the federal benefits of marriage to same-sex couples.[105] Many states followed suit, and as of the 2004 election, at least thirty-nine states had adopted measures designed to prevent the recognition of same-sex marriage. [106] Even worse, there was a movement to limit marriage to heterosexual couples by amending both the federal and state constitutions. While a federal amendment has yet to be passed by Congress, every constitutional amendment presented to state voters has been approved—in

100. Gerald N. Rosenberg, *The Real World of Constitutional Rights: The Supreme Court and the Implementation of the Abortion Decisions*, in CONTEMPLATING COURTS 390, 417 (Lee Epstein ed., 1995) (quotation and emphasis omitted).

101. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003). For an extensive exploration of the impact of the attempt to win the right to same-sex marriage through litigation, see GERALD N. ROSENBERG, THE HOLLOW HOPE (2d. ed. forthcoming 2007).

102. *Goodridge*, 798 N.E.2d at 948.

103. Baehr v. Lewin, 852 P.2d 44, 67–68 (Haw. 1993).

104. Baker v. State, 744 A.2d 864, 867 (Vt. 1999).

105. 28 U.S.C. § 1738C (2000).

106. *See, e.g.*, ALA. CODE § 30-1-19 (LexisNexis Supp. 2005).

almost all cases by lopsided majorities. As 2004 came to a close, more than one-third of all states, representing close to one-quarter of the American population, had banned same-sex marriage by constitutional amendment. With several constitutional amendments on ballots in 2006, and perhaps in 2008, more states are likely to join the list.

What happened? The answer is simple. Same-sex marriage proponents had not built a successful movement that could persuade their fellow citizens to support their cause and pressure political leaders to change the law. Without such a movement behind them, winning these court cases sparked an enormous backlash. They confused a judicial pronouncement of rights with the attainment of those rights. The battle for same-sex marriage would have been better served if they had never brought litigation, or had lost their cases. Now, they must either convince majorities in more than one-third of the states to remove the constitutional prohibitions on same-sex marriage that have just been added or hope that the U.S. Supreme Court will strike down prohibitions on same-sex marriage as unconstitutional. This is a daunting task—one that ought not to have been faced.

IV. WHEN WILL THEY EVER LEARN? RETURNING TO PAST UNDERSTANDINGS

The sad story of the turn to litigation by same-sex marriage proponents illustrates the current Progressive failure to understand that successful social change requires building social movements. From *Brown* to *Roe* to *Goodridge* the Progressive agenda was hijacked by a group of elite, well-educated and comparatively wealthy lawyers who uncritically believed that rights trump politics and that successfully arguing before judges is equivalent to building and sustaining political movements. Litigation is an elite, class-based strategy for change.[107] It is premised on the notion that it is easier to persuade similarly educated and wealthy lawyers who happen to be judges of certain liberal principles than to organize everyday citizens. That might be true but without broad citizen support change will not occur.

Litigation substitutes symbols for substance. The collapse of the pro-

107. As Alexis de Tocqueville noted more than a century and a half ago, lawyers are elitist by training. He wrote: "hidden at the bottom of a lawyer's soul one finds some of the tastes and habits of an aristocracy. . . . [American lawyers] conceive a great distaste for the behavior of the multitude and secretly scorn the government of the people." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 243 (J.P. Mayer & Max Lerner eds., George Lawrence trans., Harper & Row 1966) (1848).

choice movement after *Roe* is a perfect illustration as it remains the case that for many women abortion services are difficult to find. Similarly, the growing re-segregation of the nation's public schools is occurring at a time when *Brown* has achieved almost mythical, symbolic status. The danger of celebrating a symbol is that it can lead to a sense of self-satisfaction and insensitivity to actual practice. Seen in this light, *Brown* is "little more than an ornament, or golden cupola, built upon the roof of a structure found rotting and infested, assuring the gentlefolk who only pass by without entering that all is well inside."[108] Celebrating legal symbols encourages us to look to legal solutions for political and cultural problems. Without political support, court decisions will not produce social change. To valorize lawyers and courts encourages reformers to litigate for social change. But if political support is lacking, the effect of this vision is to limit change by deflecting claims for reform away from substantive political battles, where success is possible, to harmless legal ones where it is not. In this way, courts play a deeply conservative ideological function in defense of the status quo. When social reformers succumb to the "lure of litigation" they forget that deep-seated social conflicts cannot be resolved through litigation.

Today, there is some hope that Progressives may be turning away from litigation as a strategy for change. The cause, alas, is not a re-learning of historical lessons and an understanding of the limitations on courts and the need for political mobilization. Rather, it is a realization that the current Supreme Court is unlikely to promote progressive principles. If this were the only effect of a conservative Court it would be a good thing. The problem, of course, is that even if courts are limited in their ability to help Progressives, they have more room to do damage. Courts are not symmetrically constrained from furthering both progressive and conservative change. This is because typically Progressives are asking courts to require change while Conservatives are supporting the status quo. Further, it is easier to dismantle Progressive programs than to create them. For example, with Justice Alito replacing Justice O'Connor, affirmative action plans may be found to be unconstitutional. We are now in a position where courts can be an obstacle to change.

None of this means that law is irrelevant or that courts can never further the goals of the relatively disadvantaged. For the civil rights

108. Michael E. Tigar, *The Supreme Court 1969 Term—Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 7 (1970). Tigar wrote these words specifically about the Warren Court's criminal rights decisions but they are more generally applicable.

movement, for example, courts played an important role in keeping the sit-in movement going, ending the Montgomery bus boycott by providing the boycotters with leverage, furthering school desegregation by threatening to cut off federal funds under Title VI, and upholding affirmative action programs. But in each case courts were effective because a political movement was supporting change. The analysis does mean that courts acting alone, as in *Brown* or *Goodridge*, are structurally constrained from furthering the goals of the relatively disadvantaged.

As Progressives look to the future, they must understand that American courts are not all-powerful institutions. They were designed with severe limitations and placed in a political system of divided powers. To rely on litigation rather than political mobilization, as difficult as it may be, misunderstands both the limits of courts and the lessons of history. It substitutes symbols for substance and clouds our vision with a naive and romantic belief in the triumph of rights over politics. And while romance and even naiveté have their charms, they are no substitute for substantive change.