Gerald N. Rosenberg | Protecting Privilege: The Historic Role of the U.S. Supreme Court and the Great Progressive Misunderstanding

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Introduction

What role can courts play in furthering progressive social change? In the view of many lawyers, human rights activists, and left-leaning political activists, courts offer a golden pathway to justice and equality. In their view, courts can uphold rights where other institutions can't or won't. This is largely because courts are free from electoral constraints and institutional arrangements that stymie change. Neither beholden to interest groups, political elites, or democratic majorities, nor stymied by ossified and recalcitrant bureaucracies, judges can cut through opposition and make change. Elected and appointed officials, fearful of political repercussions, are seldom willing to fight for unpopular causes and protect the rights of disliked minorities. Furthermore, ordinary citizens have access to courts. Access and influence are not dependent on economic and political resources. The kind of

professional lobbying that is required to be effective in influencing bureaucracies or enacting legislation is not necessary for winning court cases. Groups lacking key resources can use courts not only directly to change the law but also indirectly to strengthen their voices within the other branches of government and authoritatively present their positions. As an environmental lawyer in the U.S. once put it, “all it takes is one person with a good legal argument that can convince a judge and that’s that”.

Perhaps nowhere has more progressive hope been placed in courts than in the United States. Starting in the mid-twentieth century, many political activists, progressives, legal academics, and law students came to view courts as powerful producers of progressive social change. Starting with the civil rights cases of the mid-twentieth century, and spreading to issues raised by women’s groups, environmental groups, political reformers, gay rights supporters, and others, progressive forces in the United States have increasingly turned to courts to produce the changes they seek. And, in many cases, they have won. American courts seemingly have become important producers of political and social change. Cases such as *Brown* (school desegregation), *Roe* (abortion), and *Obergefell* (marriage equality), 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. Litigation holds out the possibility of protecting minorities and defending liberty in the face of opposition from the democratically elected branches.

If only. As powerful as the belief in the progressive potential of courts to help the relatively disadvantaged may be, it is an historically odd idea. Traditionally, courts in the U.S. have protected privilege. Throughout U.S. history, 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, unequal, distribution 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 (1953-1969) and Burger (1969-1986) 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.

Lawyers are problematic allies for progressive movements. Part of the problem is that, through upbringing and education, many lawyers credit their success solely to meritocracy and hard work, not class privilege. They believe that the political and economic system, and the institutions that support them, are fundamentally fair and only need minor tweaks to empower more people. This means that lawyers are dedicated to working within the legal system. Their training disinclines them to see the need for systematic and institutional change. More importantly, lawyers are taught that all problems have legal solutions. A lawyer’s natural inclination is to identify a problem and then draft a law to ‘correct’ it. However, the more socially and culturally embedded the problematic practice is, the less

likely it is that simply writing 'better' laws will overcome it. It is only through social movements and political victories that change will occur and lawyers are trained not to see this. Writing about lawyers in the U.S. in volume 1 of *Democracy in America*, but applicable more broadly, Tocqueville summarises the world view of many Anglo-American lawyers:

> Some of the tastes and the habits of the aristocracy may consequently be discovered in the characters of lawyers. They participate in the same instinctive love of order and formalities; and they entertain the same repugnance to the actions of the multitude, and the same secret contempt of the government of the people […]

In the pages that follow, I sketch out two arguments. First, I review the court's historical record as a defender of privilege. Second, I show that the great legal victories to which progressives point as proof of the efficacy of litigation either didn't, for the most part, produce the change they wanted, or did little more than reflect change that had already largely occurred. To make matters worse, such litigation mobilised opponents, creating additional obstacles for change. I conclude by suggesting that, forgetting the lessons of history, in the mid-twentieth century, 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. I conclude that progressives have failed to understand the limits of litigation when they have litigated; have forgotten the historic role of the judiciary as a defender of the status quo, unequal, distribution of power, wealth, and privilege; and ignored the need for robust social movements. The political left's flirtation with litigation is fundamentally flawed.

The Supreme Court's historic mission to preserve the status quo, unequal, distribution of power, wealth, and privilege

The U.S. Constitution contains many guarantees of individual rights. The First Amendment protects free speech. The Fifth and Fourteenth Amendments guarantee that neither the federal nor the state governments can take away life, liberty, or property without 'due process of law'. The Fourteenth Amendment also guarantees equal protection, stating that no state shall "deny to any person within its jurisdiction the equal protection of the laws". Yet, despite these majestic words, lawyers and judges have largely turned them from protections of individual liberty, non-discrimination, and equality, into tools that support the suppression of dissident views, protect corporate largess, and strengthen inequality. I illustrate this point briefly with three examples: political dissent, economic regulation, and civil rights.

Civil liberties and dissident speech

Despite the majestic language of the First Amendment, the Supreme Court has seldom protected

political dissent. Only in those rare instances when dissidents were supported by large segments of the elite has the legal system provided any protection. U.S. history is full of examples of the repression of political dissidents, from the Alien and Sedition Acts of the late eighteenth century to the Civil War to the repression of the First World War and the subsequent decades of silencing of labour and left-wing activists, to the Cold War. Governments at all levels repeatedly and consistently silenced speech critical of their actions with the approval of the legal system including the Supreme Court. Indeed, during the Cold War, the Supreme Court's lack of protection for critical speech was unique in the Western world. For example, in 1951, the Supreme Court upheld conspiracy convictions of the national leadership of the American Communist Party in the *Dennis* case. The evidence supporting their convictions was their teaching of the classic works of Marxism, many of which are assigned readings at colleges and universities across the country. The U.S. treatment of political dissent in the Cold War years stands out among western democratic nations, being characterised by the democratic theorist Robert Dahl as a "deviant case", and, more bluntly by Martin Shapiro, as "pathological".

In the 1960s and 1970s, the Court became somewhat more protective of political dissent. However, the level of protection must not be overstated. Government at all levels took steps to harass civil rights and anti-Vietnam war activists. The federal government engaged in massive surveillance of the lawful political actions of countless Americans who criticised the war in Vietnam. The Supreme Court dismissed a challenge to the program in 1972 in *Laird v. Tatum*. And, thanks to Edward Snowden, we have learned of the extraordinary depth and breath of U.S. surveillance of the Internet and the phone system. One must remember that it was not until 1965, 174 years after the ratification of the First Amendment, that the Supreme Court first invalidated a congressional act on First Amendment free speech grounds. And, of course, historically, the First Amendment was entirely useless in protecting the speech rights of African-Americans.

To make matters worse, in 2010, in the *Citizens United* case, the Supreme Court read the First Amendment as offering protection for corporations to spend unlimited funds secretly on elections. In the hands of lawyers and judges, the First Amendment has been rendered an ineffective protection of political dissent and a robust protection of corporate wealth.

Economic regulation

Throughout virtually all of U.S. history, the courts have been no friends of working people. Until the Supreme Court's capitulation in 1937 to democratic forces, it pretty much steadfastly sided with capital against labor, employers against employees, and the wealthy against everyone else. At the end of the nineteenth century in particular, it accepted the conservative call to read the constitution to limit the power of government to regulate the economy. 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 was unwilling to do to protect African-Americans), the court stymied

progressive change for nearly half a century. For example, the Supreme Court invalidated the federal income tax in the Pollock case in 1895. It twice prohibited Congress from outlawing child labour — in 1918 and again in 1922. It denied both Congress and the states the power to regulate working hours or provide for a minimum wage in a host of cases. It prohibited Congress from requiring railroads to provide pensions, and disallowed both Congress and the states from outlawing 'yellow dog' contracts (contracts prohibiting union membership as condition of employment). As a newspaper commentator in the early twentieth century put it: "Were the Constitution & its Amendments written this way? Or has some one inserted a 'joker' clause which favors privilege?" The 'joker' clause is called 'lawyers and judges'. It took the Great Depression and the threat of President Franklin Delano Roosevelt's court-packing plan, backed by enormous Democratic majorities in the Congress, to break the court's single-minded protection of wealth from governmental regulation.

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 don't know and most lawyers ignore. While the cases are legion, four stand out: *Dred Scott v. Sandford* (1857), the *Civil Rights Cases* (1883), *Plessy v. Ferguson* (1897), and *Korematsu v. U.S.* (1944).

The Dred Scott case dealt with the citizenship status of a slave under federal law. Writing for the court, Chief Justice Roger Brooke Taney held that African-Americans were not intended to be 'citizens' in the constitution. They were not "part of the people", Taney wrote, and "had no rights which the white man was bound to respect". As a matter of constitutional law, African-Americans were simply "ordinary article[s] of merchandise".

While *Dred Scott* was overturned by the adoption of the Fourteenth Amendment, at the hands of the Supreme Court the amendment did little to protect African-Americans. Despite the Fourteenth Amendment's guarantee of equal protection, intended to protect the rights of the newly freed slaves, the Supreme Court eviscerated it to allow the creation of a full-blown system of racial apartheid. In the *Civil Rights Cases* of 1883, for example, the court invalidated the Civil Rights Act of 1875, which banned race-based discrimination in public places such as hotels, restaurants, theaters, etc. Despite the Civil War and the adoption of three constitutional amendments designed to protect the rights of the former slaves, the Supreme Court struck down the Act by a vote of 8-1. In gutting the Civil War Amendments, the court went out of its way to express its annoyance with African-Americans for seeking guarantees of non-discrimination:

> 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 […]

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 Supreme Court made it clear that it would preserve white privilege and condemn African-Americans to second-class status.

Supreme Court support for racial discrimination was further strengthened in *Plessy v. Ferguson* in 1896. At issue in *Plessy* was the constitutionality of a Louisiana law requiring railroads to segregate passengers by race. By a vote of 7-1, the court upheld the law. The court's rationale was that the Fourteenth Amendment guaranteed political as opposed to social equality, writing that the amendment "could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality". Then, in disingenuous language, the court claimed that laws requiring racial segregation "do not necessarily imply the inferiority of either race to the other". With a wink and a nod, the court wrote that the white politicians who enacted the apartheid law were not trying to treat African-Americans differently than whites:

> 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.

Note that one year later, in 1897, the Supreme Court rejected the Louisiana legislature's attempt to regulate contracts in the *Allgeyer* case. Adopting a double standard, the court held that state attempts to regulate the economy would be strictly scrutinised. But, despite the Civil War and the Thirteenth, Fourteenth, and Fifteenth Amendments, state laws discriminating against African-Americans would receive only the loosest scrutiny. The result was that while little state legislation regulating business was constitutionally acceptable, practically every law creating racial apartheid was fine! By siding with corporations and racists, the court enhanced its power and prestige. As New York University Law Professor Barry Friedman put it, "By abandoning blacks and embracing corporations, the Court rose to the pinnacle of power."

Korematsu v. U.S. (1944) dealt with the imprisonment of people of Japanese descent during World War II. At issue was a 1942 military order requiring all people of Japanese ancestry on the West coast of the United States, regardless of citizenship, to leave their homes and belongings and gather at designated Civilian Control Stations. From these stations they were shipped to what were euphemistically called 'Relocation Centers' where they spent the duration of the war. Eugene Rostow, a Vietnam War hawk in the Johnson administration, and a right-wing critic of President Reagan's Soviet arms negotiations, described the 'Relocation Centers' this way in the *Yale Law Journal* in 1945:

> the camps were in fact concentration camps, where the humiliation of evacuation was compounded by a regime which ignored citizens' rights […]

What was the evidence for sending over 100,000 people of Japanese ancestry, including 70,000 U.S. citizens born in the United States, to the camps? There was none. There were no charges brought against any of these individuals, and no trials were held. People were forced to leave their homes, their possessions, and their businesses, which were sold at fireside prices to local white people. And, by the time of the decision to send American citizens of Japanese descent to the camps, not one person of Japanese ancestry had been convicted, or even accused of espionage or sabotage. It is hard to imagine a more blatant denial of the most fundamental democratic and constitutional rights.

Before describing the Supreme Court's decision in *Korematsu*, it is worth noting how the United Kingdom (UK) dealt with the presence of approximately 74,000 German and Austrian aliens living in the UK when World War II started. The UK, of course, lacked a written constitution, a bill of rights, and courts with the power of judicial review — the power to invalidate government acts on the ground that they violate the constitution. And starting in September 1940, London suffered enormous damage from the German Blitz. Yet the British government gave every suspected person an individual hearing over a six-month period. As a result, of the 74,000 German and Austrian aliens present in the UK at the start of the war, only 1,847 were detained. By the end of 1942, that number had decreased to 486 detainees. And only 11 people were detained by the end of the war.

In glaring contrast, in 1944, in a decision that remains good law today, the U.S. Supreme Court upheld the imprisonment of over 100,000 people of Japanese descent. In a 6-3 decision, the court held that the government's actions were a 'military imperative'. Two thirds of the justices of the U.S. Supreme Court didn't think the government was required to follow even the most basic and fundamental rights of a democracy — the rights to due process of law before being incarcerated. It is hard to imagine a more blatant denial of fundamental rights.

In sum, in these three areas, dissident speech and civil liberties, economic regulation, and civil rights, the U.S. Supreme Court steadfastly protected privilege. Progressives understood this, and avoided litigation other than for defensive purposes. They crusaded against the courts, correctly understanding them as an instrument of oppression.

The illusion of progress

An obvious response to this discussion of the historic role of the U.S. Supreme Court as a protector of privilege is that history is not destiny. Indeed, many people believe that 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. As I shall demonstrate, however, court decisions have not made much difference. While history may not have determined the future role of the court, the structural

constraints that all courts share limit it.

A major reason why courts are unable — absent unusual conditions — to bring about progressive change is that courts lack the power to implement their decisions. Nobody asserts that everything the President or the Prime Minister orders is implemented. Nobody claims the same for Congress, parliament, or executive agencies. But somehow, many human rights activists and lawyers act as if the implementation of judicial decisions is unproblematic. In general, this makes no sense. In particular, courts are structured so as to lack the power of implementation. Writing of the U.S. Supreme Court in *Federalist Paper* 78, Alexander Hamilton famously underscored the Court's lack of power:

> The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

In other words, if political leaders don't support a judicial decision, and don't work to implement it, then the decision will be so many words. The institutional weakness of the judiciary makes litigation unlikely to bring about change. When progressive forces win judicial victories, either their victories won't produce change or they will simply reflect change that has already occurred. I illustrate this point with brief discussion of three well-known U.S. Supreme Court decisions.

The victory that wasn't: *Brown v. Board of Education*

The 1954 *Brown* case may be the most well-known and widely celebrated case in Supreme Court history. In *Brown,* the court unanimously held that racial segregation of children in public elementary and secondary schools denied African-American children the equal protection of the law as guaranteed in the Fourteenth Amendment. 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. Segregated public schools remained segregated after *Brown*. A decade after the decision, virtually nothing had changed for African-Americans students living in the eleven states of the former Confederacy that required race-based school segregation by law. In the 1963-1964 school year, barely 1 in 100 (1.2 per cent) of these African-American children were in a non-segregated school. Change did come to the South years later, but that occurred only after the Congress acted — providing monetary incentives for desegregation, and threatening the loss of federal funds for maintaining segregation.

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 to energise civil rights opponents and channel resources away from building the civil rights movement. In the wake of *Brown*, resistance to ending segregation increased in all areas, not merely in education but also in voting, transportation, and public places. *Brown* "unleashed a wave of racism that reached hysterical proportions." 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.

And *Brown* was the high point of judicial victories in school desegregation. Just a couple of decades after *Brown*, the court backed away from the fight against racially segregated schools. In a series of cases starting in 1974 in *Milliken v. Bradley*, the court allowed suburban white schools to wall themselves off from African-American school children. Later, the Supreme Court found no constitutional limitations on the re-creation of segregated schools, as long as such segregation was not explicitly required by state laws. Unsurprisingly, the result has been the resegregation of public schools.

The decision that didn't: *Roe v. Wade*

In 1973, in *Roe v. Wade*, the Supreme Court invalidated state laws that prohibited women for terminating unwanted pregnancies. The number of legal abortions increased in the years following *Roe*. On its face, Roe appears to have succeeded where Brown did not. Looking deeper, however, tells a different story. The number of legal abortions increased after Roe because there was public support for legal access to abortion, and demand for the service. In the years before Roe, 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 decision 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. To the extent that Roe increased women's access to legal abortion it did so because a grass-roots political movement had won many legislative victories and had dramatically influenced both elite and public opinion.

In addition, *Roe*, like *Brown*, appears to have strengthened the losers in the case — anti-abortion forces — and weakened the winners. The fledgling anti-abortion movement grew enormously after *Roe*, and the pro-choice movement, celebrating its judicial victory, collapsed. As a result, there was little pressure on local institutions to provide abortion services, and increasing pressure from an active, albeit small, anti-abortion movement, not to do so. The result has been that legal abortions are unevenly available across the United States. In sum, the finding of a constitutional right to terminate a pregnancy has not guaranteed access to legal abortion for women. It derailed the pro-choice movement and energised 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”.

Catching up with progress: *Obergefell v. Hodges*

In 2015, in *Obergefell v. Hodges*, the U.S. Supreme Court invalidated state laws that limited marriage to heterosexual couples. Heralded as a major victory for progressive forces, the decision was late in coming. American society was supportive of marriage equality years before the court acted. On virtually every conceivable measure, from public opinion to workplace benefits to anti-discrimination policies to social acceptance to mass culture to elite support, there was a sea change in attitudes towards gays and lesbians that pre-dated judicial action. By the time the court acted, majorities in virtually every state, as well as the U.S. Senate, were supportive of marriage equality. While it is the case that the decision extended the right to marriage across all states, the court was able to do so because of the widespread support the gay and lesbian rights movement had created. Even so, the U.S. was a laggard in the western world, being only the twenty-second democratic country to require marriage equality.

When will they ever learn? Returning to past understandings

If space allowed, I could continue to describe other examples, such as criminal law, where, despite the ‘criminal rights revolution’ of the Warren court, poor criminal defendants, particularly those of color, continue to be denied basic rights. As we have learned so powerfully and sadly over the last few years with the use of cell phone videos, at least some police still treat black males as if they were slaves, killing them virtually indiscriminately. The history of progressive litigation painfully demonstrates that without political support the Supreme Court will eviscerate progressive rights and create obstacles to legislative attempts to introduce new rights. And, in those few instances where progressive forces win Supreme Court cases, without powerful political and social movements to enforce them they will remain empty, symbolic victories.

Litigation substitutes symbols for substance. The danger of celebrating symbols is that it can lead to a sense of self-satisfaction. Seen in this light, the great Supreme Court progressive victories are “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”.1 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. Celebrating 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 progressive claims 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 can’t be resolved through litigation.

First and foremost, successful progressive change requires building social movements. For close to 75 years now in the U.S., the progressive agenda has been hijacked by a group of elite, well-educated and comparatively wealthy lawyers who uncritically believe that rights trump politics and that successfully arguing before judges is equivalent to building and sustaining political movements. It isn't. Litigation is an elite, class-based strategy for change. It is premised on the notion that it is easier to persuade similarly educated and wealthy lawyers, who happen to be judges, of certain progressive principles than it is to organise everyday citizens. While that might be true, it is also true that without broad citizen support, change will not occur.

None of this means that law is irrelevant, or that courts can never further the goals of the relatively disadvantaged. Judicial victories can sometimes buy time, keep movements alive, and keep activists out of prison. But they can only do so where there are active political movements supporting change.

As progressives look to the future, they must understand that 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 mobilisation, as difficult as the latter 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 naivety have their charms, they are not best exhibited in courtrooms.

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