

THE ROLE OF COURTS IN SOCIAL CHANGE: LOOKING FORWARD?

*Mark V. Tushnet**

TABLE OF CONTENTS

I. Introduction.....	909
II. Social Movements.....	910
A. Background.....	911
B. The Christian Evangelical Movement and the Gay and Lesbian Movement	912
III. Conclusion	921

I. INTRODUCTION

We can look forward to the role of courts in social change from two perspectives: first, projecting what may happen over the next several years; and second, anticipating with some pleasure what we think likely to happen. My comments here look forward in the former sense and only incidentally in the latter. The reason is that, as I will argue, what courts are likely to do with respect to social change is unlikely to please everyone. This is because the social changes in the future are likely to reflect the complexities and contradictions of American society and culture.

My general perspective is, I think, widely shared among those who have studied the relation between the courts and social change. I believe that, seen in the large, courts are simply one of many institutions that shape and, importantly, reflect culture and society. They have some distinctive characteristics. Typically, courts enter the picture only when someone asks for assistance, in contrast to the somewhat more self-starting nature of

* Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center; B.A., Harvard University, 1967; M.A., 1971, J.D., 1971, Yale University.

institutions like the press and legislatures. Additionally, courts focus more on reconciling their current actions with those taken in the past by interpreting preexisting texts, such as the Constitution, statutes, and opinions in previously decided cases, than do other institutions, such as legislatures.¹ Yet, to the rather large extent that courts are simply one institution among many, they are likely to do pretty much what the other institutions are doing.²

What are the characteristics of American society and culture the courts might end up reflecting? Without claiming more expertise in social analysis than is appropriate, I will focus on the structure of national politics and on two important contemporary social movements. With respect to national politics, currently it is unclear which of two structures will characterize the national government over the near future. One possible structure involves control of all branches of the national government by an ideologically unified Republican party. The other format involves the recreation of divided government, with an ideologically unified Republican party controlling some branches and a somewhat less ideologically unified Democratic party controlling others. The prevailing structure will influence the relation between courts and the political structure, as well as the role of courts in relation to social change.

II. SOCIAL MOVEMENTS

There are today two notable social movements: first, the movement often disparagingly referred to as the “Christian Right,” but more accurately described as the politically mobilized Christian evangelical community; and second, the gay and lesbian movement. It would seem obvious that these two movements are on a collision course, and to some extent that is true. Yet, the gay and lesbian movement is much more

1. I stress that these are differences in degree, not differences in kind. Neither the executive nor legislatures are completely self-starting, and sometimes courts send signals that invite applicants to seek their assistance.

2. Robert Dahl’s formulation, if not the evidence on which he relied, can hardly be improved upon. “Except for short-lived transitional periods when the old alliance is disintegrating and the new one is struggling to take control of political institutions, the Supreme Court is inevitably a part of the dominant national alliance.” Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 293 (1957). For recent evidence supporting Dahl’s perspective, see Thomas R. Marshall, *American Public Opinion and the Rehnquist Court*, JUDICATURE, Nov.–Dec. 2005, at 177 (reporting survey results showing that the Rehnquist Court, like five earlier Courts since the 1930s, “produced decisions that agreed with American public opinion about three-fifths of the time”).

central in contemporary culture than the evangelical movement, despite the differences in the numbers directly participating in each movement.³ The tension between cultural influence and numbers, the latter relevant to political success, suggests that each movement will achieve some success, with the gay and lesbian movement gradually outstripping the politicized evangelical movement because, in the end, culture dominates politics.

A. Background

A look backward will help clarify the relation between the two focal points of my inquiry: political structure and social movements. Consider the activities of the Legal Defense Fund of the National Association for the Advancement of Colored People (NAACP),⁴ including the litigation that led up to *Brown v. Board of Education*.⁵ The conventional story among normative-oriented legal academics is that the NAACP turned to the courts because it had to; that is, the very conditions it claimed were unconstitutional blocked it from using legislative and executive actions to change those conditions.⁶ Disfranchised in the South, African Americans could not deploy political force to eliminate racial segregation.⁷ Nor is this conventional story undermined by the now well-established proposition that African Americans did not succeed in substantially changing the system of segregation until they *were* able to deploy political power. The courts, normative theorists might suggest, were the best of a bad lot of possibilities—if not there, where?

Unsurprisingly, the full story is more complicated. African Americans were disfranchised in the South, but not—at least not formally, and not to the same degree—outside the South. This had two effects.

3. The “pop culture” references proliferate. *Will & Grace* has been displaced for a moment by the competition for 2006 Best Motion Picture of the Year award from the Motion Picture Academy of Arts and Sciences, in which two major contenders were *Brokeback Mountain* and *Capote*. See Acad. of Motion Picture Arts & Scis., 78th Academy Awards, <http://www.oscars.org/78academyawards/nomswins.html>. There is no similar pop culture reference for the politicized evangelical movement, except perhaps Christian singers, such as Amy Grant, who generally have not associated themselves with the politicized movement.

4. For my analysis of those activities, see MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950* (1987).

5. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

6. See generally MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* 94 (2004) (explaining that political protest and social protest were not possible due to African American disfranchisement and deadly retaliation).

7. *Id.*

Southern African Americans could obtain political power by leaving the South, a migration that affected the Southern economy and placed some pressure on Southern white racial “moderates” to do what they could to ameliorate segregation.⁸ African Americans outside the South—long-time residents as well as new migrants—could use their political power on the national stage to obtain national-level legislation to challenge local practices in the South.⁹ Success in those challenges was limited, but not absent.¹⁰ Achieving success required the construction of political alliances, which depended in part on numbers, potential coalition partners, and interpreting or developing an appropriate ideology around which the coalition could form.

B. *The Christian Evangelical Movement and the Gay and Lesbian Movement*

The point I wish to extract from this sketch is simple: in the pluralistic political system of the United States, numbers alone do not determine a social movement’s degree of political power. A group of minimal size can obtain a great deal of what it wants by creating alliances with other groups that are just short of large enough to win what *they* want. As a result, the courts are not a forum of last resort for marginalized social movements. They are simply another political resource such movements can use, and they are likely to be venues in which success can be achieved without resorting to legislatures and executive branch offices. For that reason, looking forward to the possible role of the courts in social change requires some attention to political structure.

Robert Dahl argues that after a short period of transition, the Supreme Court becomes part of the dominant national political alliance.¹¹ His argument applies regardless of which social movement we focus on. Dahl assumes that there *will be* a dominant national political alliance of which the courts could be a part.

Consider first the possibility of relatively sustained conservative Republican control of the national executive and legislative branches, coupled with equally substantial control of many state governments. Much of what this hypothesized Republican government would want to achieve

8. *Id.* at 100.

9. *Id.* at 100–01.

10. For a relevant account of the role of African Americans in national-level politics during the 1940s, see KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO *BROWN* 144–202 (2004).

11. Dahl, *supra* note 2, at 293.

would be accomplished through legislation, such as an expansive program providing vouchers for parents to use at private schools, including religiously affiliated ones. The courts would collaborate with that government in advancing its goals.

Again drawing on the standard accounts of the Warren Court era,¹² we would then see the Supreme Court acting against “outliers;” that is, against non-conservative legislation that remains on the books after Congress does what it can to preempt such legislation. For example, the Supreme Court might find state prohibitions on using vouchers at religiously affiliated schools to be a violation of the *federal* Constitution, as a denial of the right of free exercise of religion, or as an impermissible content-based discrimination in the allocation of public resources.

That is an example of the possibility that the courts will become allies of the politicized Christian evangelical movement. Even a sketch must be more complicated, though, because the constitutional ideology of the modern Republican party might place substantial limits on the extent to which the courts will be willing to develop the conceptual resources needed to assist that movement.¹³ The ideology to which I refer is one that combines an almost instinctive opposition to judicial “activism” with the view that courts properly invalidate legislation only when there is a substantial case to be made that the legislation is inconsistent with the original understanding of specific constitutional provisions. This ideology defends leaving a great deal to legislative choice on the ground of democratic self-government within constitutional limits. Enforcing constitutional limitations of any sort restricts legislative choice and, therefore, can be justified only in exceptional circumstances.

Contrast here the hypothesized school voucher case with the abortion issue. Undoubtedly, a collaborative Supreme Court would overturn *Roe v. Wade*.¹⁴ As the abortion issue has been framed, that would lead to state legislative battles, many of which, I believe, would result in the enactment of statutes going a fair way to protect the right to choose (and not doing much to protect the right to life). How far would the Court’s collaboration with the politicized Christian evangelical movement go? It is not difficult to develop standard-form constitutional arguments to support the

12. See generally LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000) (detailing the history of the Warren Court).

13. Republican constitutional ideologists seemingly prefer to describe their position as a judicial philosophy and their opponents’ as a judicial ideology. Path-dependence aside, I see no analytic difference in the terms.

14. *Roe v. Wade*, 410 U.S. 113 (1973).

proposition that the Fourth Amendment is violated when a state places relatively few restrictions on the right to choose.¹⁵ Yet, it stretches the imagination to the breaking point to believe that the Supreme Court would accept that proposition in the foreseeable future.

Collaborative courts would be limited to modest amounts of mopping up, leaving most of the policy issues of interest to the politicized Christian evangelical movement to the ordinary legislative process. At least as things seem now, that movement may win fewer legislative struggles than its most zealous members hope.

Consider next the other social movement I have mentioned. Again as things seem now, the gay and lesbian movement has reached a position in which public opinion surveys reveal substantial support for some parts of its policy agenda, such as a general ban on discrimination against gays and lesbians by private employers,¹⁶ and a great deal of support for other parts, such as the adoption of domestic partnership laws.¹⁷ Would courts collaborating with a unified conservative Republican government obstruct the adoption of laws enacting those policy choices? It would not be hard to

15. For example, such a statute might be said to deny the unborn child/fetus its right to life without due process of law or to deny that child/fetus the equal protection of the laws by denying it the protections against murder made available to other children and adults.

16. In 1977, a Gallup Poll survey found that 56% of those questioned answered "Should" to the following question: "In general, do you think homosexuals should or should not have equal rights in terms of job opportunities?" KARLYN BOWMAN & ADAM FOSTER, AM. ENTER. INST., AEI STUDIES IN PUBLIC OPINION: ATTITUDES ABOUT HOMOSEXUALITY & GAY MARRIAGE 11 (2006), http://www.aei.org/docLib/20050520_HOMOSEXUALITY0520.pdf. In May 2005, the same question was asked and the survey found that 87% of those questioned answered "Should." *Id.* Also in May 2005, 90% answered "Should" to the following question: "Do you think homosexuals should or should not be hired for" a position as a salesperson? *Id.* at 11-12. In addition, 76% answered "Should" when the question asked about hiring for the Armed Forces. *Id.* at 12. See Gallup Brain, <http://brain.gallup.com> (last visited May 5, 2006), for more information on questions asked in Gallup Poll surveys.

I thank Scott Barclay and William Ford for directing me to the sources cited in this and the next footnote.

17. In May 2004, a Fox News/Opinion Dynamics Poll asked, "Do you believe gays and lesbians should be allowed to get legally married, allowed a legal partnership similar to but not called marriage, or should there be no legal recognition given to gay and lesbian relationships?" Twenty-five percent answered that gays and lesbians should be allowed to get legally married, and twenty-six percent answered that gays and lesbians should be allowed a legal partnership. PollingReport.com, Law and Civil Rights, <http://www.pollingreport.com/civil2.htm> (last visited May 17, 2006). Other polls taken around that time yielded similar results. For a compendium of surveys, see *id.*

develop a constitutional rule, rooted in notions of religious liberty, freedom of association, or privacy, that would provide exemptions from nondiscrimination laws for some objectors, and—in contrast to the constitutionalized right-to-life position—it is not difficult to imagine courts enforcing such a rule. But, the more general ideology of deference to democratic choice would have a great deal of purchase.

I have been describing the best-case scenario for members of the politicized Christian evangelical social movement. In that scenario they have something to look forward to, but I believe that, if this scenario materializes, they will find themselves surprised and a bit disappointed that they get so little support from the courts. Still, they would have achieved a great deal through legislation and might be satisfied with courts that kept open the possibility that they could succeed later, for example, through legislation repealing domestic partnership statutes.

The other scenario I address is that of persistent divided government, of the sort that typified American politics through the 1980s and 1990s.¹⁸ Divided government poses a challenge to a Dahl-inspired analysis because during periods of divided government there is no dominant national political alliance, and so nothing with which the courts can collaborate. Formally speaking, in periods of divided government, courts can do whatever they want. No matter what the courts do, those who like a decision will be in a position to protect the courts against significant retaliation from those who do not.

The question, then, is: what do the judges want to do? That will depend on how they got their positions. When the presidency and the Senate are controlled by different parties—as was true in much of the 1980s and 1990s—the Senate ordinarily will constrain the choices the President makes in selecting nominees and will, therefore, confirm nominees who are somewhere “in between” the Senate and the President—less liberal than a liberal President would like, less conservative than a conservative one would like. Such judges may well end up mirroring the divisions in the political branches, particularly if divided government arises from switches in control of both the presidency and the Senate, as was true in the 1980s and 1990s. Democratic appointees, who are conservative relative to the Democratic party, joined Republican appointees, liberal relative to the Republican party, in producing outcomes that overall, once again, partisans

18. See generally MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* 5, 8–32 (2003) (describing “divided government, which places important constraints on what the national government can do,” as “[t]he most important feature of the modern constitutional order”).

on both sides are unhappy with.¹⁹

As we have recently seen, what happens is that partisans focus on the cases where the Court seems to have betrayed “the cause,” criticizing the Court for failing to go as far as it should have in recognizing the interests they think important. I do not find it surprising that partisans undervalue the victories they have achieved because partisans tend to set the baseline as getting everything they want. Victories are, from their point of view, only natural, whereas defeats are betrayals.

The present picture is different from the sketch I have offered of a Court situated between both sides, of course, because there has been a significant period of unified government in which the President’s judicial appointments have been relatively unconstrained by Democrats.²⁰ If divided government recurs, we might see a judiciary dominated by appointees of President George W. Bush and some other judges appointed during the Reagan and first Bush administrations articulating a modern Republican judicial ideology. Yet, what such judges would do might not differ much from what the same judges would do during a period of unified Republican government because of the tensions within that ideology.

I suspect that the present Court operating in a renewed period of divided government would find statutes unconstitutional somewhat more frequently than courts in other scenarios would because of a combination of some points I have already made. A Court facing divided government is relatively free to do what its members prefer, and it can do more than simply discipline outliers from a nonexistent dominant national alliance. It can discipline *any* legislature that, in the view of a majority on the Court, has gone too far. In periods of divided government legislatures are likely to go too far more often, from the Court’s majority’s point of view, than in

19. Jeffrey Rosen argues in his forthcoming book, *The Most Democratic Branch: How the Courts Serve America*, that this partisan reaction is not the reaction of the general public, and that the Supreme Court has become the political institution most representative of the views of the nation’s median voters. See Jeffrey Rosen, *Center Court*, N.Y. TIMES MAG., June 12, 2005, at 17 (arguing that “unelected Supreme Court justices are expressing the views of popular majorities more faithfully than the people’s elected representatives”); see also J. Harvie Wilkinson III, *The Rehnquist Court at Twilight: The Lures and Perils of Split-the-Difference Jurisprudence*, 58 STAN. L. REV. (forthcoming 2006) (arguing against writing judicial opinions that “split the difference” between competing alternatives).

20. However, not entirely unconstrained, given the credible threat Democrats made to filibuster judicial nominees who, in the Democrats’ judgment, were too extreme. That threat was never credible with respect to Supreme Court nominees, though.

periods when the Court can collaborate with a dominant alliance.

I think it worth mentioning an additional possibility. Even during a period of divided government, the Supreme Court can overreach. Its majority might simply miscalculate the degree of support it can obtain from the part of the political system with which they are allied. The Court might invalidate or substantially restrict the scope of *important* pieces of legislation, for example.²¹ Constitutional crisis might then result, as the Court's opponents overcome the Court's supporters and push through legislation that amounts to a real challenge to the courts.²²

So far I have discussed the relation between the courts and social movements in the future from the courts' side. What about the social movements' side? I focus on the kinds of resources social movements have, dividing them into *ideological* and *material* resources, although these categories are not sharply distinct. This is because, as an abstract analytic matter, the interpretive resources of American constitutional interpretation are sufficiently rich to support essentially any proposition about what the Constitution permits, requires, or prohibits.²³ Those resources are such that the propositions, "The Constitution *requires* that governments adhere to policy *X*" and, "The Constitution *bars* governments from adhering to policy *X*" are supportable. Yet, the abstract analytic

21. David Mayhew has argued, contrary to the conventional view that I, among others, have accepted, that there is no significant difference between periods of unified government and periods of divided government in the amount of important legislation adopted. *See generally* DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–2002* 1–7 (2d ed. 2005). As with all such studies, one can quarrel with the units of measurement and can counter that things have changed from 1990 to the present. Still, Mayhew's argument suggests caution in asserting, as I have, that divided government necessarily produces only unimportant legislation. *Id.* at 2–4. This may be the point to note another possibility for constitutional crisis: when a Court produced during one period of unified government confronts a unified government under a different party's control. These are the periods of transition to which Dahl referred, and they are ripe for constitutional crisis. At present, the possibility of this sort of crisis seems quite remote.

22. It is important to distinguish between real and rhetorical challenges. The latter will occur routinely during periods of divided government, for example, through the introduction of bills challenging the courts that have no realistic chance of adoption because of the strength of the Court's supporters in Congress. *See generally* Mark Tushnet, *The Constitution Restoration Act and Judicial Independence*, 56 CASE W. RES. L. REV. (forthcoming 2006).

23. My personal judgment is that the only propositions about which the statement in the text is untrue are some propositions using proper names. But, for present purposes, it is enough that the range of supportable propositions is wide indeed.

supportability of such propositions is uninteresting, because well-socialized lawyers—meaning, the lawyers who bring cases and the judges who decide them—know that at any specific moment, some propositions are “off-the-wall” and others are legally credible. We also know that propositions move from being “off-the-wall” to being legally credible.²⁴ This process is not a *legal* one; it is a social one. It occurs through the deployment of material resources. Ideas circulate and become legally credible when, and because, someone with material and reputational resources circulates and endorses them.

Consider, for example, the proposition that the Equal Protection Clause requires that the national government, having provided some degree of insurance against the cost of obtaining medical care, must provide universal health care insurance. It would not take much work with standard interpretive resources to support that proposition. One would play with specifying rights on appropriate levels of generality, citing cases to show that it is legally appropriate to specify rights on those levels, and one would distinguish seemingly adverse cases by limiting them to their facts and describing their broader statements as dicta, by stressing the ways in which the contemporary problem of health insurance is different from the problem the adverse precedent addressed, and the like. This argument would be off-the-wall today because it has not (yet) obtained sufficient support from interest groups pushing the adoption of a system of universal health care insurance—and, of course, it would be derided by interest groups opposed to that policy.

This example suggests that the resources needed to convert arguments from being off-the-wall to being legally credible are not necessarily specifically legal. Rather, the resources may be political or, more important for present purposes, cultural. Movies and television shows can bring a social issue to prominence in a way that provokes people to think that “something” should be done, at which point lawyers can start saying, “Well, we have a suggestion about what could be done.” To introduce a term that I will discuss in more detail, we might say that converting legal arguments from off-the-wall to credible requires a *cultural*, not a legal, support structure. And, notably, it seems unlikely that such a structure can be developed intentionally. It is more likely the product of other decisions not aimed at anything legal at all. For that reason, we are quite unlikely to be able to make plausible projections into the future of what arguments will become legally credible.

24. For one analysis of the process, see Sanford Levinson, *Frivolous Cases: Do Lawyers Really Know Anything at All?*, 24 OSGOODE HALL L.J. 353 (1986).

What we can focus on are arguments that are not now off-the-wall. That is why I have singled out the politicized Christian evangelical movement and the gay and lesbian movements as the groups to discuss. *Their* arguments are not off-the-wall anymore. But, moving from off-the-wall into the domain of legal credibility is insufficient to produce legal change. The legally credible arguments have to be *accepted*. Acceptance depends on a combination of a favorable political environment, as I have already suggested, and the resources to exploit the opportunities that environment provides. Charles Epp has described those resources as the “support structure” for a successful rights revolution.²⁵ This support structure includes lawyers with assured sources of financing, whether from the government, from fee-generating cases, from members who contribute funds, or from external donors, such as foundations or other well-to-do sympathizers.²⁶

Both the movements I have described appear to have the requisite support structures. What are their litigation goals, and how likely are they to achieve them? Few of the issues of interest to the politically mobilized Christian evangelical movement are off-the-wall,²⁷ and a fair number are close to acceptance already. (1) the overruling of *Roe v. Wade*, but not, however, the adoption of a constitutional amendment that abortion be unlawful, except under restricted conditions; (2) acknowledgment by government of the essential role of Christianity in the creation of the United States and in embedding basic values in American political culture; (3) extension of public support for faith-based institutions, including religiously affiliated schools; whether through vouchers or direct grants; (4) protection from the application of anti-discrimination laws to those whose decisions, otherwise covered by such laws, rest on religious grounds; (5) a cluster of issues related to the teaching of the Darwinian theory of evolution in public schools: (a) finding that it is constitutionally permissible to characterize that theory as a “mere” theory; (b) allowing public schools to teach alternatives to Darwinian theory, even though those alternatives can be characterized as religious; and (c) requiring public schools to teach such alternatives; and (6) another cluster of issues aimed at

25. See CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 17–20 (1998) (describing the components of the support structure).

26. *Id.*

27. The only off-the-wall issue I can think of is the possibility that state governments could issue declarations that the United States is a Christian nation. It is not clear to me that there is any real—again, as distinct from rhetorical—interest in the movement in seeing that legislatures adopt such declarations.

eliminating some regulations imposed on religiously affiliated schools.

This list has several characteristics that are striking. First, it is quite limited in its scope. Were all the items on the list to become constitutional law, the United States would not be close to a theocracy. The pluralistic politics of religion, which benefit the politicized Christian evangelical movement today, also are likely to limit what it can accomplish.²⁸ Second, the list is also quite limited in its range, in the sense that it encompasses only a small part of public policy, even what we might call moralized public policy. The limited range may result from the numbers of those associated with the movement, which are large enough to make accomplishing many other goals possible through legislation rather than litigation.²⁹

Third, many of the movement's legal goals aim either at giving religious institutions some space within which they can operate, insulating them from public regulation, but not insisting that nonadherents accept the religious institutions' commitments, or at ensuring equal treatment of religious and non-religious institutions. Fourth, many of the legal goals are defensive, seeking to ensure that the movement's political victories will not be taken away in the courts. Only a few seem to be affirmative claims on substantial public resources or for substantial public support of religious views specific to the movement's adherents. And, finally, nearly all are likely to be accepted by the courts in a unified conservative government, and many might well be accepted by the courts in a divided government if it emerges from the present state of affairs.

What of the gay and lesbian rights movement? The litigation goals of the gay and lesbian rights movement are the following: (1) an extension of *Romer v. Evans*,³⁰ first to establish that express exclusion of gays and lesbians from anti-discrimination laws is unconstitutional³¹ and then to establish that failure to include gays and lesbians within the coverage of anti-discrimination laws is unconstitutional;³² (2) an elimination of the ban

28. For example, the financial costs of extensive voucher programs are likely to mean that public financial support of religiously affiliated schools will remain small relative to public expenditures on public schools.

29. It may also result from a sense of what is politically achievable in the short run, a sense that might change if the political environment were to change in a favorable direction.

30. *Romer v. Evans*, 517 U.S. 620 (1996).

31. The extension is needed because of the post-*Romer* decision by the Sixth Circuit in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 300-01 (6th Cir. 1997), in which the court upheld a city ordinance excluding gays and lesbians from coverage.

32. Cf. *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (Can.) (holding that exclusion

on employment of gays and lesbians by the United States armed forces under the “don’t ask, don’t tell” policy; (3) an extension of rights to gays and lesbians in long-term relationships of the benefits of domestic partnership beyond those that can be established by contract, such as rights to visit ill partners on the same terms that spouses can; (4) a gradual extension of *those* rights to the point where there are relatively few benefits available to heterosexual partners that are not available to gay or lesbian ones (for example, the right to adopt); and (5) the ultimate goal, the right to marry.

None of these legal claims are off-the-wall anymore, although a decade ago at least the final one was. The goals are listed in the order that they seem likely to be accepted—even if presented during a unified conservative government at the national level. That possibility again raises the question of numbers. As I have noted, even a small group *can* exercise significant political power through strategic alliances. Yet, constructing such alliances is almost certainly more difficult for small groups than for larger ones. As a result, courts are likely to be more attractive venues for smaller than for larger groups: while not the venue of first resort, courts may be places that smaller groups go to more frequently.

My sense is that the genie is out of the bottle on antidiscrimination principles as applied outside of close relationships.³³ Much more would have to be done to make the other claims acceptable. To make the obvious point—even under conditions of divided government, there is essentially no chance that claims for gay marriage would be accepted within the foreseeable future.³⁴ The only true question is whether the support structure can control the course of litigation so that “premature” defeats on issues close to that of gay marriage do not impede, or worse foreclose, some success on other non-discrimination issues.

III. CONCLUSION

Beyond acceptance, of course, lies actualization. It is one thing for the courts to say that you have a right, but it is another for you to enjoy that right. Gerald Rosenberg has argued that constitutional reform

of gays and lesbians from employment non-discrimination law violated the equality guarantees of Canada’s Charter of Rights).

33. A category that might include rental of housing units occupied by the lessor, as well as employment in relatively small workplaces.

34. For an argument to that effect, compatible in its essentials with the perspective offered here, see Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431 (2005).

litigation achieves its most lasting results when the end sought has support in the political system, either directly, as when Congress and the presidency finally embraced the civil rights agenda in the mid-1960s, or indirectly, as when the outcome can be reached by the use of resources available in relatively unregulated markets (which political actors are unwilling or unable to regulate after the courts have spoken).³⁵ That, however, is a story for another time.

35. See Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 DRAKE L. REV. (forthcoming Summer 2006).