A PROGRESSIVE JUDICIARY? JUDICIAL REVIEW AND NATIONAL POLITICS FROM RECONSTRUCTION TO THE PRESENT

Joshua Braver* & Gregory Elinson**

Within legal academia, the conventional historical narrative is that the Supreme Court has regularly interfered with legislative and executive efforts to protect minority rights and remedy economic inequality. Citing this reactionary tendency, an influential and vocal group of progressive legal scholars have argued that progressives ought to stop defending judicial review and instead devote their energies to eliminating it, or at least aggressively curbing its use. These progressive critics of judicial review (our term) proffer two related historical claims. First, they assert, the Supreme Court has consistently been less progressive than congressional majorities and Presidents. Second, they suggest, even landmark progressive rulings in cases like Brown v. Board of Education *and* Roe v. Wade *were not, in and of themselves, meaningful contributions to progressive causes.*

This Article evaluates these claims and concludes that judicial review's progressive critics are wrong on both counts. Revisiting the key eras and cases the progressive critique of judicial review is based on—including Reconstruction, Lochner v. New York, Brown, *and* Roe*—we find little evidence that the Court has been consistently less progressive than the elected branches. We focus on postmaterial political issues that broadly code as part of a broader "culture war," such as race and sex equality. As to Reconstruction, given that the Republican Party had largely turned away from the project of expending the necessary resources to promote Black equality, progressive critics of judicial review greatly overstate the Court's contribution to Reconstruction's demise. In the* Lochner *era, politicians in both political parties harbored racist views and promoted racist public policy, so the Court's anti-*

* Joshua Braver (J.D. Yale Law School, Ph.D. Political Science, Yale University) is Assistant Professor of Law, University of Wisconsin, Madison, joshua.braver@wisc.edu.

** Gregory Elinson (J.D. Stanford Law School, Ph.D. Political Science, University of California, Berkeley) is Assistant Professor of Law, Northern Illinois University, elinson@niu.edu. For helpful comments and conversations, we are grateful to David Barron, Ruth Bloch Rubin, Jon Gould, Andy Coan, Vicki Jackson, Mike Klarman, Shalev Roisman, David Schwartz, Eric Segall, and Lorianne Updike Toler, as well as participants in the 2022 Wisconsin Con Law "schmooze," the 2023 National Conference of Constitutional Law Scholars, and the 2023 Loyola Constitutional Law Colloquium.

government ideological commitments ultimately redounded to the benefit of Black Americans. Moving toward the present, we argue that Brown *should be celebrated for desegregating the former "border" states and making the Civil Rights Act of 1964 possible.* Roe*, for its part, established a permissive national abortion regime that went well beyond what was possible to achieve through politics then. On balance, we conclude, a world without judicial review might well have been meaningfully less progressive.*

Why have judicial elites usually been more progressive than majorities in Congress or presidential administrations on culture-war issues? During Reconstruction, legal elites were largely undifferentiated from their counterparts serving elsewhere in the national government. By the Progressive Era, however, legal elites had become relatively more skeptical of state power compared to their political brethren, a disposition that sometimes furthered progressive ends. After the New Deal, we credit educational polarization, which has tended to make the elite bar, and thus the pool of actual and potential judges and justices, comparatively more open to progressive claims. We observe, however, that beginning in the 1990s, through effort and mobilization—perhaps most notably with the establishment of the Federalist Society—conservatives have offset the exclusionary effects of the legal profession's liberal leanings on the judiciary.

TABLE OF CONTENTS

INTRODUCTION

For an influential and vocal group of progressive legal scholars, judicial review—that is, the power of a court to hold a duly enacted statute or executive action unenforceable under the Constitution—is and has almost always been a pernicious influence on our politics. It interferes with legislative and executive initiatives to better and more durably protect minority rights and remedy economic inequality.[1] Worse still, judicial review blinds the public to the reality that "rights must be protected through political means, rather than judicial fiat."[2] Hence, progressives ought to stop defending judicial review and instead devote their energies to eliminating it, or at least aggressively curbing its use.

In many ways, these contemporary progressive critics of judicial review (our term) are the heirs to a venerable political tradition.[3] Wisconsin Senator Robert La Follette's 1912 charge that the Supreme Court, acting on behalf of the "wealthy and powerful few," had wrongfully arrogated itself "supreme law-making and law-giving" power still sounds fresh.[4] Recent events, however, including the domination of the Court by its conservative wing, have given these arguments new currency in both the legal academy and broader popular discourse. In law school classrooms across the country, in influential movements like Law and Political Economy, and in the editorial pages of major newspapers, it is increasingly mainstream to view robust American-style judicial review as unimpeachably anti-progressive.

---

1. Scholars, of course, disagree in the particulars. Some favor the elimination of judicial review entirely, while others advocate more limited reforms, such as eliminating judicial review only for federal statutes. On the latter, see, for example, Written Statement of Nikolas Bowie, Assistant Professor of L., Harv. L. Sch., to Presidential Comm'n on the Sup. Ct. of the U.S., The Contemporary Debate over Supreme Court Reform: Origins and Perspectives 24 (June 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony.pdf [https://perma.cc/KLP8-4AST].

2. Samuel Moyn, *Perspective: Counting on the Supreme Court to Uphold Key Rights Was Always a Mistake*, WASH. POST (July 17, 2022, 1:31 PM), https://www.washingtonpost.com/outlook/2022/06/17/supreme-court-rights-congress-democracy [https://perma.cc/5F2V-YCT7].

3. *See, e.g.*, WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937, at 49 (1994). Of course, this was only part of the Progressive critique of the Constitution. For one detailed treatment, see Aziz Rana, *Progressivism and the Disenchanted Constitution*, *in* THE PROGRESSIVES' CENTURY: POLITICAL REFORM, CONSTITUTIONAL GOVERNMENT, AND THE MODERN AMERICAN STATE 41, 46 (Stephen Skowronek et al. eds., 2016).

4. Brian Z. Tamanaha, *The Progressive Struggle with the Courts: A Problematic Asymmetry*, *in* THE PROGRESSIVES' CENTURY: POLITICAL REFORM, CONSTITUTIONAL GOVERNMENT, AND THE MODERN AMERICAN STATE, *supra* note 3, at 65, 67.

"Progressives," Samuel Moyn summarizes, "have little to lose and much to gain by leaving juristocracy to the enemies of democracy."[5]

Admittedly, progressive critics of judicial review are not alone in harboring a dim view of the Supreme Court. Just the opposite. The conventional historical narrative among left-leaning scholars of constitutional law is that the Supreme Court has undercut legislative and executive efforts to promote minority rights and reduce economic inequality.[6] What *is* novel is the conclusion that progressive critics of judicial review urge us to draw: judicial review ought to be eliminated! As this Article details, the progressive indictment of judicial review relies on a series of counterfactuals. Most of the time, critics argue, the Supreme Court has stymied the progressive ambitions of the legislative and executive branches. As a result, they posit, a world without judicial review would have yielded consistently more progressive policy outcomes. To evaluate whether they are right, this Article revisits the history on which the progressive critique is based.

---

5. Samuel Moyn, *The Court Is Not Your Friend*, DISSENT (2020), https://www.dissentmagazine.org/article/the-court-is-not-your-friend [https://perma.cc/99ZP-2YAG].

6. *See, e.g.*, ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 5–6 (2014) ("[The Supreme Court] has rarely lived up to these lofty expectations and far more often has upheld discrimination and even egregious violations of basic liberties. . . . Now, and throughout American history, the Court has been far more likely to rule in favor of corporations than workers or consumers; it has been far more likely to uphold government abuses of power than to stop them."); Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. 59, 102 (2022) ("A cursory glance at U.S. history provides support for the proposition that judicial review of federal statutes tends to be biased against left-leaning political programs—a proposition that early twentieth century progressives took as given."); David Luban, *The Warren Court and the Concept of a Right*, 34 HARV. C.R.-C.L. L. REV. 7, 7 (1999) ("The Warren Court, after all, was not just the most liberal Supreme Court in American history, but arguably the *only* liberal Supreme Court in American history."); Joseph Fishkin & William E. Forbath, *Giving Up on the Supreme Court Is the Beginning, Not the End, of Progressive Constitutional Theory in the 21st Century*, BALKINIZATION (Jan. 19, 2023, 11:00 AM), https://balkin.blogspot.com/2023/01/giving-up-on-supreme-court-is-beginning.html [https://perma.cc/8MRU-YRWW] ("[F]or most of the nation's past, reform-minded Americans saw the courts as hostile political actors and their constitutional output as primarily the work of conservative politicians in robes."); Jed S. Rakoff, *The Most Conservative Branch*, N.Y. REV. BOOKS (Sept. 19, 2024), https://www.nybooks.com/articles/2024/09/19/the-most-conservative-branch-reading-the-constitution-stephen-breyer/ [https://perma.cc/UZD6-55GE] ("[F]or much of its history the Supreme Court has been the most conservative branch of the US government, and its justices have been chiefly motivated by their personal ideologies."); Daniel Denver, *The Supreme Court Has Always Been a Reactionary Body: An Interview with Aziz Rana, Amna A. Akbar, & Marbre Stahly-Butts*, JACOBIN (July 11, 2022), https://jacobin.com/2022/07/supreme-court-working-class-women-abortion-carceral-state-law [https://perma.cc/X39B-ZVRG]; Josh Chafetz (@joshchafetz), X (Feb. 29, 2024, 5:37 PM), https://x.com/joshchafetz/status/1763362850402078864 [https://perma.cc/FC7Z-5C3C] ("The courts have been the most regressive institution of national governance across the 230+ years of American history. I implore you, don't let the very occasional good decision give you faith in them as governing institutions.").

When it comes to issues that reflect an ongoing "culture war" between the two major political parties—among other things, protecting marginalized groups, sexual liberation, school prayer, and reforming the criminal-justice system—we find limited evidence for the claim that the Court has "been a stubbornly reactionary force in American law and politics" or that its anti-progressive record exceeded that of contemporaneous congressional majorities or presidential administrations.[7] On that score, we find little reason to assign the judiciary greater responsibility for thwarting progressive aims.

In fact, when judged against the elected branches' performance, the judiciary's uneven progressive record is neither unique nor the result of poor institutional design. Rather, durable progressive coalitions have been rare across all three branches of government. Consequently, it is an error to imagine that but for the Court's interventions, progressive movements would have achieved their ends via legislative or executive means.

In keeping with judicial review's progressive critics, much of this Article's focus is on the Court's race-related jurisprudence, eliding, for example, analysis of potentially relevant issues like Chinese exclusion or Indian affairs. We begin with Reconstruction—a period in which the Court's interventions are thought to be most deleterious to the prospects of achieving racial equality. In this period, the Court's decisions were not inconsistent with a growing political ambivalence about the wisdom of a muscular program of governmental support for formerly enslaved Americans. Although the Court did not aid that program, it deserves far less blame than progressive critics of judicial review assign it.[8] We move next to the *Lochner* era. Here, the Court's interventions took shape in a political context where Black Americans lacked effective political representation and forces hostile to their interests dominated the elected national government. When the Court held facially race-based restrictive zoning unconstitutional, its ruling contributed durably to the cause of racial equality.[9] As to both eras, we maintain that singling out the judiciary deflects attention away from a more generalized institutional responsibility for progressive failures.

After the New Deal, the Court made a series of rulings that were widely celebrated by the progressive commentators of the day. Today, however, progressive critics dismiss these decisions as mostly sizzle, with minimal substance. *Brown v. Board of Education*, they contend, changed little about segregated public education on the ground, while the abortion right recognized for nearly two generations after *Roe v. Wade* would soon have been granted by state legislatures.[10] But while it is surely true that positive progressive judicial interventions benefitted from the collaboration of other institutional actors, we think it a mistake to belittle the judiciary's triumphs on the ground that they did not achieve *enough*. *Brown* should be celebrated for desegregating the border states of Delaware, Kentucky, Maryland, and Missouri and making the Civil Rights Act of 1964 possible.[11] *Roe*

---

7. Fishkin & Forbath, *supra* note 6.
8. *See infra* Part II.
9. *See infra* Part III.
10. *See infra* Parts IV, V.
11. *See infra* Part V.

similarly deserves great credit for establishing a permissive national abortion regime that went well beyond what was possible to achieve through politics then. On balance, we conclude, a world without judicial review might well have been meaningfully less progressive.

This conclusion has important implications for our understanding of the Supreme Court as a majoritarian institution. Beginning with mid-twentieth century political scientist Robert Dahl, many scholars have argued that the Supreme Court is unlikely to regularly stray from majority opinion or the priorities of a majority of elected officials.[12] But our account suggests that the Court has more room to maneuver than this literature acknowledges. Indeed, it may help to explain why the justices have moved faster and farther than the elected branches on select issues like abortion, race, and sex discrimination.[13]

Why have judicial elites usually been more progressive than majorities in Congress or presidential administrations on culture-war issues? Why and in what ways are legal elites different than political ones? We trace a separation that has hardened over time. During Reconstruction, legal elites were largely undifferentiated from their counterparts serving elsewhere in the national government. In consequence, while it is difficult to sustain the argument that during Reconstruction the judiciary was uniquely hostile to progressive ends, we acknowledge that judges did not play a vanguard role either. By the Progressive Era, legal elites had become relatively more skeptical of government power compared to their political brethren, a disposition that sometimes furthered progressive ends. After the New Deal, we credit educational polarization, which has tended to make the elite bar—and thus the pool of actual and potential judges and justices—relatively more open to progressive arguments. Legal elites since the 1940s have grown more progressive than the average Democratic voter or officeholder.[14] We note, however, that political conservatives have offset these effects through effort

12. The foundational work in this literature is Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957). For prominent examples of works in this same vein, see TOM S. CLARK, THE LIMITS OF JUDICIAL INDEPENDENCE (2010); BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2006); KEITH E. WHITTINGTON, REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT (2019).

13. Among the reasons the Court can diverge from the elected branches: retaliation by elected officials requires significant political capital and may often be especially difficult under divided government; elected officials often prefer to duck issues that are cross-cutting for their party; Presidents select justices for reasons other than ideology; and Presidents often cannot predict the ideology of Supreme Court candidates on unforeseen issues. For a discussion of how elected officials often prefer for courts to decide issues that divide their parties, see Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 36–37 (1993).

14. ADAM BONICA & MAYA SEN, THE JUDICIAL TUG OF WAR: HOW LAWYERS, POLITICIANS, AND IDEOLOGICAL INCENTIVES SHAPE THE AMERICAN JUDICIARY 125 (2021). And elite lawyers (measured by the relative prestige of law school attended) are more progressive than their already left-leaning colleagues. *Id.*

and mobilization in recent decades, perhaps most importantly with the establishment of the Federalist Society.[15]

Our critique illustrates why judicial review might be a crucial tool for progressives to win on key culture-war issues in the future. Just as past generations of progressives have struggled to garner majority support, many current progressive priorities are unpopular today. On criminal justice, for instance, a majority of Americans reject the idea that criminal sentences are too long;[16] public support for the death penalty remains strong;[17] and there is little support for decreasing local police budgets.[18]

Nor are emergent, durable progressive majorities around the corner. Predictions that demographics—namely, a relative increase in the national proportion of voters of color—will lead to a leftward shift have yet to come to fruition.[19] People of color are today the fastest growing constituency within the Republican Party.[20] Scholars of minority political opinion find that Americans of Latino origin "lean conservative" on issues like same-sex marriage,[21] and have documented a "dramatic rightward shift in black political attitudes over the last half century."[22]

Progressive critics may be right that abolishing judicial review would lead to gains in economic redistribution when progressive-allied coalitions control

---

15. *See infra* Part VI.

16. John Gramlich, *U.S. Public Divided Over Whether People Convicted of Crimes Spend Too Much or Too Little Time in Prison*, PEW RSCH. CTR. (Dec. 6, 2021), https://www.pewresearch.org/fact-tank/2021/12/06/u-s-public-divided-over-whether-people-convicted-of-crimes-spend-too-much-or-too-little-time-in-prison [https://perma.cc/8YJ7-W6WB].

17. *Most Americans Favor the Death Penalty Despite Concerns About Its Administration*, PEW RSCH. CTR. (June 2, 2021) [hereinafter *Most Americans Favor the Death Penalty*], https://www.pewresearch.org/politics/2021/06/02/most-americans-favor-the-death-penalty-despite-concerns-about-its-administration [https://perma.cc/3JNH-LKCA].

18. Kim Parker & Kiley Hurst, *Growing Share of Americans Say They Want More Spending on Police in Their Area*, PEW RSCH. CTR. (Oct. 26, 2021), https://www.pewresearch.org/fact-tank/2021/10/26/growing-share-of-americans-say-they-want-more-spending-on-police-in-their-area [https://perma.cc/3A37-GYMY].

19. *See, e.g.*, Nate Cohn, *Lost Hope of Lasting Democratic Majority***,** N.Y. TIMES (Sept. 24, 2022), https://www.nytimes.com/2022/09/24/upshot/democratic-majority-book.html [https://perma.cc/R6ZJ-SUBK].

20. *See, e.g.*, Michael C. Bender, Katie Glueck, Ruth Igielnik & Jennifer Medina, *In Trump's Win, G.O.P. Sees Signs of a Game-Changing New Coalition*, N.Y. TIMES (Nov. 6, 2024), https://www.nytimes.com/2024/11/06/us/politics/donald-trump-2024-campaign-coalition.html [https://perma.cc/U7KR-YGTS] (noting that in his 2024 run for the presidency, Donald Trump "made modest gains . . . with Black voters, and even more significant inroads with Latinos"); Joshua Jamerson & Aaron Zitner, *GOP Gaining Support Among Black and Latino Voters, WSJ Poll Finds*, WALL ST. J. (Nov. 7, 2022, 7:01 AM), https://www.wsj.com/articles/gop-gaining-support-among-black-and-latino-voters-wsj-poll-finds-11667822481 [https://perma.cc/H4EA-9T4Y].

21. LUIS R. FRAGA ET AL., LATINOS IN THE NEW MILLENNIUM: AN ALMANAC OF OPINION, BEHAVIOR, AND POLICY PREFERENCES 378 (2012).

22. ISMAIL K. WHITE & CHERYL N. LAIRD, STEADFAST DEMOCRATS: HOW SOCIAL FORCES SHAPE BLACK POLITICAL BEHAVIOR 6–11 (2020).

Congress and the White House. Action on this dimension of politics—increasing the minimum wage, for instance—is backed by strong popular support.[23] But ending judicial review is not likely to prove a win on every dimension and on every time scale. Consequently, we urge progressives not to discount the potential of *any* institution to further their aims. Decisions about whether and how to curb the Court must take into account a complicated series of costs and benefits. This Article cannot definitively answer the question of how progressives should respond to a recalcitrant Supreme Court. But it does provide important context for the decision by reminding progressives of the benefits the Court has provided in the past and could once again provide in the future.

Several points of clarification are worth making before delving further into the analysis. First, we use the term "progressive" here with awareness that progressivism may mean different things to different people. Historically, the term has implicated a variety of different policy commitments across different political eras.[24] Nevertheless, we think that progressives—of today, yesterday, and tomorrow—generally share a common set of political ideals that distinguish them from other political currents and ideological movements. Situated on the political left, progressives tend to believe in the importance of redistributing material wealth, often via a robust welfare state, and disrupting "concentrations of economic and political power."[25] Progressives also tend to support the protection and expansion of political and civil rights for racial, ethnic, sexual, and other socially disfavored minorities.[26] Taken together, these political lodestars helpfully distinguish progressives, whether in the electorate or in office, from other factional clusters.

Second, when we refer to progressive critics of judicial review, we mean to describe one influential faction of thinkers on the left who argue that the practice ought to be jettisoned because it has proved an often-insurmountable obstacle to

---

23. Will Bauer, *Following National Trends, Nebraskans Vote to Increase the State's Minimum Wage*, NEB. PUB. MEDIA (Nov. 8, 2022, 9:37 PM), https://nebraskapublicmedia.org/en/news/news-articles/following-national-trends-nebraskans-vote-to-increase-the-states-minimum-wage [https://perma.cc/RA6E-TD5N]; Heather Long, *Arkansas and Missouri Just Approved Big Minimum Wage Increases, a Liberal Victory in Red States*, WASH. POST (Nov. 6, 2018, 11:01 PM), https://www.washingtonpost.com/business/2018/11/07/arkansas-just-approved-big-minimum-wage-increase-liberal-victory-red-state [https://perma.cc/R3AA-8PPE].

24. *See, e.g.*, DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 40 (2011) (observing that it is important not to "assume that early-twentieth-century Progressives were ideological twins of modern 'liberals,'" and that capital-P Progressives took "illiberal stance[s]" on issues including "equality for women workers, housing segregation, educational freedom, and coercive eugenics").

25. JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY 8, 16 (2022).

26. *See, e.g.*, Jonathan S. Gould, *Puzzles of Progressive Constitutionalism*, 135 HARV. L. REV. 2054, 2059 (2022) ("Even a casual observer of American politics can identify the cluster of commitments that make up contemporary progressivism: support for a social welfare state, civil rights for demographic minorities, protections for workers and labor unions, and environmentalism, among others.").

progressive political aims. Many other progressives are hostile to the current Supreme Court, but not to judicial review per se.[27] For critics of the Roberts Court, the problem can be remedied by better appointments, better reasoning, or more just outcomes. By contrast, we seek to engage with those who criticize judicial review as a general practice.

Third, in our view, the argument by progressive critics of judicial review is distinct from (albeit related to) the claim that judicial review is inconsistent with fundamental, small-d, democratic principles. Accordingly, we leave to the side the question of whether on more normative grounds judicial review has no place—or, at minimum, a more circumscribed one—in a true democracy.[28]

Finally, we wish to be clear that this is a consciously synthetic account rather than a work of original constitutional history. Much like the progressive critics themselves, we have set ourselves the task of assessing the progressive critique of judicial review against the best available historical evidence. Accordingly, our account draws on a wide array of relevant scholarly works by legal academics, historians, and political scientists. Where appropriate, we describe scholarly debates within the relevant literature and adjudicate them through reasoned argument.

The remainder of the Article is organized as follows. Part I provides a more detailed description of the progressive critique of judicial review, followed by a more rigorous accounting of our own theoretical approach. Parts II–V then deploy these conceptual tools to explore each of the key historical eras that undergird progressive criticism of judicial review. We begin with Reconstruction. Continuing in chronological order, we next discuss the *Lochner* era, *Brown*, and *Roe*. Before concluding, Part VI discusses the implications of our historical tour for contemporary debates about progressive politics and the role of judicial review in our constitutional democracy.

I. THE PROGRESSIVE CRITIQUE OF JUDICIAL REVIEW

A. The Critique

Progressive critics of judicial review principally argue that it has rarely advanced minority rights, if ever. From landmarks of our constitutional anti-canon like *Dred Scott v. Sandford*[29] and *Plessy v. Ferguson*,[30] to postbellum judicially imposed limitations on a robust program of legislative Reconstruction like *United States v. Cruikshank*[31] and the *Civil Rights Cases*,[32] critics observe that the Supreme Court (and the federal courts more generally) has almost always been a significant, and frequently insurmountable, obstacle to racial progress. As Moyn writes, it was Congress that in the aftermath of the Civil War "took the lead on rights," enacting, among other things, "a Civil Rights Act in 1866 to protect the equality of newly

27. *See* Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 HARV. L. REV. 728, 785 (2024).

28. *See* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1353 (2006).

29. 60 U.S. (19 How.) 393 (1857).

30. 163 U.S. 537 (1896).

31. 92 U.S. 542 (1876).

32. 109 U.S. 3 (1883).

emancipated African Americans before the law."[33] And it was the Court that "drastically restricted the rights Congress had accorded," including by "gut[ting] Congress's civil rights statutes."[34]

As poor as the Court's performance has been on issues of race, its economic record is even worse. Characteristic of his fellow progressive critics, Moyn contends that the Court "weaponized many precious rights . . . from shields for the vulnerable and weak into swords for the powerful and wealthy."[35] "Astonishingly," he observes, "the most prominent rights the Supreme Court protected in the name of the Constitution were those that helped rich business owners at the expense of the majority—by, for example, striking down maximum-hour laws for workers or a federal minimum wage."[36] Likewise, Nikolas Bowie argues, "[I]f you look at the history of the judicial review of federal legislation, the principal 'minority' most often protected by the Court is the wealthy."[37]

Progressive critics are no more favorably disposed to the Court's supposed triumphs. *Brown v. Board of Education*,[38] they suggest, did little to change the lived reality of racial discrimination in the United States. It was Congress that ultimately desegregated the former Confederacy.[39] "What *Brown* actually illustrates," Bowie suggests, "is how federal legislation has successfully expanded American democracy when the Supreme Court has stopped interfering with Congress."[40] Thus, he comments, "Formal segregation drew to a close in the South *only* after Congress enacted the Civil Rights Act of 1964 and the Voting Rights Act of 1965."[41]

Roe v. Wade[42] elicits similar reproach. Looking to other advanced industrial democracies, progressive critics argue the decision was, at minimum,

---

33. Moyn, *supra* note 2.

34. *Id.*; *see also* Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 VAND. L. REV. 769, 791 (2022) ("[T]he Court played an instrumental role in the end of Reconstruction . . . undermining federal majoritarian efforts toward racial equality.").

35. Written Statement of Samuel Moyn, Henry R. Luce Prof. of Juris. & Prof. of Hist., Yale Univ., to Presidential Comm'n on the Sup. Ct. of the U.S., Hearing on "The Court's Role in Our Constitutional System" 7 (June 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Moyn-Testimony.pdf [https://perma.cc/8Y7Z-G97N] (quotation marks omitted).

36. Moyn, *supra* note 2.

37. Written Statement of Nikolas Bowie, *supra* note 1, at 10. Although Bowie expresses skepticism about the efficacy of the *Brown* decision which struck down state laws, he does not advocate abolishing judicial review of state statutes, only federal ones.

38. 347 U.S. 483 (1954).

39. Ryan D. Doerfler & Samuel Moyn, *Making the Supreme Court Safe for Democracy*, NEW REPUBLIC (Oct. 13, 2020), https://newrepublic.com/article/159710/supreme-court-reform-court-packing-diminish-power [https://perma.cc/5MXK-NB9M].

40. Written Statement of Nikolas Bowie, *supra* note 1, at 8; *see also* Doerfler & Moyn, *supra* note 39 ("[E]ven at the zenith of liberal power over the courts, congressional action actually led to a greater expansion of rights protection in American society.").

41. Written Statement of Nikolas Bowie, *supra* note 1, at 8.

42. 410 U.S. 113 (1973).

unnecessary to liberalize abortion rights in the United States.[43] After all, they note, "[F]eminists abroad made greater strides than ever occurred in the United States without generalized recourse to judges."[44] Given this dismal history, judicial review's progressive critics urge left-of-center Americans to jettison the myth of a rights-protective Court as bad history and to get on with the business of achieving their goals through the elected branches. "Better to disempower the court than to hope that it rules in your favor."[45]

B. Methodological Concerns

As the preceding discussion makes clear, progressive critics of judicial review rely on a series of historical counterfactuals to advance their thesis. In each historical era, they ask us to conjure a world without judicial review and to consider whether that world would have been meaningfully more progressive than the reality we got. In this sense, progressive critics invite us to shift our focus away from the judiciary and attend instead to the goings-on on Capitol Hill and in the White House, as well as in statehouses and city council chambers across the country. They challenge us to assess whether elected officials would have produced more durably progressive outcomes absent judicial intervention.

Engaging in this kind of counterfactual analysis is no easy task, however. For that reason, this Section addresses possible methodological concerns. Our own approach is surely not immune from the challenges of doing counterfactual history. Our aim, instead, is to assess the available evidence, dismiss implausible answers, and ultimately offer more reasonable alternatives.

By way of illustration, consider Congress. To assess the House and Senate's capacity to pass progressive policies, one must first know the composition of the majority coalition in each legislative chamber. But legislative outcomes are the sum of many inputs. As to any legislative session, we must ask: how progressive is the floor median—the legislator who gives the party its majority?[46] How progressive is the party median—the legislator who guarantees the House Speaker or Senate Majority Leader's re-selection? We must then consider legislative leaders themselves: what do they want?[47] But this is just the tip of the iceberg. We might also look to key committee members and chairs who, together with party leaders,

---

43. *See, e.g.*, Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1205 (1992) (arguing that "abortion law" at the time *Roe* was decided was "in a state of change across the nation" and suggesting that the Court's intervention was therefore unwise because it "invited no dialogue with legislators" about the issue).

44. Moyn, *supra* note 5.

45. Doerfler & Moyn, *supra* note 39.

46. *See, e.g.*, KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING 23–24 (1998).

47. *See* GARY W. COX & MATHEW D. MCCUBBINS, SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S HOUSE OF REPRESENTATIVES 24–27 (2005) (arguing that the "first commandment of party leadership" is "*Thou shalt not aid bills that will split thy party*" and that the "second commandment of party leadership" is "*Thou shalt aid bills that most in thy party like*").

help dictate the pace and scope of lawmaking.[48] And in the Senate, we must attend to the views of the filibuster "pivot"—the lawmaker whose vote is necessary to close debate and force a vote on a particular measure.[49]

The difficulties compound as we attempt to track Congress's relative progressivism over time. Shifts in majority control, for instance, can foreclose opportunities to move policy in a progressive direction. So, too, they can create new vulnerabilities by making available new opportunities to challenge existing progressive victories. Changes in committee composition can have a similar effect. And the rise or fall of organized party factions—whether progressive, moderate, or conservative—can alter the odds of securing progressive policies from one moment to the next.[50] This is to say nothing of the consequences of event-driven shocks: wars, depressions and recessions, energy crises, or other exogenous jolts to the political ecosystem.[51] These can reconfigure the congressional agenda and members' preferences in ways that will affect a majority's ability to pass progressive policies.

To the extent the executive branch is similarly shaped by internal institutional dynamics, it is no easier to assess its propensity to further progressive goals. To be sure, the hierarchical organization of the executive branch privileges the personal preferences of the President.[52] But the viewpoints of those staffing key cabinet, advisory, and lower-level positions within the federal bureaucracy matter too.[53] And even the most self-directed Presidents can be cross-pressured by the multiple constituencies they must serve—from the nation at large, to the members of the party that elected them, to particularly influential constituencies or interests, whether concentrated or diffuse.[54] Whatever a President's own policy tastes may

---

48. *See, e.g.*, RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES xiii (1973) (describing the importance of congressional committees); IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME 149 (2013) (describing the importance of congressional committees in the middle of the twentieth century).

49. KREHBIEL, *supra* note 46, at 23–24.

50. *See, e.g.*, RUTH BLOCH RUBIN, BUILDING THE BLOC: INTRAPARTY POLITICS IN THE U.S. CONGRESS 27–28 (2017).

51. *See, e.g.*, David Mayhew, *Wars and American Politics*, 3 PERSPS. ON POL. 473, 473 (2005) ("Wars seem to be capable of generating whole new political universes. They can generate new problems and open up policy windows, thus often fostering new policies, but they can also generate new ideas, issues, programs, preferences, and ideologies and refashion old electoral coalitions—thus permanently altering the demand side of politics.").

52. *See, e.g.*, Terry M. Moe & William G. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 PRES. STUD. Q. 850, 851 (1991) (identifying the President's "capacity for taking unilateral action and thus for making law on his own" as critical to her power).

53. *See, e.g.*, M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 645 (2001) (arguing that the executive, no less than the other branches, is a "complex institution[] . . . made up of many subparts," and observing that "those subparts have varying interests that do not always coincide with one another"); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch From Within*, 115 YALE L.J. 2314, 2318 (2006) (proposing a "set of mechanisms that create checks and balances *within* the executive branch" (emphasis added)).

54. *See, e.g.*, DANIEL J. GALVIN, PRESIDENTIAL PARTY BUILDING: DWIGHT D. EISENHOWER TO GEORGE W. BUSH 2 (2010).

dictate, she may choose to prioritize the policy goals of her party or important allies over her own. For these reasons, we wish to underscore how challenging it can be to gauge the relative progressivism of the executive branch or to track its interest in advancing progressive aims over time. All of these complexities likewise should, in expectation, shape politics at the state and local level.

It is no easier to conclude with certainty that political outcomes would have changed absent judicial review or to predict with confidence whether those changes would have been for good or ill. And yet, progressive critics of judicial review tend to assume that progressive legislation blocked by judicial review would have been passed and implemented in much the same form in a world without it. But we think it a mistake to assume that in the absence of judicial review little else about our politics would be different. Indeed, scholars have argued that judicial review can make lawmaking in some policy areas easier by clearing the political agenda of "controversial policies that political elites approve of but cannot publicly champion and to do so in such a way that these elites are not held accountable by the general public."[55] In situations when left-affiliated politicians face a crowded agenda marked by divisive but politically salient policy goals, judicial review can liberate them to focus on pursuing policies that are both popular and progressive. Thus, for instance, one effect of *Roe* was to take abortion off the legislative agenda and thereby help congressional Democrats maintain their alliance between "liberals who were attracted to new understandings of gender roles and sexual practices[] and traditionalists who were repelled by such attitudes."[56] In consequence, the less Democrats fought over abortion politics in Congress, the more they could focus on other issues, including economic ones, that advanced other parts of the progressive agenda.

Finally, there is the problem of historical anachronism. Today's progressive coalition did not exist in precisely the same form in prior historical eras. Previous generations of progressives espoused positions that are antithetical to contemporary progressivism, including belief in the superiority of members of the "Anglo–Saxon race" and the value of forced sterilization.[57] Likewise, when they advocated for the rights of one disfavored minority, they often opposed extending those rights to others. Thus, while we acknowledge that the Supreme Court has not been a consistent bulwark against anti-progressive legislative initiatives, we think it doubtful that American politics unfettered by judicial review would have generated only those outcomes that contemporary progressives support and none that they oppose. Instead, we think it incumbent on judicial review's progressive critics to explain why, on balance, majoritarian politics would have tilted in a progressive direction and to demonstrate that claim empirically.

It is with these challenges in mind that we embark on our tour of the Reconstruction, *Lochner*, *Brown*, and *Roe* eras.

---

55. *Cf.* Graber, *supra* note 13, at 43.

56. *Id.* at 55.

57. *See* BERNSTEIN, *supra* note 24, at 96 (identifying broad public support for eugenics at the turn of the twentieth century).

II. RECONSTRUCTION

For progressive critics of judicial review, Reconstruction looms large. In this first and most promising effort to reconstitute the United States as a multiracial democracy, Congress gaveth and the Court tooketh away. As Bowie recounts, "Congress passed laws to bring lynch mobs to justice, to protect the right of black men to vote, and even to ban racial discrimination in public places like hotels and train cars."[58] The Court then destroyed all of that racial progress, systematically "'depriv[ing] this enforcement legislation of nearly all its strength.'"[59]

It should be no surprise that judicial review's progressive critics put such emphasis on Reconstruction. This is the historical era where they are on strongest ground. We acknowledge that the on-the-ground protections afforded freedmen[60] by legislative and executive efforts to enforce the Reconstruction amendments may well have had a better chance of survival had the Court not meddled in Congress's affairs. But it is hard to disentangle the damage done by the Court to Reconstruction from the effects of time and a rapidly changing political and economic climate. In the years between the passage of major enforcement legislation in the late 1860s and early 1870s and the Court's review of that legislation in the mid-1870s and early 1880s, legislative and executive support for federal protection of freedmen softened considerably.

With this softening as historical context, we ask: how would Reconstruction have turned out had progressive critics had their way and judicial review played no role in Reconstruction? We find strong evidence that without judicial review Congress and the White House would not have continued to prioritize the rights of the formerly enslaved. To make our case, we begin with an overview of politics in the elected branches during the 1870s and 1880s. Our aim is to evaluate the counterfactual that judicial review's progressive critics seek to conjure. Outside the judiciary and absent judicial review: would there have been vigorous appetite for the continued and aggressive deployment of significant federal resources to bolster the political and material fortunes of formerly enslaved people? We argue the answer is no. While historians have rejected the claim that freedmen were abandoned by the federal government during this time, politics beginning in the early 1870s nevertheless witnessed a broad shift away from expanding and protecting their rights.

After sketching out a Reconstruction unaffected by the Supreme Court's ostensible meddling, we turn to the historical record to examine judicial review's actual impact. Even if Congress and the President were unlikely to vigorously protect the rights of Black people, did the Court's actual interventions nevertheless contribute durably and independently to the long-term failure of Reconstruction? Here, we focus on two critical Supreme Court decisions: *Cruikshank* and the *Civil Rights Cases*. While recognizing that both decisions set back the cause of racial

---

58. Written Statement of Nikolas Bowie, *supra* note 1, at 6.

59. *Id.*

60. Consistent with accepted usage, we use the term "freedmen," rather than more gender-neutral language. *See, e.g.*, *The American Freedmen's Aid Commission*, LIBR. OF CONG., https://www.loc.gov/resource/rbaapc.01600/?sp=1&st=image [https://perma.cc/YE4W-855N] (last visited Nov. 15, 2024).

equality in identifiable ways, we argue that progressive critics overstate the judiciary's impact. Indeed, it would be particularly surprising if the world were otherwise. Because the justices were, by disposition and profession, committed to the same animating principles as their counterparts elsewhere in the federal government, prevailing views about how robustly to protect the rights of freedmen in the former Confederacy were reflected in the Court's rulings.

A. The Progressive Critique of the Reconstruction-Era Court

Progressive critics of judicial review target two pairs of specific cases from the Reconstruction era. The primary object of their opprobrium is the *Civil Rights Cases*. In the progressive critique, this set of consolidated rulings handed down in 1883 "gutted" the efforts of the legislative and executive branches to establish racial equality as a non-negotiable principle of political and social life in the United States.[61] The proposed mechanism is the so-called state action doctrine. As the Court explained, the prohibitions set forth in the Fourteenth Amendment did not apply to "individual invasion[s] of individual rights," but rather to "[s]tate action of a particular character."[62] For that reason, the Court held that the Reconstruction amendments to the Constitution did not provide an appropriate constitutional foundation for the Civil Rights Act of 1875, which barred racial discrimination in inns, public conveyances, and theaters.

For progressive critics, the *Civil Rights Cases* represent an instance where the Court squelched legislative efforts to promote the cause of racial equality.[63] Had the Court not undermined the political program of the Republican-dominated Congress that passed the Civil Rights Act of 1875, Black citizens would have benefited from the law's protections against discrimination in public accommodations—rights guaranteed only a century later by the Civil Rights Act of 1964. The Court's deleterious intervention, they argue, "helped to institutionalize African-American subordination in new guise."[64] It was, as Frederick Douglass remarked at the time, "'a heavy calamity' that 'construed the Constitution in defiant disregard of what was intended' by Congress."[65]

Progressive critics also lambast an earlier decision, *Cruikshank*. They suggest it served not only as the foundation for the Court's holding in the *Civil Rights Cases*, but also effectively licensed white militia activity throughout the former Confederacy that resulted in the destruction of multi-racial, Republican-led state governments.[66] At issue in *Cruikshank* was "the bloodiest single instance of

61. Written Statement of Nikolas Bowie, *supra* note 1, at 8.

62. Civil Rights Cases, 109 U.S. 3, 10–11 (1883).

63. Doerfler & Moyn, *supra* note 34, at 791 (arguing that the *Civil Rights Cases* "undermin[ed] federal majoritarian efforts toward racial equality in the form of guarantees of equal treatment in public accommodations and public transportation").

64. Written Statement of Samuel Moyn, *supra* note 35, at 6.

65. As quoted in ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 155 (2019).

66. *See infra* notes 72–74 and accompanying text.

racial carnage in the Reconstruction era"—the so-called Colfax massacre.[67] In the aftermath of the 1872 elections, members of white militia groups battled supporters of the Republican claimant to the Louisiana governorship in the town of Colfax, located in the center of the state.[68] After a lengthy fight, the militia defeated the town's Black defenders, killing dozens at minimum, and perhaps hundreds, including many who had formally surrendered.[69]

Nine militia members were brought to trial, and three were convicted for violating sections 6 and 7 of the Enforcement Act of 1870, which prohibited conspiracies to do violence "with intent to prevent or hinder [a citizen's] free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States."[70] The three defendants successfully appealed their convictions, first to the federal circuit court and ultimately to the Supreme Court, where it was affirmed that the massacre of dozens of Black citizens would not be punishable in federal court.[71]

Progressive critics have assailed *Cruikshank* on two grounds. First, they argue, the case laid the groundwork for the state action doctrine later ratified in the *Civil Rights Cases*. As one commentator puts it: "*Cruikshank* may well have been the single most important civil rights ruling ever issued by the United States Supreme Court"—the first case to hold explicitly that the Fourteenth Amendment "protect[ed] only against specifically identified state violations, and not directly against private action."[72] Second, they argue that the Court's intervention in *Cruikshank* had the practical effect of precluding the executive branch from enforcing existing civil rights legislation. The Court, they suggest, "disrupted the federal enforcement effort and unleashed a coordinated campaign of paramilitary terrorism," ultimately ensuring that white supremacists would retake political power across the former Confederacy.[73] All of this, they contend, is particularly galling because the Court ignored the racial animus that motivated the murders at issue in

---

67. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 437 (1988); *see also* James Gray Pope, *Snubbed Landmark: Why* United States v. Cruikshank *(1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV 385, 387–88 (2014).

68. Pope, *supra* note 67, at 387.

69. FONER, *supra* note 67, at 437; ROBERT KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866–1876, at 175 (1985); Pope, *supra* note 67, at 387. For book-length scholarly treatments of the Colfax Massacre, see generally LEEANNA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION (2008); CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION (2008).

70. Enforcement Act of 1870, ch. 114, §6, 16 Stat. 140 (1870). Violation was punishable by a term of imprisonment of up to ten years and a fine of up to $5,000. *Id.*

71. United States v. Cruikshank, 92 U.S. 542, 559 (1875).

72. Pope, *supra* note 67, at 388; *see also* Doerfler & Moyn, *supra* note 34, at 791 n.100 (suggesting that *Cruikshank* stands for the proposition that the "reach of the Fourteenth Amendment" is limited to "'state action,' i.e., violations traceable to government action, not covering historic patterns of state inaction, let alone private discriminatory conduct"); *see* KACZOROWSKI, *supra* note 69, at xiii; FONER, *supra* note 67, at 530–31.

73. Pope, *supra* note 67, at 389.

the case, holding that the indictment charging them with violating the 1870 Enforcement Act did not sufficiently allege that the intent behind the massacre was to intimidate Black citizens of the former Confederacy.[74]

B. Reconstruction-Era Politics Outside the Court

Progressive critics thus argue that efforts to promote Reconstruction would have had a better chance of success absent judicial review. As this Section makes clear, however, the elected branches during the 1870s and 1880s were not obviously more committed to the cause of racial equality than the judiciary.

In the three decades between the end of the Civil War in 1865 and the Supreme Court's 1896 *Plessy* decision, the Republican Party—the "leviathan" that had prosecuted and won the war—dominated national politics.[75] That dominance, however, meant that factional divisions within this dominant political coalition took center stage. Conflict between "moderate" and "radical" Republicans over the nature and extent of the federal government's involvement in protecting formerly enslaved people in the former Confederacy—including the appropriateness of a continuing federal military presence in the South—became increasingly pronounced after 1868.[76] Moderates argued that "[B]lack civil rights were a distraction and a waste of resources" and that only whites were qualified to serve as the region's governing class.[77]

Support in the elected branches of government for an aggressive program of Reconstruction tended to wax and wane in relation to the relative standing of these opposing factions and their ability to find productive common ground.[78] A key factor that would ultimately give moderates the upper hand in these conflicts was the Depression (or "Panic") of 1873. This great downturn in national financial fortunes weakened the North's commitment to the GOP's racially progressive program and durably "altered the politics of rights enforcement."[79] Perhaps most directly, the Panic fueled moderate attacks on federal spending to protect the lives

---

74. *Id.* at 409–11.

75. *See, e.g.*, RICHARD FRANKLIN BENSEL, YANKEE LEVIATHAN: THE ORIGINS OF CENTRAL STATE AUTHORITY IN AMERICA, 1859–1877, at 392–93 (1991).

76. *See, e.g.*, CHRISTOPHER W. SCHMIDT, CIVIL RIGHTS IN AMERICA: A HISTORY 19 (2020) ("The Republicans who controlled Congress divided into two factions: the Radicals, who sought to remake the South through a dramatic expansion of national authority over the states; and the moderates, who hoped for a quicker and more conciliatory approach to Reconstruction.").

77. Jed Handlesman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 142 (2014). That year has particular significance for intra-Republican conflict, as it witnessed the death of radical Republican, and de facto House majority leader, Pennsylvania's Thaddeus Stevens. *See* FONER, *supra* note 67, at 344 (noting that the death of Stevens symbolized the passing of the "Radical generation").

78. *See* JEFFERY A. JENKINS & JUSTIN PECK, CONGRESS AND THE FIRST CIVIL RIGHTS ERA, 1861–1918, at 170–71 (2021).

79. PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 8 (2007); JENKINS & PECK, *supra* note 78, at 117, 173–74; XI WANG, THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE AND NORTHERN REPUBLICANS, 1860–1910, at 110–11 (2012).

and rights of formerly enslaved people in the South. After the Panic, their hesitancy to dedicate federal resources to the cause of racial equality could be expressed in economic terms, and their warnings that Republicans would be punished at the polls for ignoring the interests of white northern voters became substantially more credible.[80] As leading Reconstruction-era scholar Pamela Brandwein summarizes, "[C]ivil rights enforcement became a political liability for the Republican Party in the context of the Depression, when Northern whites did not want scarce economic resources sent to the South."[81]

Economics shaped the politics of race for Republican officeholders, and particularly for moderates, in a second way. The party, as political scientist Richard Bensel has carefully traced, was committed to a program of northern industrialization.[82] This required a robust set of tariff protections to insulate nascent American industrial production from international competition and to fund generous veterans' benefits designed to reward northern voters, often Union Army veterans, for continuing to favor the party at the polls.[83] In turn, high tariffs drove large-scale, inter-regional capital transfers. Agricultural commodities like cotton and sugar grown in the South could be sold on the international market, with the profits spent on northern industry.[84] In this "zero-sum game in which one region's loss was another region's gain," Republicans' insistence on promoting northern industry demanded a concomitant resolve to do what was necessary to restart agricultural production in the South.[85] In practical terms, particularly after 1873, this meant increased tolerance for the exploitation of southern Black labor. "[T]he erosion of the free labor ideology" that had always animated Republican politics and provided a blueprint for the early years of Reconstruction "made possible a resurgence of overt racism that undermined [the] support" necessary to continue it.[86]

Debate over a proposal to supplement the Civil Rights Act of 1866 by "secur[ing] equal rights" for Black Americans in public accommodations, schools, churches, cemeteries, and juries well illustrates congressional Republicans' waning commitment to racial equality. Initially introduced by radical Massachusetts Senator Charles Sumner in May 1870, consideration of the measure was blocked by moderates on the ground that it was a "political liability."[87] Reintroduced in 1872, the proposal again failed to win majority support.[88] Moderates, worried that northern voters viewed "Southern Republican regimes as support[ing] corruption and laziness in the ex-slave population,"[89] justified their inaction on the ground that the

---

80. *See* WANG, *supra* note 79, at 173–75.

81. Pamela Brandwein, *A Lost Jurisprudence of the Reconstruction Amendments*, 41 J. SUP. CT. HIST. 329, 331 (2016).

82. RICHARD FRANKLIN BENSEL, THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877–1900, at 2 (2000).

83. *Id.* at 460, 502.

84. *Id.* at 463–64.

85. *Id.* at 464.

86. FONER, *supra* note 67, at 525.

87. *Id.* at 504–05.

88. JENKINS & PECK, *supra* note 78, at 182–85.

89. HEATHER COX RICHARDSON, THE DEATH OF RECONSTRUCTION: RACE, LABOR, AND POLITICS IN THE POST-CIVIL WAR NORTH, 1865–1901, at 128 (2004).

Fourteenth Amendment granted no new "legislative authority or legislative power" to Congress.[90]

When the bill was reintroduced a third time in late 1873, even radical Republicans began to question "the disposition of Congress to extend its jurisdiction over questions and concerns heretofore acknowledged by all parties, to pertain, rightfully and exclusively to the states."[91] After Sumner's sudden death, the Republican House again voted down a version of Sumner's proposal in the spring of 1874 on the ground that it would unduly advantage the Democrats in the upcoming elections.[92] Shorn of its education-related provisions, a weakened version of the bill ultimately passed in a lame-duck session of Congress as the Civil Rights Act of 1875.[93] But it was uniformly understood to be a "symbolic measure to shore up party support among African Americans without offending white voters with vigorous enforcement."[94] As the great Reconstruction historian Eric Foner observes: the bill "left the initiative for enforcement primarily with black litigants suing for their rights in the already overburdened federal courts."[95] With "[o]nly a handful of Blacks c[oming] forward to challenge acts of discrimination . . . well before the Supreme Court declared it unconstitutional in 1883, the law had become a dead letter."[96]

Economic anxieties and a consequently changing political climate undermined enthusiasm for robust enforcement of freedmen's rights in the executive branch as well.[97] Under President Ulysses Grant, the executive branch deployed considerable resources to combat southern white paramilitary activity and preserve Black political gains.[98] As one biographer writes, Grant had "resolved to mount a comprehensive campaign against the [Ku Klux] Klan" by early 1871.[99] But scholars also agree that particularly in his second term the President retreated in important

---

90. JENKINS & PECK, *supra* note 78, at 146.

91. RICHARDSON, *supra* note 89, at 135.

92. BRANDWEIN, *supra* note 79, at 67–68.

93. Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115, 125 (1994) (observing that the bill's sponsors "watered down its penalty provisions").

94. STUART CHINN, RECALIBRATING REFORM: THE LIMITS OF POLITICAL CHANGE 77 (2014) (arguing that the Act's "framers did not expect—and some did not even want—the act to be fully enforced").

95. FONER, *supra* note 67, at 556.

96. *Id.*; *see also* H.W. BRANDS, THE MAN WHO SAVED THE UNION: ULYSSES GRANT IN WAR AND PEACE 553 (2012) (observing that the Civil Rights Act required litigants to bring their claims in federal court where the "penalties were modest").

97. *See* WANG, *supra* note 79, at 110–11; BRANDWEIN, *supra* note 79, at 9 (arguing that it is no "coincidence . . . that the year 1873 marked the high point in the number of federal voting rights prosecutions brought in the South under the Enforcement Acts of 1870 and 1871" with the low point coming in 1878).

98. *See, e.g.*, Robert J. Kaczorowski, *Federal Enforcement of Civil Rights During the First Reconstruction*, 23 FORDHAM URB. L.J. 155, 158–59 (1995).

99. RONALD C. WHITE, AMERICAN ULYSSES: A LIFE OF ULYSSES S. GRANT 521 (2016).

ways from his commitment to using federal authority—including military might—to pursue Reconstruction.[100]

Wounded during his reelection campaign by a challenge led by his party's racial conservatives—one that tolled the bell for "the death of Radicalism as both a political movement and a coherent ideology"[101]—and aware of the changing national mood, Grant's second inaugural address declared that his campaign against the Klan had ended.[102] "The states lately at war with the General Government are now happily rehabilitated," he announced.[103] Even on the campaign trail in 1872, he "did not appear to support civil rights legislation, halfheartedly declaring . . . only that he favored 'the exercise of those rights to which every citizen should be justly entitled.'"[104] By 1874, even as he endorsed the use of federal troops to quell political violence in Louisiana, Grant was questioning the use of federal resources to prop up state-level Republican parties, calling them "dead weight."[105] He refused to intervene in Arkansas's disputed gubernatorial election, ensuring the victory of a unionist slaveholder whose election "seal[ed] the doom of Arkansas Reconstruction."[106] And in 1875, Grant elected not to use federal troops to quell a coordinated paramilitary campaign to regain power in Mississippi, "calculat[ing] quite explicitly the tradeoff between preserving Republican rule [in the state] and risking the alienation of Ohio voters who were electing a governor that fall and might desert to the Democratic Party in protest."[107] At times, the Grant Administration appeared to skeptical observers to be overtly sympathetic to former Confederates, with many radical Republicans complaining that "[f]ederal patronage flowed freely to 'respectable' Southern Democrats."[108] What emerges from the historical record is the conclusion that independent of judicial review the commitment of the executive branch to securing racial equality through muscular enforcement was, at a minimum, wavering.

The political climate of the mid-1870s was characterized by real vulnerabilities for Republican officeholders, seeding doubts that the party could continue to prioritize the needs of southern Blacks at the perceived expense of northern whites for long. In the 1874 midterm elections, voters returned the House

---

100. WANG, *supra* note 79, at 112–13 (commenting that Grant "was never a faithful preacher for racial equality and hardly an ardent fighter for black rights").

101. FONER, *supra* note 67, at 510. So-called Liberal Republicans nominated New York's Horace Greeley in a separate convention; Democrats then agreed to run Greeley as their candidate, although the two organizations never merged. *See id.* at 502, 505–09.

102. FERGUS M. BORDEWICH, KLAN WAR: ULYSSES S. GRANT AND THE BATTLE TO SAVE RECONSTRUCTION 341 (2023).

103. *Id.*

104. RICHARDSON, *supra* note 89, at 128.

105. *Id.* at 140.

106. FONER, *supra* note 67, at 528; *see also* BORDEWICH, *supra* note 102, at 336–37 (noting that "Grant regarded as lost causes the Republican governors who clung precariously to power in Arkansas and Texas").

107. Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1906–07 (1995).

108. Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511, 516 (2002).

to Democratic control for the first time since 1856, with Democratic candidates prevailing in gubernatorial elections across the North.[109] Republicans' support for the legislation that became the 1875 Civil Rights Act was a "significant issue," strongly suggesting that the party's representatives had "ventured out ahead of its constituents" on civil rights.[110] Restored to power, Democrats gave Southerners half of the committee chairmanships, a redoubt from which they sought to "block further racial progress."[111]

In turn, the return of two-party contestation created a new political reality for the Republican Party. Rights-expansion was no longer on the table. With momentum to deploy the power conferred by the Reconstruction amendments stalled out, in the lame-duck session that followed the Republicans' 1874 shellacking, Congress failed to enact additional enforcement legislation aimed at voter-intimidation conspiracies.[112] Nor did it pass an appropriations bill guaranteeing two years of funding for the army.[113] In contrast, Republicans easily repealed a tariff reduction bill and reauthorized the redemption in gold of paper money.[114] Their new concern was rights-preservation. With Democrats hostile to the formerly enslaved, national Republicans had to worry that their opponents' electoral success would yield political and constitutional regression to the pre-Civil War order.[115] This was no idle anxiety. By the end of the 1870s, Democrats would use their hold on both chambers of Congress to repeal the Republican-sponsored Enforcement Acts—votes nullified in practice only by the veto pen of President Rutherford Hayes.[116]

Taken together, these developments suggest that the full promise of Reconstruction was unlikely to be achieved even in a world without judicial review. The Civil Rights Act of 1875 was, as Michael McConnell observes, the "last legislative achievement of Reconstruction."[117] In the nearly eight-year gap between the Court's decision in *Cruikshank* and its ruling in the *Civil Rights Cases*, Republicans in Congress and the White House remained reluctant to use federal power to defend the rights of formerly enslaved people in the former Confederacy.[118] While progressive critics of judicial review implicitly assume that absent judicial

---

109. DAVID A. BATEMAN ET AL., SOUTHERN NATION: CONGRESS AND WHITE SUPREMACY AFTER RECONSTRUCTION 82 (2018); FONER, *supra* note 67, at 523.

110. Klarman, *supra* note 107, at 1924.

111. RON CHERNOW, GRANT 784 (2017).

112. FONER, *supra* note 67, at 553–56.

113. *Id.*

114. *Id.* at 557; RICHARD WHITE, THE REPUBLIC FOR WHICH IT STANDS: THE UNITED STATES DURING RECONSTRUCTION AND THE GILDED AGE, 1865–1896, at 325 (2017).

115. *See* McConnell, *supra* note 93, at 124 ("The Democrats' broader objective was to neutralize the Fourteenth Amendment: to restore white Democratic government in the southern states and with it, a legal subordination of the African race."); WHITE, *supra* note 114, at 362 ("Democrats were a white man's party and from the end of the Civil War to the end of the century, no Democratic congressman or senator voted for a piece of civil rights legislation.").

116. BORIS HEERSINK & JEFFERY A. JENKINS, REPUBLICAN PARTY POLITICS AND THE AMERICAN SOUTH, 1865–1968, at 108–09 (2020).

117. McConnell, *supra* note 93, at 125.

118. *Id.*

review legislative and executive actors would have enforced civil rights laws as written, we think the evidence points the other way. Had the Court not intervened, Republican majorities in Congress were unlikely to insist on robust enforcement. Moreover, had the Civil Rights Act of 1875 endured long enough for the Democrats to secure unified control of government (as they would in 1892), it seems quite likely that the law would have been repealed, along with other civil rights protections. For these reasons, we think progressive critics have overestimated the progressive potential of Reconstruction carried out by the legislative and executive branches in a world without judicial review.

C. The Court's Impact

Beyond suggesting that a world without judicial review would have furthered the cause of racial progressivism during Reconstruction, progressive critics have also argued that the practical effect of *Cruikshank* and the *Civil Rights Cases* was to durably and independently contribute to Reconstruction's unraveling. Progressives' condemnation of both cases is understandable, for both decisions were detrimental to the cause of racial equality. "No feat of revisionism," one scholar has written, "can turn the Waite Court of the 1870s and 1880s into a firm and unflinching defender of black peoples' rights."[119]

But how detrimental? As we argue, progressive critics err in ascribing too much influence to the Court's rulings. Contrary to the progressive critique, *Cruikshank* did not durably foreclose federal enforcement of congressional civil rights statutes. Rather, in keeping with Republicans' broader goal of building up the southern wing of their party with Black voters as the base, executive branch officials followed the doctrinal pathway set forth by *Cruikshank* in continuing to prosecute violations of federal election law well into the 1880s.[120] In contrast, we find limited evidence that legislative or executive actors were likely to back meaningful enforcement of the civil rights legislation the *Civil Rights Cases* ruling is alleged to have gutted, making it difficult to assess the magnitude of the *Civil Rights Cases*' effect on Reconstruction-era racial justice.[121] Accordingly, we think there is significant doubt that either decision, however lamentable, independently contributed to Reconstruction's demise.

1. Cruikshank

We begin with the claim that the Court's intervention impeded federal prosecutions of white paramilitary violence designed principally to frustrate the exercise of Black citizens' suffrage rights. The case against *Cruikshank* on this score rests principally on a correlation in timing, with enforcement cases and convictions declining in the years between 1873 and 1876—the very same time that the case was under consideration by the federal judiciary.[122] The proposed mechanism is legal

---

119. Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39, 40 (1978).

120. *See infra* Subsection II.C.1.

121. *See infra* Subsection II.C.2.

122. *See* Pope, *supra* note 67, at 434. Enforcement cases "resolved in the South dropped from 1148 in 1873 to 890 in 1874, and thence to 216 and 108 in 1875 and 1876." *Id.* Convictions similarly "fell from 466 (40%) in 1873 to 97 (11%) in 1874, and thence to 16 (7%) and 2 (2%) in 1875 and 1876." *Id.*

uncertainty, as federal officials paused prosecutions under the Enforcement Act between the issuing of Justice Joseph Bradley's circuit court opinion in 1874 and the Supreme Court's two years later.[123] Although enforcement picked up again after the Supreme Court clarified a doctrinal path forward,[124] the pause may have sufficiently advantaged white paramilitaries and thereby made later enforcement efforts more difficult.

Here, however, it is difficult to say that *Cruikshank* directly contributed to the enforcement pause. During this same period, key actors in the executive branch were questioning the political wisdom of continuing to vigorously enforce Reconstruction-era statutes. As early as 1873, Grant responded favorably to lobbying by southern leaders, agreeing to slow down enforcement in the hopes that doing so would yield more compliance with the rule of law among southern whites.[125] Two years later, Grant proposed to Attorney General Edwards Pierrepont a theory of overall voter fatigue, observing in the fall of 1875 that "[t]he whole public are tired out with these annual, autumnal outbreaks [of violence] in the South."[126] Indeed, scholars have suggested that we might treat the White House's "anemic" arguments before the Supreme Court in *Cruikshank* as evidence that the Grant Administration "welcomed a Supreme Court decision that precluded the civil rights enforcement efforts that had become so politically debilitating."[127] Far better to "withdraw gracefully from an undesirable policy under the semblance of a judicial mandate."[128]

Thus, it is no coincidence that the unanimous decision warranted only brief mention in the two papers with the largest circulation, the *New York Times* and the *Chicago Tribune*, as resting on legal technicalities.[129] Other Republican-affiliated press outlets, including the radical *Philadelphia Daily Evening Bulletin*, applauded the Court's embrace of a limited federal supervisory power under the Constitution. Commentators emphasized that the "right of States to govern themselves . . . ought to be dear to [the people], for when they abandon it they will have utterly forsaken the system of government established under the Federal Constitution."[130] The Republican press expressed far more concern over increases in federal spending and rising tax rates attributable to continuing enforcement-related expenditures,[131] while others worried that freedmen were becoming too dependent on government aid.[132]

Independent of *Cruikshank*, enforcement was explicitly not a top priority for Grant's successor Rutherford Hayes—a self-avowed moderate Republican, who

---

123. *Id.* at 414. Unusually for a Supreme Court case, the circuit court opinion authored by Justice Bradley is generally thought to be more important and influential than the one ultimately authored by Chief Justice Morrison Waite, which largely tracked Bradley's doctrinal moves. BRANDWEIN, *supra* note 79, at 93.

124. *See* Pope, *supra* note 67, at 438.

125. Kaczorowski, *supra* note 98, at 182–83.

126. BORDEWICH, *supra* note 102, at 359.

127. KACZOROWSKI, *supra* note 69, at 169.

128. *Id.*

129. BRANDWEIN, *supra* note 79, at 126–27.

130. RICHARDSON, *supra* note 89, at 135.

131. *See id.* at 136.

132. *See id.* at 137.

organized his campaign for the presidency on a "strategy of 'conciliation'" with white Southerners.[133] Under his aegis, Republicans would largely abandon federal civil rights enforcement and instead attempt to shore up the southern wing of the party by appealing to "the Whiggish elements in the white South—principally industrialists and businessmen, but also small farmers."[134] The Hayes Administration's posture on Reconstruction gives little reason to think that robust enforcement would have continued for long at pre-Depression levels.[135]

In sum, there is no indication that most Republican officeholders in the mid-1870s (let alone voters) would have supported more robust enforcement of the Reconstruction amendments than what *Cruikshank* ratified.[136] Their doubts were magnified by the economic woes that followed the Depression, as *Cruikshank* wended its way through the court system. By 1874, one historian comments, "[M]ost Republicans were ready to cut the freedpeople's ties to the government in order to force African-Americans to fall back on their own resources."[137]

Critics also tend to give *Cruikshank* short shrift as a doctrinal matter, overlooking the Court's embrace of suffrage specifically as a core constitutional right.[138] This makes it difficult to sustain the claim that eliminating judicial review would necessarily have strengthened efforts to promote racial equality. Indeed, forging a new doctrinal pathway to justify federal enforcement of Reconstruction Era voting-rights law, *Cruikshank* ratified the federal government's role in supervising elections and ensuring, to the extent possible, full participation by Blacks and whites alike. The state, it announced, could help freedmen chart their political destiny through self-determination. As Justice Bradley explained in his circuit court opinion, the Fifteenth Amendment conferred "a positive right which did not exist before"—namely, the "right not to be excluded from voting by reason of race, color, or previous condition of servitude."[139] Accordingly, he concluded, Congress "ha[d] the power to secure that right not only as against the unfriendly operation of state laws, but against outrage, violence, and combinations on the part of individuals, irrespective of the state law."[140]

In so doing, Bradley carved out a Fifteenth Amendment exception to the state action (or "state neglect") rule he had announced for the Fourteenth

---

133. JENKINS & PECK, *supra* note 78, at 163.

134. *Id.* Consistent with these ideas, Hayes nominated Democrats to key cabinet positions, as well as Liberal Republican leader Carl Schurz to serve as Secretary of the Interior. *Id.*

135. *See* RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 66–68 (2004).

136. Although the Court formally dismissed the indictment in *Cruikshank*, the ruling made it possible for the federal government to try individuals who interfered with the exercise of the right to vote so long as any indictments plainly alleged that racial animus was the motivation for the interference. *See* BRANDWEIN, *supra* note 79, at 122.

137. RICHARDSON, *supra* note 89, at 140.

138. *See* BRANDWEIN, *supra* note 79, at 98–101.

139. United States v. Cruikshank, 25 F. Cas. 707, 712 (C.C.D. La. 1874) (No. 14, 897).

140. *Id.* at 713.

Amendment.[141] The Fifteenth Amendment in no uncertain terms applied to conduct by private individuals that had the effect of limiting Black suffrage. Given the way the indictments in *Cruikshank* itself were written, Bradley held they were invalid, as they did not specifically allege a racial motive for the violence.[142] But this was an easy hurdle to overcome: subsequent prosecutions simply needed to use the right magic words.

This doctrine was elaborated in several subsequent cases. In *Ex parte Yarbrough*, for instance, the Court upheld the conviction of a Klan mob for brutally beating a Black voter on the ground that it deprived him of his constitutional rights under the Fifteenth Amendment.[143] Decided in 1884, *Yarbrough* is thought to have "*widened* the scope of the Fifteenth Amendment" by taking what Bradley in *Cruikshank* had read as a negative right (the right not to have one's vote negated on account of race) and transforming it, via a "bold, highly nationalist approach," into an affirmative right to vote.[144]

Cruikshank thus proved consequential in a positive way when federal enforcement rebounded under Hayes's successors, James Garfield and Chester Arthur.[145] Relying on the legal theories developed in *Cruikshank*, the Department of Justice again sought "to br[ing] cases that resulted in rights victories, putting election officials and Klansmen in jail."[146] A renewed interested in civil rights enforcement represented a deliberate reaction to the perceived failures of Hayes's conciliatory approach, which many Republicans believed "at least partially responsible for the aggressive comeback of the Democratic party" that the disastrous 1874 midterms had inaugurated.[147] Although enforcement between 1881 and 1885 did not rebound to its 1873 high, it well exceeded Hayes-era lows.[148] A reasonable inference from these data is that changing views within the executive branch about the wisdom of enforcement, rather than the Court's rulings, represent the primary variable driving shifts in enforcement.

2. Civil Rights Cases

Progressive critics argue that the *Civil Rights Cases* represented a dramatic shift away from a widespread consensus codified in the Civil Rights Act of 1875. Not so. We can say with confidence that the Court's decision hewed closely to mainstream currents in Republican thinking. In keeping with how both moderate and radical Republicans understood rights protections at the time of the decision, the

---

141. On the difference between state action and state neglect, see BRANDWEIN, *supra* note 79, at 12–14. Bradley's reasoning for treating the Fifteenth Amendment differently was grounded in the idea that it created a new right, unlike the Fourteenth Amendment, which simply constitutionalized existing ones. *See id.* at 15 (distinguishing between "secured" and "created" rights).

142. *Id.* at 105.

143. 110 U.S. 651, 657 (1884).

144. VALELLY, *supra* note 135, at 69–70.

145. *See* WANG, *supra* note 79, at 300–01 (documenting enforcement activity from 1870 to 1894).

146. BRANDWEIN, *supra* note 79, at 88.

147. WANG, *supra* note 79, at 181.

148. *See id.* at 300–01.

Court identified a distinction between so-called civil and social rights. On the civil side were those rights that enabled full participation in a laissez-faire economy: "the right to contract, to purchase, sell, inherit, hold and dispose of property, to sue in the courts, and to have redress for injuries."[149] On the social side were a looser category of rights associated with broader equality in public interactions, including public accommodations, education, and intermarriage.[150] This second, and considerably more controversial, category often functioned as a pejorative category of exclusion, typically connoting "forced association for whites" with Blacks and even "interracial sexual intimacy."[151]

Even by the early 1870s, this dichotomy was commonly articulated by Republican elites. Critiquing the measure that would become the 1875 Civil Rights Act on the Senate floor in 1872, Illinois's Lyman Trumbull, author of the 1866 Civil Rights Act guaranteeing civil rights to freedmen, decried his colleagues' efforts to "force the colored people and white people into mutual contact."[152] More instrumentally, fear that northern whites might abandon the Republican Party if federal protection for freedmen grew to encompass the social realm prompted many influential Republicans to declare it "a great mistake to seek to impose new social customs on a people by act of Congress."[153] As one former abolitionist conceded: "We never contemplated when we took the freed blacks under the protection of the North that the work was to be for an unlimited time."[154] In sum, as legal historian Christopher Schmidt comments, "[i]nstead of attempting to undermine federal oversight over civil rights by emphasizing the expansive qualities of the category," opponents of expanding civil rights in general, and of the 1875 Civil Rights Act in particular, "insisted that the category be understood as narrowly as possible."[155]

Thus, in striking down section 1 of the Civil Rights Act of 1875 (providing for racial equality in public accommodations) and section 2 of the Act (imposing

---

149. BRANDWEIN, *supra* note 79, at 71; *see also* SCHMIDT, *supra* note 76, at 19 ("Republican lawmakers generally agreed that the fundamental rights of a free republic included those that would allow black southerners to engage in economic relations as free laborers. This required the protection of rights to contract, to buy and sell property, to sue, and to testify in court; it also required basic protection of life and property.").

150. BRANDWEIN, *supra* note 79, at 72; *see also* SCHMIDT, *supra* note 76, at 33 (characterizing social rights as a "category that implicated an amorphous conception of social interactions that ran the gamut from personal relationships to private social clubs to public accommodations—lodging, restaurants, theaters, common carriers, and the like—to public schools").

151. BRANDWEIN, *supra* note 79, at 72.

152. JENKINS & PECK, *supra* note 78, at 147.

153. RICHARDSON, *supra* note 89, at 144.

154. Benedict, *supra* note 119, at 51.

155. SCHMIDT, *supra* note 76, at 38. Indeed, given the difficulties it encountered in both chambers of Congress, many historians attribute the Act's ultimate passage to two contingent events: the death of the measure's chief sponsor, Massachusetts Senator Charles Sumner, whom many of his colleagues sought to honor, and the Democrats' 1874 sweeping midterm victory, which gave urgency to the project of "consolidat[ing] Reconstruction" before the opposition gained hold of the machinery of government. *See* RICHARDSON, *supra* note 89, at 141–43.

penalties on violators) as unconstitutional,[156] the Court simply ratified how many Republicans in Congress had come to understand the limits of federal power. As Justice Bradley's opinion for the Court now-infamously declared:

> 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.[157]

What, then, are we to make of the Court's decision and its contribution to Reconstruction's downfall? Here, we think evidence on several fronts is informative. For one, as we have already seen, with the Act's enforcement authority conferred on private litigants rather than the executive branch, the opinion had little practical effect.[158] In the eight years between its passage and the Court's *Civil Rights* decision, the Act was "chronically underenforced."[159] It was, one historian writes, "a kind of legislative recessional, a stirring but ultimately empty dirge for the cause of civil rights."[160] In the aftermath of the decision, several states passed their own versions of a public-accommodations bill, but these too were rarely enforced. This suggests that due to "some combination of inadequate penalties, the burden of private enforcement, the unwillingness of blacks to force themselves into places where they were not wanted, the inability of most blacks to finance lawsuits, and the fondness of courts for parsimonious [statutory] interpretations," the legal structure undergirding the 1875 Civil Rights Act was unlikely to yield a dramatic reshaping of race relations.[161]

For another, many Republican commentators processed the Court's decision as fully consistent with the growing sense that social legislation on behalf of Black citizens was an inappropriate and fruitless use of legislative power.[162] The *Chicago Tribune*, for instance, praised the ruling for "plac[ing] the negro upon the same plane of equality in the exercise of his personal privileges as that upon which the white citizen stands."[163] While the newspaper's editors lamented the persistence of racial prejudice, they argued, along with Bradley, that prejudice of that kind was necessarily "overcome without the aid of laws" by "demonstration of the negro's personal claims to equality and uniformity of association with the whites."[164] The *New York Times* similarly ratified Bradley's position, reflecting that "[l]aw has done

---

156. Civil Rights Cases, 109 U.S. 3, 9, 25–26 (1883).

157. *Id.* at 25. Bradley's private beliefs aligned with his opinion. *See, e.g.*, G. Edward White, *The Origins of Civil Rights in America*, 64 CASE W. RSRV. L. REV. 755, 803 (2014) (noting that "Bradley believed that the right to choose one's own company was what had come to be called a 'social' right rather than a civil right").

158. FONER, *supra* note 67, at 556.

159. SCHMIDT, *supra* note 76, at 40. Aside from the private-enforcement piece, the Act's steep penalty provisions served to further "dissuade aggressive enforcement." *Id.*

160. BORDEWICH, *supra* note 102, at 340.

161. Klarman, *supra* note 107, at 1908 n.66.

162. *See* RICHARDSON, *supra* note 89, at 150. As Schmidt observes, "The white press generally approved of the Court's ruling." SCHMIDT, *supra* note 76, at 45.

163. BRANDWEIN, *supra* note 79, at 175.

164. *Id.* at 172.

all that it can for the negroes, and the sooner they set about securing their future for themselves the better it will be for them and their descendants."[165]

Given the obstacle it would later prove to be for subsequent generations of civil rights reformers, it is certainly easy to wish that the Court's *Civil Rights* decision had been written differently. But it is hard to say that its practical consequences in its own time were especially significant. The Civil Rights Act of 1875 surely did not reflect a consensus within the Republican Party, a reality evidenced by the difficulty its supporters encountered in shepherding the measure through Congress. Nor did the Act's demise merit condemnation from the wider Republican public, who surely recognized that the Court's decision to strike down a widely underenforced piece of legislation would not matter much to the broader course of race relations in the 1880s.

It may well be true that the Court's ruling "imposed a heightened burden on those proponents of Reconstruction who were inclined to press their transformative goals further."[166] But it is hard to find many such proponents in the elected branches or in the Republican Party by the time the ruling was issued. A year after the *Civil Rights* decision was announced, the Republican Party's platform for the 1884 presidential election emphasized economic issues—chief among them, the protective tariff, protection of labor, and civil service reform.[167] In the last paragraph of the platform, the national party promised to its southern wing only its "cordial sympathy . . . pledg[ing] to them our most earnest efforts to promote the passage of such legislation as will secure to every citizen, of whatever race or color, the full and complete recognition, possession and exercise of all civil and political rights."[168]

D. Comparing Political and Judicial Elites

Progressive critics of judicial review may fairly decry Reconstruction Era jurisprudence for failing to realize radical Republicans' most progressive interventions. But there is sparse evidence that the judiciary was uniquely hostile to the cause of racial equality. For starters, justices in this era did not operate at a remove from partisan politics.[169] Instead, the Supreme Court, like the lower federal courts, was populated by individuals publicly allied with various factions within the Republican Party and sympathetic to Reconstruction's aims. They were active participants in the fights roiling the party over the wisdom of using federal power to aid freedmen.[170]

Consider Justice Bradley, who authored the circuit court opinion in *Cruikshank* and the opinion for the Supreme Court in the *Civil Rights Cases*. The Justice was personal friends with New Jersey Senator and radical leader Frederick

---

165. *Id.*
166. CHINN, *supra* note 94, at 106.
167. WANG, *supra* note 79, at 204.
168. *Id.* at 204–05.
169. *See, e.g.*, Gregory Elinson, *Judicial Partisanship and the* Slaughterhouse Cases*: Investigating the Relationship Between Courts and Parties*, 31 STUD. AM. POL. DEV. 24 (2017).
170. *See* FONER, *supra* note 67, at 129.

Frelinghuysen from their undergraduate days at Rutgers University.[171] Bradley was sufficiently politically connected in New Jersey, his adopted home state, that he ran for Congress in 1862 and was chosen as a presidential elector in 1868, taking an "active part" in the campaign to elect Grant.[172] On the Waite Court, Bradley was surely no exception. Justice David Davis, who later served in the U.S. Senate, was a close friend of Abraham Lincoln and worked as his campaign manager in 1860; Justice Samuel Miller was a long-shot candidate for the presidency in both 1880 and 1884; Justice William Strong represented Pennsylvania in Congress; and Justices Nathan Clifford, Stephen Field, and Noah Swayne all served in their respective state legislatures.[173]

Nor is there any indication that a majority of Republicans in Congress viewed the federal courts as antagonistic to their aims. Far from it. Following the party's disastrous showing in the 1874 midterm elections, and fearing the loss of control over other instruments of federal power, Republican lawmakers sought to bolster the authority of the federal judiciary by enacting a broad expansion of the jurisdiction of the federal courts via the 1875 Judiciary Act.[174] After all, Republicans had remade the judiciary in the decade since the end of the Civil War: by the end of Grant's second term in office in 1876, 85% of lower federal court judges were affiliated with the party, with Grant personally responsible for appointing 64%.[175] Four years later (after the end of Hayes's single term in office), the lower federal courts were 91% Republican, with Hayes alone responsible for appointing 28%.[176]

As a result, we should approach the claim that the Court deliberately sought to undermine Reconstruction via judicial review with deep skepticism.[177] In a political context where Democrats threatened to regain full control of national political institutions after the 1874 midterms and repeal the Republicans' legislative program, deference to legislative assessments of what was "appropriate" under the generous textual terms of the Reconstruction amendments was no longer tenable.[178] Rather, it became critical to use judicial review as a tool to define what the

---

171. *See, e.g.*, Charles Fairman, *Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases*, 54 HARV. L. REV. 977, 981, 1002–03 (1941). Frelinghuysen, for his part, was instrumental in pushing for Bradley's appointment to the Court. *See id.* at 1002–03; BRANDWEIN, *supra* note 79, at 91. Other friends included a member of the family that published the *Philadelphia Inquirer* and New Jersey's attorney general, later elevated to a cabinet post in the Grant Administration, both of whom also lobbied for Bradley's appointment to the Court. *See* Fairman, *supra*, at 989–96.

172. Fairman, *supra* note 171, at 988–89; *see* RONALD M. LABBÉ & JONATHAN LURIE, THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT 177 (2003).

173. *See* LABBÉ & LURIE, *supra* note 172, at 168–77.

174. EDWARD A. PURCELL, LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958, at 105 (1992).

175. Gillman, *supra* note 108, at 517.

176. *Id.*

177. *See, e.g.*, BRANDWEIN, *supra* note 79, at 11 (suggesting that the argument that the Court "abandon[ed] . . . blacks" is implausible in light of a "'regime' understanding" of its role, "which conceives of the Court as enacting the policy shift of the ruling coalition").

178. *See* Pope, *supra* note 67, at 402–03.

postbellum Constitution required and thereby immunize those requirements from legislative meddling.

Bradley again serves as an illustrative example. A mainstream and politically well-connected Republican,[179] Bradley was deeply invested in his party's prosecution of the Civil War and dismissive of the "states rights heresies of the Democratic Party."[180] And while no zealot for racial equality, he was committed to using interpretive tools to harmonize the era's constitutional innovations with its antebellum constitutional traditions—intending for *Cruikshank* to serve as a vehicle to "*preserve* federal jurisdiction over civil rights."[181]

His colleagues on the Court were little different. Like Bradley, they were selected on the basis of "their devotion to [Republican] party principles and 'soundness' on the major economic questions of the day," including their "attitude toward regulation of interstate commerce by the individual states."[182] Generally drawn from the ranks of the railroad bar,[183] the justices were seen as pivotal players in the broader Republican project of constructing an "unregulated national [economic] market."[184]

Bradley and his colleagues on the Court also shared Republicans' commitment to promoting northern industrialization. Notwithstanding the costs for formerly enslaved Black agricultural laborers in the former Confederacy, they believed that Black farm work was necessary to restart the southern export economy and generate the capital necessary to fund a complex system of protective tariffs.[185] This axiom of Republican politics provides the necessary socio-political context for Bradley's private insistence, highlighted by critics of his jurisprudence, that "the great question of the day" was "how to restore the labor of the Southern states"—that is, freedmen—"to a normal condition."[186] In the context of his time, Bradley was no reactionary. Rather, consistent with the views of many within the Party, including its powerful moderate faction, he was not willing to subordinate its economic program to the ideal of racial equality. Indeed, many Republicans in the 1870s and 1880s would abandon the party's principled commitment to free labor as applied to the former Confederacy.[187]

The fluidity of regular interactions between the judiciary and the elected branches suggests that what is distinctive about the Reconstruction period is not the relative conservatism of the courts, but instead the overlap in perspective between

---

179. BRANDWEIN, *supra* note 79, at 91.

180. *Id.* (internal quotation marks omitted). One biographical overview notes: "Bradley supported the adoption and ratification of both the thirteenth and fourteenth amendments, and with them, the inescapable conclusion that abolition of slavery had merged with saving the Union to become the twin goals of the [Civil War]." Jonathan Lurie, *Mr. Justice Bradley: A Reassessment*, 16 SETON HALL L. REV. 343, 349–50 (1986).

181. KACZOROWSKI, *supra* note 69, at 146 (emphasis added).

182. BENSEL, *supra* note 82, at 7.

183. *See* BRANDWEIN, *supra* note 79, at 26 (discussing a general historical consensus that the justices were railroad lawyers).

184. BENSEL, *supra* note 82, at 7.

185. *See id.* at 460–64.

186. Pope, *supra* note 67, at 419.

187. FONER, *supra* note 67, at 525.

the courts and other parts of the Republican-dominated establishment.[188] Judges during this era were participants in a national conversation about the meaning and limits of Reconstruction.[189] While it is surely true that they did not play the heroic role our mythology sometimes assigns to the judicial branch, it is not clear that they were, or could plausibly have been, meaningfully anti-progressive outliers either.

E. Coda: Plessy v. Ferguson

Scholars largely agree that 1890 marks the last great effort by a Republican Congress to expand federal power to protect Black suffrage. Named for Massachusetts Representative (and future Senator) Henry Cabot Lodge, a proposed federal elections bill sought to secure additional Black voting rights in the former Confederacy.[190] The bill aimed to deploy federal election supervisors and canvassers to oversee voter registration and vote counting and pass judgment on the legitimacy of vote certifications.[191] This "revolutionary" proposal, which gave federal agents final authority to decide contested elections, rested on the constitutional foundation established by the Supreme Court in the 1870s and 1880s, beginning with *Cruikshank* and continuing through *Yarbrough*.[192] While the proposal passed the House in the summer of 1890, it was soon mired in Republican factional conflict in the Senate, where issues of inflation policy, including the possibility of coining silver, took center stage.[193] In the end, the defection of "Silver Republicans" meant that proponents of the Lodge Force Bill were unable to defeat a Democratic-led filibuster.[194]

In the ensuing years, Democratic-controlled Congresses repealed most of the enforcement legislation passed by Republican lawmakers in the early 1870s.[195] And Democrats in southern states continued their efforts to undo the gains in racial equality made in the generation after the Civil War, enacting the suite of laws we now know as Jim Crow.[196] By 1910, the former Confederacy had largely disenfranchised its Black citizenry. Increasingly reliant on the growing ranks of

---

188. *Cf.* Rachel A. Shelden, *"I Shall Not Forget or Entirely Forsake Politics on the Bench": Abraham Lincoln,* Dred Scott*, and the Political Culture of the Judiciary in the 1850s*, 83 MD. L. REV. 217, 219 (2023) ("Rather than relegated to their own separate judicial sphere, judges were key players in nineteenth-century politics; they served as partisan presidential electors, advised political candidates (or were candidates themselves), and collaborated on legislation.").

189. Indeed, Bradley's private sentiments about the wisdom of the 1875 Civil Rights Act reflect increasingly prevalent views about the difference between civil and social rights. *See* Lurie, *supra* note 180, at 366–67 ("The right to expect the legal order to insure one's ability to testify as a witness was very different and far more important, in Bradley's view, than a desire on the part of blacks to sit next to whites while dining.").

190. *See* JENKINS & PECK, *supra* note 78, at 190; WANG, *supra* note 79, at 233.

191. JENKINS & PECK, *supra* note 78, at 189; WANG, *supra* note 79, at 236–37.

192. WANG, *supra* note 79, at 237–38.

193. *Id.* at 246–47, 251.

194. *Id.* at 248–49, 251.

195. *See* HEERSINK & JENKINS, *supra* note 116, at 128; JENKINS & PECK, *supra* note 78, at 212.

196. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 64–65 (2004); JENKINS & PECK, *supra* note 78, at 193.

western voters to supplement its northern base, the Republican Party had by this time divested itself of its commitment to freedmen.

For these reasons, when it was decided in 1896, *Plessy* had even less practical or theoretical consequence than the *Civil Rights Cases*. As one scholar summarizes, "Once the Republican Party abandoned [Black voters] . . . they faced a context in which both national parties effectively agreed to allow southern Democrats a free hand in structuring American race relations."[197] In the face of this overwhelming national consensus, it is hard to attribute any causal significance to the Court's endorsement of separate-but-equal in *Plessy*.[198]

III. *LOCHNER*

Lochner v. New York[199] has long contended for the dubious distinction of "most widely reviled" Supreme Court decision of the twentieth century.[200] Often seen as emblematic of an entire jurisprudential era, *Lochner* struck down a New York law regulating maximum hours for bakers as unconstitutional under the Fourteenth Amendment's Due Process Clause.[201] For contemporary progressive critics of judicial review, *Lochner* typifies the judiciary's corporate favoritism and hostility to policies of government regulation and economic redistribution.[202]

Although historians of the period increasingly agree that this picture is at the very least overdrawn,[203] the Court's progressive critics are on strong ground in arguing that *Lochner* itself pulled policy in an anti-progressive direction.[204] But in

197. VALELLY, *supra* note 135, at 139.

198. *See* KLARMAN, *supra* note 196, at 9 (arguing that the "*Plessy* Court's race decisions reflected, far more than they created, the regressive racial climate of the era").

199. 198 U.S. 45 (1905).

200. David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373, 373 (2003); *see also* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 417 (2011).

201. 198 U.S. at 64.

202. *See* Written Statement of Nikolas Bowie, *supra* note 1, at 23; *see also* Doerfler & Moyn, *supra* note 39; *see, e.g.*, Douglas NeJaime & Reva Seigel, *Answering the* Lochner *Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. REV. 1902, 1905–06 n.18 (2021) (cataloguing sources).

203. *See, e.g.*, Laura Kalman, *In Defense of Progressive Legal Historiography*, 36 LAW & HIST. REV. 1021, 1027 (2018); Gary D. Rowe, Lochner *Revisionism Revisited*, 24 LAW & SOC. INQUIRY 221, 241 (1999) (characterizing the traditional view of *Lochner* as a "relic").

204. Nevertheless, it is important to acknowledge the limitations of even this point. *Lochner* is one of very few instances during its time when the Court struck down a state or federal statute under the Constitution. As the legal scholar Charles Warren observed at the time, the Court invalidated only two state laws (out of a total of 560) that that could be described as addressing "social justice." Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 295 (1913); Keith E. Whittington, *Congress Before the* Lochner *Court*, 85 B.U. L. REV. 821, 832 (2005) ("In an average year during this period, the Court heard over five constitutional challenges to the federal government and upheld the government in more than four of them."). Nor is *Lochner* necessarily representative of the Court's jurisprudence on wage and hours law. In 1898, for instance, the *Lochner*-era Court upheld protective legislation for Utah miners in *Holden v. Hardy*, 169 U.S.

shifting their attention away from race and toward economic policy for this era in Supreme Court history only, they do not acknowledge the justices' relative progressivism on issues of race and gender. In contrast, we argue that the *Lochner* era can be viewed as part of a consistent twentieth-century throughline in the relationship between the Court and the elected branches. With elected officials at best indifferent, and often outright hostile, to the interests of Black people and women, the Court's anti-government stance proved beneficial to these two groups.

A. Race in the Supreme Court

In an era when Republicans were at best indifferent to Black Americans' exercise of political power and Democrats aggressively working to curb it, the Supreme Court was more hospitable to the claims of racial minorities than were elected officials at either the federal or local level. Given this history, we think it reasonable to conclude that the status quo would have been more conservative on matters of race absent judicial review.

There is almost no serious debate among scholars that by the early 1890s "civil rights policy largely disappeared from the [national] agenda."[205] Democrats won unified control of the national government in 1892 and promptly used their newfound authority to "destroy the national government's capacities for enforcing the Fourteenth and Fifteenth Amendments."[206] Without a federal watchdog, southern states ratified new constitutions that imposed a variety of disenfranchising mechanisms, including poll taxes and literacy tests, to suppress the Black electorate.[207] When Republicans regained control of the White House four years later, the situation did not improve. Republican candidates, eager to cultivate the support of white voters in the North and West, including millions of new European immigrants, abandoned Black voters throughout the South.[208] Their lack of interest in resurrecting civil rights was due in part to the beginnings of large-scale Black migration northward, which created an appetite for policies of discrimination and segregation in public facilities above the Mason–Dixon line.[209]

366, 395 (1898), ruling that mining was an inherently dangerous activity warranting state intervention. For the next several decades, *Holden* rather than *Lochner* "was the most influential precedent on the scope of the states' police power to protect workers." BERNSTEIN, *supra* note 24, at 21; Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive* Era, *in* YEARBOOK 1983: SUPREME COURT HISTORICAL SOCIETY 53, 62 (1983) ("*Holden* became the paradigmatic case for protective legislation."). Finally, and particularly given its closely contested nature, *Lochner* does not stand outside the bounds of reigning *Republican* orthodoxy. In permitting economic regulation in appropriate contexts, the Court married the reformist goals of Progressive Republicans with regular Republicans' broader commitment to individualism. 8 OWEN M. FISS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910, at 44 (1993) ("Only on occasion . . . did progressives ever contemplate an interference with the normal exchange relationship.").

205. JENKINS & PECK, *supra* note 78, at 213.

206. VALELLY, *supra* note 135, at 122; *see also* JENKINS & PECK, *supra* note 78, at 213–16 (describing Democratic efforts to repeal Reconstruction era legislation).

207. *See* VALELLY, *supra* note 135, at 125–27.

208. *See id.* at 134–36; BATEMAN ET AL., *supra* note 109, at 223.

209. KLARMAN, *supra* note 196, at 63.

These dynamics encouraged Republican Presidents to "devote much attention and verbiage to the cause of sectional reconciliation."[210] Theodore Roosevelt, for instance, was personally moderate on race—famously meeting with Booker T. Washington in the White House—but he demonstrated limited zeal for the cause of racial justice.[211] Instead, as President, Roosevelt sought politically expedient solutions to racial problems, at one point authorizing the dishonorable discharge of members of a decorated Black battalion who had been falsely accused of attacking the residents of a Texas town.[212] Roosevelt's successor William Howard Taft was little better, having campaigned for the votes of southern whites on the promise that he would not "interfere with the regulation by Southern States of their domestic affairs."[213] Consistent with these public remarks, Taft's personal aide recalled that the President, who professed to "dislike[] the Negro," sought "to eliminate them in politics" and remained "determin[ed] to recognize only white men in the South."[214]

A changing of the party guard did not yield an Executive more progressive on racial issues. Woodrow Wilson, Taft's Democratic replacement, encouraged Congress to impose de jure, Jim Crow-style segregation on the federal capital. He also undertook to resegregate the federal bureaucracy, with substantial professional and personal costs for the growing Black middle class in Washington, D.C.[215] What was already in effect a "white-only federal administrative apparatus" would in Wilson's hands become yet another obstacle to achieving equal rights.[216]

Congress was no more open to the entreaties of civil rights advocates. In 1901, for the first time since 1870, the Fifty-Seventh Congress convened without a single Black representative.[217] Efforts to reduce the representation of southern states in response to their disenfranchisement of Black citizens—a maneuver required by section two of the Fourteenth Amendment—were buried in committee.[218] An investigation into Roosevelt's dishonorable discharge of the Black battalion accused of wrongdoing in Texas produced a majority report that backed the President's decision on the ground that the troops themselves were at fault.[219] And after regaining control of both chambers of Congress in 1912, Democratic majorities

---

210. ROBERT MICKEY, PATHS OUT OF DIXIE: THE DEMOCRATIZATION OF AUTHORITARIAN ENCLAVES IN AMERICA'S DEEP SOUTH, 1944–1972, at 50 (2015).

211. Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era, Part I: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444, 455 (1982).

212. DORIS KEARNS GOODWIN, THE BULLY PULPIT: THEODORE ROOSEVELT, WILLIAM HOWARD TAFT, AND THE GOLDEN AGE OF JOURNALISM 512 (2013).

213. KLARMAN, *supra* note 196, at 67. Under Taft, the executive branch generally denied federal patronage to southern Blacks. *Id.*

214. 1 ARCHIBALD BUTT, TAFT AND ROOSEVELT: THE INTIMATE LETTERS OF ARCHIE BUTT, MILITARY AIDE 204 (1930).

215. THOMAS C. LEONARD, ILLIBERAL REFORMS: RACE, EUGENICS & AMERICAN ECONOMICS IN THE PROGRESSIVE ERA 127 (2016); MICKEY, *supra* note 210, at 52.

216. MICKEY, *supra* note 210, at 52. In his influential academic writing, Wilson was highly critical of Reconstruction and Black suffrage. *See, e.g.*, RONALD J. PESTRITTO, WOODROW WILSON AND THE ROOTS OF MODERN LIBERALISM 45 (2005).

217. BATEMAN ET AL., *supra* note 109, at 219–20.

218. JENKINS & PECK, *supra* note 78, at 216.

219. *See id.* at 227.

sought to deploy the legislature as a tool to promote white supremacy, proposing bills that would "strip the federal government of its authority to supervise Senate elections under the Seventeenth Amendment and . . . legally prohibit interracial marriage."[220] Congressional Democrats also steered federal funds to white land-grant colleges in the South at the expense of Black institutions.[221] Perhaps most odious, lawmakers entertained proposals to repeal the Fifteenth Amendment and bar Blacks from serving as officers in the military, unleashing "some of the most racist rhetoric ever heard in Congress."[222]

These grim institutional dynamics were reinforced by an elite consensus that racism could be grounded in science.[223] "By the 1890s, tough-minded racial Darwinists were exalting census statistics showing higher black mortality and a lower black birth rate than those of whites as a demonstration of the futility of egalitarian or even traditionally paternalistic approaches to black economic, social, and political participation."[224]

Given the dismal state of racial progress by the early 1910s, it is fair to say that the Supreme Court helped to keep the cause of racial justice alive. Most importantly, in a 1917 case—*Buchanan v. Warley*—the Court struck down a Louisville zoning ordinance mandating residential segregation.[225] *Buchanan* arose in the context of explosive urban growth across the nation. In Louisville alone, the white and Black populations nearly doubled between 1880 and 1900.[226] Hemmed into a small area near the city's downtown, Black residents sought to purchase homes in adjacent parts of the city, prompting the city council to pass a segregation ordinance.[227] Louisville was not exceptional in doing so. With larger cities like Baltimore, St. Louis, and Atlanta—as well as many smaller ones in states from Oklahoma to North Carolina—enacting similar measures, "the country stood on the brink of residential apartheid."[228]

After Kentucky's state courts upheld the ordinance, the Supreme Court unanimously struck it down. Writing for the Court, Justice William Day declared that "[c]olored persons are citizens of the United States and have the right to purchase property and enjoy and use the same without laws discriminating against them solely on account of color."[229] Much like in the *Civil Rights Cases*, the Court was conscious of the popular "feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration."[230] But as it had recognized in *Lochner*, the Constitution imposed limits on the exercise of the police power—deployed here to "promote the public peace by preventing race

220. *Id.* at 230.
221. *Id.*
222. KLARMAN, *supra* note 196, at 68.
223. BATEMAN ET AL., *supra* note 109, at 224.
224. Schmidt, *supra* note 211, at 453.
225. 245 U.S. 60, 81–82 (1917).
226. George C. Wright, *The NAACP and Residential Segregation in Louisville, Kentucky, 1914–1917*, 78 REG. KY. HIST. SOC. 39, 39 (1980).
227. *Id.* at 41–43.
228. Schmidt, *supra* note 211, at 501; *see also* Wright, *supra* note 226, at 44–45.
229. *Buchanan*, 245 U.S. at 78–79.
230. *Id.* at 80.

conflicts."[231] Noting that a core purpose of the Fourteenth Amendment was to guarantee to Blacks the "same right to purchase property as [was] enjoyed by white citizens," Day held that racially discriminatory legislation had "its limitations, and [could] not be sustained where the exercise of authority exceeds the restraints of the Constitution."[232] In so doing, the Justice recovered the Reconstruction Era conception of civil rights—a "limited collection of rights . . . understood to constitute the legal requirements of human freedom" and including the right to buy and sell property.[233] As the majority made clear, Louisville had infringed on a core "civil right"—the right to acquire and dispose of property by buying or selling to any other person, regardless of race—rather than simply "prohibit[ing] the amalgamation of the races."[234]

It is important to be modest in assessing the practical consequences of the Court's intervention. *Buchanan* did not prompt a wave of desegregation anywhere in the country. Rather, even as levels of segregation remained constant in the former Confederacy, the decision coincided with an increase in racial segregation in northern cities as Blacks migrated northward in ever-growing numbers.[235] Formal apartheid was only one among many tools governments could use to restrict where Black Americans could live, from racially restrictive covenants to racist lending policies and facially neutral, but racially motivated, zoning ordinances.[236]

Nevertheless, modesty does not imply irrelevance. At a time when the elected branches of the national government were hostile to the cause of racial justice, the Supreme Court proved more welcoming. It did so "even though popular and expert opinion, backed by contemporary social science evidence, supported the underlying prejudiced rationale for the residential segregation law" at issue.[237] Indeed, while much of the academic world condemned the Court's decision—with law review editors at Columbia, Harvard, and Yale criticizing the justices for protecting the property rights of Black Americans—proponents of racial justice understood *Buchanan*'s significance.[238] Moorfield Storey, president of the NAACP and plaintiff's co-counsel, called *Buchanan* "the most important decision that has been made since the *Dred Scott* case, and happily this time it is the right way."[239] Likewise, Black newspapers like the *Chicago Defender* lauded the decision as a "slap" at Jim Crow that promised to "lend zest to the millions of our people who are ready to aid and even die for this country in the present great struggle for true

231. *Id.* at 81.

232. *Id.* at 78, 81.

233. Christopher W. Schmidt, Buchanan v. Warley *and the Changing Meaning of Civil Rights*, 48 CUMB. L. REV. 463, 494 (2018).

234. *Buchanan*, 245 U.S. at 81.

235. *See id.*

236. *See* KLARMAN, *supra* note 196, at 92.

237. BERNSTEIN, *supra* note 24, at 84; Schmidt, *supra* note 211, at 509 ("[L]aw reviews from all parts of the country generally registered surprise and disapproval.").

238. Schmidt, *supra* note 211, at 509–10.

239. PATRICIA SULLIVAN, LIFT EVERY VOICE: THE NAACP AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT 72 (2009).

democracy."[240] Boston's *Guardian* similarly "rejoiced at the invalidation of 'the most outrageous of all civil discriminations against the negro race.'"[241]

Buchanan also helped to catalyze Black political mobilization. "At a time when the oppression of southern blacks seemed immutable," the Court "shook the illusion that this arrangement was permanent."[242] Serving, in conjunction with the United States' entry into World War I, as a "touchstone in the NAACP's continuing effort to broaden its base,"[243] the group's membership soon grew from under 10,000 to approximately 45,000 nationwide.[244] The decision also reaffirmed the NAACP's "commitment to a test case litigation strategy."[245]

Nor is *Buchanan* easily dismissed as an outlier in the Court's race-related jurisprudence.[246] In the years between 1911 and 1917, the Court struck down state statutes designed to constrain the employment options of Black sharecroppers by criminalizing breaches of labor contracts,[247] held unenforceable so-called grandfather clauses as unconstitutional restrictions on the right to suffrage,[248] and banned the exclusive provision of luxury rail accommodations to whites.[249] And in the roughly two-decade period following *Buchanan*, Black litigants won 25 out of 27 Fourteenth Amendment cases argued before the Supreme Court.[250]

Despite this record, some commentators contend that *Buchanan* and its siblings constitute only "minimal constitutionalism"—a floor the United States could not fall below and remain a constitutional democracy.[251] But with the elected branches indifferent at best and overtly hostile at worst to the needs and interests of Black citizens, even minimal constitutionalism was surely better than none at all. Given prevailing attitudes toward Black Americans, and the partisan incentives to abandon racial justice, it is easy to imagine a counterfactual where the Court *did* sanction racial apartheid. It is doubtful that either Congress or the White House would have objected to such a decision, and it is credible that many politicians would have applauded it—just as mainstream legal commentators attacked *Buchanan*. Perhaps in such a world the Great Migration would have been smaller, limiting the sea change to American politics prompted by politicians competing to win the votes

240. *Id.*
241. Schmidt, *supra* note 211, at 508.
242. KLARMAN, *supra* note 196, at 93.
243. SULLIVAN, *supra* note 239, at 73.
244. KLARMAN, *supra* note 196, at 94. In Louisville alone, membership in the NAACP increased exponentially in the aftermath of *Buchanan*. *Id.*
245. Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910-1920)*, 20 LAW & HIST. REV. 97, 128 (2002).
246. For a concise overview of this jurisprudence, see David E. Bernstein & Ilya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 YALE L.J. 591, 617–40 (2004).
247. Bailey v. Alabama, 219 U.S. 219, 245 (1911).
248. Guinn v. United States, 238 U.S. 347, 366 (1915).
249. McCabe v. Atchison, T. & S.F. Ry. Co., 235 U.S. 151, 161–62 (1914).
250. BERNSTEIN, *supra* note 24, at 84.
251. *See* Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 885–86 (1988).

of northern Black voters.[252] It is therefore worth contemplating the possibility that "the plight of African Americans today would be *far worse*" had the Court sanctioned formal residential segregation.[253] By demonstrating that there were constitutional limits to racialized legislation and "call[ing] a halt to the spread of Jim Crow laws,"[254] the judiciary helped to "decelerate" the imposition of a totalizing, state-sanctioned segregation regime across the United States.[255]

Why did the Court prove more receptive to the cause of racial justice than the legislative or executive branches? One possibility is biography. Justice Day, who authored *Buchanan* and descended from "strong antislavery forebears in Ohio and Connecticut, . . . often recalled childhood memories of antislavery agitation and protest against the Fugitive Slave Law in his hometown."[256] Recently elevated to the post of Chief Justice, Edward G. White, although a Confederate veteran and opponent of Reconstruction, was a jurist committed to "the supremacy of federal power," including the authority of "each of the Civil War amendments" to govern the conduct of states and localities.[257] And many of the other justices, including the newly confirmed Louis Brandeis, were not proponents of scientifically grounded

---

252. *See* Bernstein & Somin, *supra* note 246, at 634. ("*Buchanan* impeded the efforts of urban whites to prevent blacks from 'colonizing' white neighborhoods, both in the South and the North."). Identifying with confidence *Buchanan*'s practical effect on racial segregation in northern cities is vexingly difficult. Influential commentators focus on the wide array of tools, both legal and extra-legal, available to whites intent on keeping Blacks out of their neighborhoods that *Buchanan* did not address. As Klarman observes, "White supremacy depended less on law than on entrenched social mores, backed by economic power and the threat and reality of violence." KLARMAN, *supra* note 196, at 82. They rightly observe that segregation was (and remains) a lived reality in most of the United States. In response, those scholars who defend *Buchanan*'s significance point to the Great Migration's sheer size. As David Bernstein observes, "[T]he very fact that millions of African Americans successfully migrated to formerly white neighborhoods in urban areas around the country, ultimately unimpeded by other mechanisms of trying to stop them, demonstrates the importance of the Court's refusal to countenance residential segregation laws." David E. Bernstein, *Reflections on the 100th Anniversary of* Buchanan v. Warley*: Recent Revisionist History and Unanswered Questions*, 48 CUMB. L. REV. 399, 405 (2018). One possibility for resolving the impasse is simply to note that the Court should be credited for removing a powerful weapon from the white supremacist arsenal. For a scholarly overview of the consequences of incorporating Black voters into the northern Democratic party, see generally ERIC SCHICKLER, RACIAL REALIGNMENT: THE TRANSFORMATION OF AMERICAN LIBERALISM, 1932–1965 (2016).

253. A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 126 (1996).

254. Schmidt, *supra* note 211, at 522.

255. HIGGINBOTHAM, *supra* note 253, at 126; Bernstein & Somin, *supra* note 246, at 632–33.

256. 9 ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910–21, at 814 (1984).

257. *Id.* at 966–67 ("A Democrat from the deep South, veteran of the Confederacy, Chief Justice at a time when constitutional principles protecting black people's political and civil rights were in danger of sinking from view, White lent his powerful, nationalist voice to the constructive record of the Supreme Court in race relations cases during the second decade of the twentieth century.").

racism, even as they were not especially progressive on race either.[258] Absent the institutional incentives that existed elsewhere in the national government to disenfranchise Black voters, these idiosyncratic ideological commitments might well have carried the day.

Alternatively, it may be that the Court's *Lochner*-type constitutionalism was particularly amenable to a certain model of racial progressivism. As exemplified by *Lochner* itself, the Supreme Court during the Progressive Era was institutionally and intellectually "committed to the notion of inherent limits on government power."[259] The specific form of that commitment—a general skepticism of class legislation and an undue premium on the right to sell one's labor—may strike modern lawyers and legal scholars as ill-founded.[260] But in espousing that commitment, the Court nevertheless maintained that a key judicial responsibility in the separation-of-powers system was to scrutinize legislation for its compatibility with constitutional rights and, if necessary, to invalidate legislation judged to be in conflict with those rights.[261]

All of this suggests that judicial review *can* generate more progressive outcomes than would be possible to achieve through the elected branches. As *Buchanan* underscores, at times in our history when partisan competition or other institutional orderings have rendered Congress and the presidency inhospitable to certain forms of progressivism, specific alignments of judicial ideology and

---

258. *See* MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 640 (2009) (noting that Brandeis was both a "man of his times" when it came to race but observing that this "certainly does not prove bigotry," particularly insofar as Brandeis encouraged his protégé, Felix Frankfurter, to work with the NAACP and helped a former student similarly interested in using the courts to pursue racial justice).

259. BERNSTEIN, *supra* note 24, at 5.

260. *Cf.* Victoria Nourse, *A Tale of Two* Lochners*: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 757 (2009) (distinguishing between *Lochner*-era substantive due process and contemporary equivalents).

261. *Cf.* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWER JURISPRUDENCE 10 (2003) (arguing that "nineteenth-century judges . . . uph[e]ld legislation that (from their perspective) advanced the well-being of the community as a whole or promoted a true 'public purpose' and . . . [struck] down legislation that (from their perspective) was designed to advance the special or partial interests of particular groups or classes"). This argument holds even if we accept the view that *Buchanan* was motivated by the justices' solicitude for property rights, rather than any particular concern for what we would now call civil rights. As Christopher Schmidt (among other scholars) has argued, however, this view is not supported by the language of the opinion, which relies on Reconstruction Era cases identifying the right to buy and sell property as core to meaningful racial equality. *See* Schmidt, *supra* note 233, at 482–83, 485 (identifying in *Buchanan* citations to opinions containing "sweeping assertions of the racial egalitarian goals of the Reconstruction Amendments" and identifying the majority's use of the term "civil rights" as a "usage drawn from the 1960s, from the Civil Rights Act of 1866 and debates surrounding its passage"); Schmidt, *supra* note 211, at 520 (arguing that, "measured against Day's generally phlegmatic style, the *Buchanan* opinion is a resounding statement of Reconstruction principles, statutory and constitutional").

personnel yielded a Court more receptive than the elected branches to cases and arguments that helped to nurture the flames of progressivism.

B. Gender in the Supreme Court

Just as Congress was abandoning civil rights, state and federal lawmakers were increasingly committed to passing protective legislation on behalf of women laborers. Both at the time and in retrospect, such laws had a mixed progressive valence. On the one hand, they were understood to be the tip of the progressive spear—efforts to leverage popular and judicial solicitude for women into maximum-hours and minimum-wage legislation. The explicit hope was that the popularity of such legislation would provide momentum for expanding similar protections to the male workforce. An "opening wedge" rather than a slippery slope, "shorter hours for some . . . would inevitably lead to better conditions for all workers."[262] On the other hand, advocates for such laws relied on crudely paternalistic stereotypes of women as the weaker sex, valuable to the polity only as mothers or potential mothers. For many champions of protective legislation for women, their advocacy was necessary because of the unique "attributes" of women: their "compassion, nurturance, [and] a better-developed sense of morality—unfitted [them] for the competitive economic struggle."[263]

In this way, protective legislation for women served as a "common carrier"—a legislative initiative that a variety of political interests could support for their own distinctive reasons.[264] The material lot of women could be improved "without violating traditional female roles."[265] Consequently, advocates for these policies included:

> [P]aternalists concerned with women's health; moralists who thought that low-wage, long-hour jobs tempted women into immorality and prostitution; "family wage" advocates who sought to protect family men from "destructive" competition from women workers; "maternalists" who sought to promote and preserve women's maternal role in the family; and eugenicists who believed that working women "weakened the race."[266]

Not surprisingly, a coalition of such breadth proved formidable in achieving its goals. By the turn of the twentieth century, nearly half of the states had enacted limitations on the hours women could work.[267]

The common-carrier logic that made passing protective legislation possible also helped to immunize the statutes from legal challenge. In *Muller v. Oregon*,

---

262. ALICE KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES 184 (1982).

263. *Id.* at 185.

264. ERIC SCHICKLER, DISJOINTED PLURALISM: INSTITUTIONAL INNOVATION AND THE DEVELOPMENT OF THE U.S. CONGRESS 15 (2001).

265. KESSLER-HARRIS, *supra* note 262, at 212.

266. BERNSTEIN, *supra* note 24, at 58.

267. *See* Brief for Defendant in Error at 1–8, Muller v. Oregon, 208 U.S. 412 (1908) (No. 107), https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/muller1.pdf [https://perma.cc/FF9V-NCH8] (cataloguing statutes); KESSLER-HARRIS, *supra* note 262, at 186.

decided three years after *Lochner*, the Supreme Court *upheld* an Oregon statute setting maximum hours for women working in a "mechanical establishment, or factory, or laundry."[268] On behalf of a unanimous Court, Justice Brewer's opinion emphasized sex-based differences in "structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labor, . . . and in the capacity to maintain the struggle for subsistence."[269] And given women's unique "physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race," Brewer declared that "legislation to protect [women] from the greed as well as the passion of man" was appropriate.[270] *Lochner* and *Muller* are for that reason rightly viewed as jurisprudential twins. Grounded in shared legal premises, the divergence in their outcomes is attributable to the Court's conclusion that women merited special protective status. As wards of the state, they could be the beneficiaries of the kind of particularized legislation that would ordinarily have been off-limits.[271]

Though Brewer often led the Court's conservative bloc, commentators have long remarked on the parallels between the arguments laid out in his opinion and those contained in a brief written by Brandeis, then a prominent progressive Boston lawyer; Brandeis's sister-in-law Josephine Goldmark, then head of the Progressive National Consumer League's committee on labor law; and Goldmark's colleague Florence Kelley, the League's vice president and architect of Illinois's maximum-hours law.[272] Compiling "113 pages of densely packed data demonstrating why women's health and safety was particularly at risk under conditions of overwork," the brief is arguably *Muller*'s lasting legacy—the case that served as the springboard for the first so-called Brandeis brief.[273] Like Brewer, Brandeis and Goldmark relied on the allegedly scientific claim that women suffered from a "special susceptibility to fatigue and disease which distinguished the female sex qua female."[274] And while there is no evidence that Brewer or any of his colleagues were especially influenced by Brandeis's and Goldmark's brief,[275] their overlap makes clear that *Muller* reflects the broad intersection of then-dominant progressive views about gender politics and more traditional ones.

After all, crafting policy at that particular intersection was precisely the goal of the "wedge" strategy, notwithstanding the cost of reinforcing gender

---

268. 208 U.S. at 416, 423.

269. *Id.* at 422.

270. *Id*.

271. *See id.*

272. *See, e.g.*, NANCY WOLOCH, A CLASS BY HERSELF, PROTECTIVE LAWS FOR WOMEN WORKERS, 1890S–1990S, at 61–70 (2015); UROFSKY, *supra* note 258, at 57–58; BERNSTEIN, *supra* note 24, at 57–58.

273. ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH CENTURY AMERICA 30 (2001).

274. Thomas C. Leonard, *Protecting Family and Race: The Progressive Case for Regulating Women's Work*, 64 AM. J. OF ECON. & SOC. 757, 773 (2005*)* (quoting JOSEPHINE GOLDMARK, FATIGUE AND EFFICIENCY: A STUDY IN INDUSTRY 39 (1912)) (observing that the book "derived" from the brief she and Brandeis had worked on together).

275. *See* WOLOCH, *supra* note 272, at 77.

stereotypes. In *Muller*'s aftermath, that strategy proved especially prescient, as the decision "electrified the field of protective legislation."[276] After 19 additional states passed hours restrictions on women's workdays in the ensuing decade, only 9 states lacked such legislation by the end of the 1910s.[277] Evaluating these legislative initiatives requires grappling with the same tensions that animated the push for gendered protective legislation in the first place. In a political environment skeptical of labor regulation, legislation for women only was perhaps the best that could be achieved. With "traditional views of women prevail[ing]," at least some women could be "releas[ed] . . . from some of the misery of toil."[278] At the same time, accepting its premises meant accepting the contention that women were, in the words of Ruth Bader Ginsburg, "less than full persons."[279]

For our purposes, however, it is clear that the Court was at least as progressive on women's rights legislation as other political institutions, given how progressivism was understood at the time in that particular context. Why? Two variables are worth underscoring. First, women's rights, and particularly women's suffrage, never took on a partisan cast. At the state level, suffrage was expanded in states under both Democratic and Republican control.[280] As one scholar observes, "attentive politicians" recognized that "women as a category would not be likely to define a single partisan constituency."[281] Groups committed to promoting suffrage—including organized labor, farmers' groups, and the Progressive Party—also crossed the partisan divide.[282] For that reason, the commitments of the Court's members to the coalitions that brought them into office would not have implied any particular outcome.

Second, the evidence suggests that there was no reason to think that legal elites had different views about women's rights, as then understood, than elites of any other stripe. As we have seen, a broad political coalition backed protective legislation. Both traditional and progressive elites fit comfortably into that coalition and could back its aims for their own purposes, whether to underscore what was then understood to be the separate nature of women or to create precedent for more generalized regulation of the labor market. And the doctrine of substantive due process as it had developed in the postbellum period could accommodate protective legislation—whether on the ground that it was appropriate because of the ostensibly dangerous nature of a particular line of work or because of the specific features of the protected population (as then understood).

---

276. KESSLER-HARRIS, *supra* note 262, at 187.

277. *Id.* at 188.

278. *Id.* at 214.

279. WOLOCH, *supra* note 272, at 83.

280. CORINNE M. MCCONNAUGHY, THE WOMAN SUFFRAGE MOVEMENT IN AMERICA: A REASSESSMENT 215 (2013).

281. *Id.*

282. *Id.* at 216–17 (noting that "the presence of a strong farmers' association for suffragists to partner with was key in Michigan" and that "in Illinois . . . it was evident that organized labor could be invested in the cause and important to leveraging success").

IV. *BROWN*

Brown v. Board of Education is the most celebrated case in the Supreme Court's history. It is praised by lawyers and law professors across the political and ideological spectrum and is an integral part of our constitutional canon.[283] Ironically, however, the near-consensus among professors about the decision's effects is quite bleak: despite its intentions, *Brown* utterly failed to achieve its goals.[284] In fact, the ruling may have even prompted a significant enough backlash that it set back progress on civil rights, at least in the short run.[285] Not until Congress passed and the Johnson Administration began to implement the Civil Rights Act of 1964 did school desegregation truly begin.[286] The lesson for many is that relying on the Supreme Court alone to achieve social change is a "hollow hope."[287]

Drawing on widespread scholarly acceptance of *Brown*'s lack of meaningful consequence, progressive critics of judicial review quickly dismiss the challenge that *Brown* poses to their thesis. *Brown*, after all, appears at least on its face to be a problem for the progressive challenge to judicial review.[288] It protected not powerful elites, but the oppressed class of Black people in the South. And while the decision was careful in its language, its overruling of *Plessy* in the sphere of education served as a frontal and dramatic assault on the constitutional foundations of Jim Crow segregation.

Consequently, progressive critics seize on Brown's apparent lack of practical significance. Empirically, they observe, the South's defiance of the Supreme Court meant that desegregation did not begin in earnest until Congress passed the Civil Rights Act of 1964. Hence, Bowie concludes, "What *Brown* actually illustrates is how federal legislation has successfully expanded American democracy when the Supreme Court has stopped interfering with Congress."[289] Similarly, Moyn comments that *Brown* is the Court's most "romanticized accomplishment" because "school integration in the South didn't genuinely begin until a full ten years after the Supreme Court's landmark decision [in *Brown*],

---

283. *See, e.g.*, Jack Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 978 (1998) (noting that a "cultural literacy canon" would include "affirmative icons like *Brown v. Board of Education*"); Greene, *supra* note 200, at 381 ("*Brown v. Board of Education* is the classic example of such a case: all legitimate constitutional decisions must be consistent with *Brown*'s rightness.").

284. The classic text for this assertion is GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE 47 (2008).

285. Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 82 (1994).

286. ROSENBERG, *supra* note 284, at 47.

287. The phrase "hollow hope" is from the title of ROSENBERG. *See id.*

288. Written Statement of Nikolas Bowie, *supra* note 1, at 7 (asserting that the Supreme Court's "sorry legacy . . . might be better known today if not for the decision most invoked in defense of judicial review: *Brown v. Board of Education*"). However, Bowie is primarily concerned with judicial review of federal, not state legislation or executive action. *See, e.g.*, *id.* (noting that "*Brown* is not an example of the Supreme Court disagreeing with Congress about the constitutionality of a Federal Law").

289. *Id.* at 8.

precisely because it ultimately required federal legislative action."[290] The innovation offered by judicial review's progressive critics is thus to push this conventional scholarly wisdom to its logical conclusion: if *Brown* was pretty on paper, but a dud in the real world, why should it count in favor of judicial review?

Prevailing narratives about *Brown*'s inefficacy have taken on a life of their own and become unmoored from the original sources their authority is drawn from. Here, we revisit reigning scholarship to reground *Brown* in its historical context. We make three points. First, *Brown* was a vanguard decision that was significantly more progressive than public opinion or the positions of the elected branches of the national government. As in Reconstruction, this part of the analysis requires an overview of the politics of the *Brown* era, motivated by an implicit counterfactual. What was the likelihood that national politics absent *Brown* would have yielded meaningful change? Second, while in the short-term *Brown* was ineffective in the Upper and Deep South, it brought desegregation to the border states much sooner than was otherwise likely. Here, we focus our attention on a comparative case, arguing that failures to desegregate public recreational spaces in the border states make clear that desegregation of public education in these same states would not have happened without the Court's intervention. Third and most importantly, *Brown* was integral to the success of the civil rights movement and, more concretely, to passage of the Civil Rights Act of 1964. Thus, we contend, we should reject the core of progressive critics' argument—that the elected branches alone were responsible for civil rights progress in the mid-twentieth century.

A. The Politics of School Desegregation

In 1954, the Supreme Court "played a vanguard role in school desegregation" that was significantly ahead of the lower courts, public opinion, the political parties and the elected branches of government.[291] On contentious issues, it is frequently the lower courts that pave the way before the Supreme Court addresses the issue. That typical pattern, however, did not occur in the school desegregation context, where, prior to *Brown*, only a single district court in California had ruled that school segregation was unconstitutional.[292]

Most importantly, politics during this period was structured in a way that stymied progress on civil rights. The political parties were post-New Deal coalitions that reflected divisions over economic issues and, in so doing, often suppressed issues relating to race. The Republican Party did not support or strongly oppose Jim Crow, and hence it was unlikely to expend political capital on the issue. More importantly, the Democratic Party—the dominant party in national elections—brought together conservative, segregation-supporting Southerners with non-southern liberals including Blacks, Jews, and unionized workers.[293] Thus, "the post-

290. Moyn, *supra* note 5.

291. KLARMAN, *supra* note 196, at 343; *see* Mendez v. Westminster Sch. Dist. of Orange Cnty., 64 F. Supp. 544, 546–51 (S.D. Cal. 1946).

292. KLARMAN, *supra* note 196, at 311.

293. For two of the more recent and prominent accounts of changes to the Democratic party in the wake of the New Deal, see generally IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME (2013); ERIC SCHICKLER, RACIAL REALIGNMENT: THE TRANSFORMATION OF AMERICAN LIBERALISM, 1932–1965 (2016).

New Deal Democratic Party included both segregation's strongest supporters and its most ardent foes."[294] Democratic party leaders had every incentive to bury the issue of race so as not to inflame tensions within the party. For that reason, there was almost no progress on civil rights issues under the Roosevelt Administration.[295] As was true during Reconstruction, the elected branches were far from bastions of racial progressivism in the early 1950s.

Nor was there significant public pressure on the parties to act. Although public opinion shifted significantly in the immediate months and years after *Brown*, it initially commanded the approval of only a slight national majority, with much of its support coming from the North and opposition coming from the South.[296] While it is tempting to argue that the Court was acting as a tie-breaker, this interpretation obfuscates the considerable difference in the intensity of preferences between the South and the rest of the nation. The relevant counterfactual is clear: politics alone would not have yielded this clarion call for racial justice.

In *Brown*'s immediate aftermath, most Americans outside the South were opposed to Jim Crow in education, but felt little urgency on the issue and were not prepared to take institutional measures necessary to achieve school desegregation.[297] Two years after *Brown*, fewer than 6% of citizens outside the South considered civil rights to be the nation's most important issue, while 40% of Southerners thought the opposite.[298] Northern support for the decision was lukewarm, while Southerners' scalding rage was bubbling over.[299] Furthermore, 72% of Americans opposed cutting federal education funds to those schools that refused to desegregate, the exact measure that proved necessary to accomplish *Brown*'s goals.[300] Five years after the ruling, 53% of Americans agreed that "the decision caused a lot more trouble than it was worth," with only 37% taking the opposite position.[301]

---

294. DAVID KAROL, PARTY POSITION CHANGE IN AMERICAN POLITICS: COALITION MANAGEMENT 104 (2009).

295. *See* KATZNELSON, *supra* note 293; NANCY J. WEISS, FAREWELL TO THE PARTY OF LINCOLN: BLACK POLITICS IN THE AGE OF FDR 34 (1983). *But see* KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO BROWN 97–143 (2003) (arguing that Roosevelt fought for civil rights in low-profile ways).

296. *See* KLARMAN, *supra* note 196, at 310 (stating that "[s]lightly more than half of the nation supported *Brown* from the day it was decided"); Joseph Carroll, *Race and Education 50 Years After* Brown v. Board of Education, GALLUP (May 14, 2004), https://news.gallup.com/poll/11686/Race-Education-Years-After-Brown-Board-Education.aspx [https://perma.cc/FL3J-98BW] ("The initial results, from a May 21–26, 1954, poll, found that 55% of Americans approved of the decision, and 40% disapproved. The results remained essentially unchanged in two additional polls conducted in 1954, including a June poll with 53% approval and a late December poll with 52% approval.").

297. Michael Murakami, *Desegregation*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 18, 24–25 (Nathaniel Persily et al. eds., 2008) (noting that a majority of those polled initially supported the decision but that 70% of that support was from the North and southern support dropped another four percentage points six months later).

298. KLARMAN, *supra* note 196, at 365.

299. *See id.* at 365–66.

300. *Id.* at 362, 365.

301. Carroll, *supra* note 296.

Nonetheless, before *Brown*, politics would still sometimes bring civil rights issues to the fore. But while *Brown* struck at the controversial heart of Jim Crow-era segregation, progressive legislators pre-*Brown* opted to strike at features either broadly deemed beyond the pale, such as lynching; or more peripheral to the functioning of this racially repressive regime, such as the poll tax or desegregation in the military.[302] While cross-party coalitions in the House would sometimes pass some of these measures, they inevitably died or were severely undermined in the Senate, where southern senators' use of the filibuster and dominance over key committees empowered the region's representatives to transform "the chamber into a citadel of their interests."[303]

In 1957, Congress passed civil rights legislation for the first time in 82 years. Although passage required violation of congressional norms,[304] the measure was ultimately a toothless one. Both President Eisenhower and civil rights activists considered it a failure.[305] The problem was not only southern resistance. Rather, western Democrats agreed to weaken the bill in exchange for southern concessions on water rights, while northern liberals, like then-Senator John F. Kennedy, went along because union allies were concerned that certain enforcement features could be used against labor strikes.[306]

Whereas members of Congress tend to cater to their local constituencies, presidential candidates are usually thought to eye the national vote and hence are saddled with the burden of maintaining their party's coalition. In the post-World War II era, this maintenance entailed balancing the demands of white Southerners against those of northern Black voters. With the presidential election preceding the *Brown* decision, the balance tipped in favor of the South. In the 1952 election, both presidential nominees—Dwight Eisenhower for the Republicans and Adlai Stevenson for the Democrats—were weaker than the 1948 nominees on civil rights, and the parties' platforms reflected this retrogression.[307] Once elected, Eisenhower,

---

302. KLARMAN, *supra* note 196, at 364–65.

303. KEITH M. FINLEY, DELAYING THE DREAM: SOUTHERN SENATORS AND THE FIGHT AGAINST CIVIL RIGHTS, 1938–1965, at 4 (2008); *see also* BLOCH RUBIN, *supra* note 50, at 112–86; Ira Katznelson et al., *Limiting Liberalism: The Southern Veto in Congress, 1933–1950*, 108 POL. SCI. Q. 283, 284–94 (1993).

304. *See* Gregory A. Elinson, *Norm-Breakers, Rights-Makers: Legislative Norms, Democratization, and the Fight for Civil Rights*, 26 N.Y.U. J. LEGIS. & PUB. POL'Y 65, 85–86 (2023).

305. On Eisenhower, see ROBERT FREDRICK BURK, THE EISENHOWER ADMINISTRATION AND BLACK CIVIL RIGHTS 152, 224 (1984); STEPHEN E. AMBROSE, EISENHOWER VOLUME II: THE PRESIDENT 413 (2014). For the reaction of civil rights activists, see TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63, at 221–22 (1989).

306. FINLEY, *supra* note 303, at 166, 179–80; *see, e.g.*, *Address of John F. Kennedy upon Accepting the Liberal Party Nomination for President, New York, New York*, JOHN F. KENNEDY PRESIDENTIAL LIB. & MUSEUM (Sept. 14, 1960), https://www.jfklibrary.org/archives/other-resources/john-f-kennedy-speeches/liberal-party-nomination-nyc-19600914 [https://perma.cc/5F72-UMFN] ("I would like to say what I understand the word, 'Liberal,' to mean and explain in the process why I consider myself to be a 'Liberal,' and what it means in the presidential election of 1960.").

307. KLARMAN, *supra* note 196, at 192.

who had grown up on segregated southern military bases and in 1948 testified against integrating the military, had no intention of taking any action on civil rights.[308] As President, he refused to endorse *Brown* and to condemn southern resistance to it; equated southern extremism with the positions of the NAACP; and took action to implement the decision only when massive resistance reached such flagrant proportions that he had no choice.[309] When ultimately forced into taking a stand on civil rights, Eisenhower sincerely, though clumsily, pushed for voting rights in the form of the Civil Rights Bill of 1957, and felt great disappointment when the measure was effectively neutered by southern senators.

Despite his support for Black suffrage, Eisenhower was fundamentally uncomfortable with any policy that would "foster more than minimal contact between whites and Negroes, even in public places."[310] On segregation, the President commented on the difficulty of using "law and force to change a man's heart"—a line often taken by segregationists and one so well-known that Martin Luther King Jr. devoted passages in his first book to rebutting it.[311] When elected to succeed Eisenhower, Kennedy was even less committed to civil rights than his predecessor. Ultimately, then, it was the Supreme Court that "put the issue [of school desegregation] on the map."[312]

B. Assessing Brown*'s Impact: The Border States*

The success of desegregation in the border states is easy to miss. The oversight is understandable; the horrors of Jim Crow are more closely associated with "true" southern states like Mississippi. The progressive critique of judicial review builds on a voluminous scholarly literature that focuses on the Upper and Deep South, where opponents of desegregation effectively neutered it for a decade through evasion and massive resistance. In those states, de jure segregation continued until Congress intervened by passing the Civil Rights Act of 1964.

But the story is quite different in the border states where desegregation was "done and done quickly."[313] The Court's intervention in the border states was crucial. Without *Brown*, school desegregation was unlikely to be achieved in this region with as much deliberate speed.

As the moniker suggests, the border states are geographically, culturally, economically, and politically in-between the North and the South. These six states—Kentucky, Delaware, Oklahoma, West Virginia, Missouri, and Maryland—are a

---

308. *See id.*

309. *Id.* at 324–26.

310. BRANCH, *supra* note 305, at 213.

311. MARTIN LUTHER KING, JR., STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY 192–93 (2010) ("Morals cannot be legislated, but behavior can be regulated. . . . We must depend on religion and education to alter the errors of the heart and mind; but meanwhile it is an immoral act to compel a man to accept injustice until another man's heart is set straight. As the experience of several Northern states has shown, antidiscrimination laws can provide powerful sanctions against this kind of immorality.").

312. KLARMAN, *supra* note 196, at 343.

313. CHARLES T. CLOTFELTER, AFTER *BROWN*: THE RISE AND RETREAT OF SCHOOL DESEGREGATION 25 (2004).

"middle ground," a "world between," or a "gateway [to the South.]"[314] At the time of *Brown*, the border states had a significant Black population. The 1950 census reported that 10% of the population in the border states was Black, which was higher than the North's 5% but lower than the South's 25%.[315] Unlike the North, at the time of *Brown*, the border states had significant Jim Crow laws or practices, including pervasive segregation of public schools. While the border states' version of Jim Crow was both morally repugnant and devastating to Black communities, it was not as directly brutal and entrenched as it was in the Upper and Deep South.

Not only did *Brown* break down de jure segregation in the border states, it also wrought significant progress by bringing about actual integration. Indeed, with exceptions, the border states for the most part complied with *Brown*. The decision, "met with no widespread resistance, aroused only minor threats to the public order and brought no challenge to the authority of the judicial or executive branches of government."[316] To be sure, there were pockets of trouble in small enclaves, such as the southernmost part of Delaware or the "boot heel" of Missouri.[317] But the NAACP celebrated wholeheartedly the success of desegregation in the border states.[318] By 1956–1957, 70% of school districts had begun the process of ending de jure desegregation.[319] Even more extraordinary, in that same time period, 30% of all Black students were enrolled in school with white children, which would increase by another 11% by the 1960–1961 school year.[320] And the progress continued so that even before the 1964 Civil Rights Act passed, "in the 1963-1964 school year, only 7% of districts that enrolled both whites and blacks were still segregated, and more than half of all the region's blacks in public schools attended schools with whites."[321]

How much credit does the Court deserve for these developments? The answer would be very little if the border states had "followed similar paths and desegregated even without court intervention."[322] On this reading, the Court's desegregation order was so successful in the border states because it simply beat those cities and elected legislatures to the punch. *Brown*'s limited effect may have been to overcome tepid opposition to desegregation by "supply[ing] the push that

---

314. BRETT GADSDEN, BETWEEN NORTH AND SOUTH: DELAWARE, DESEGREGATION, AND THE MYTH OF AMERICAN SECTIONALISM 7 (2012).

315. CLOTFELTER, *supra* note 313, at 46.

316. BENJAMIN MUSE, TEN YEARS OF PRELUDE: THE STORY OF INTEGRATION SINCE THE SUPREME COURT'S 1954 DECISION 36–37 (1964).

317. On Delaware, see CHOOSING EQUALITY: ESSAYS AND NARRATIVES ON THE DESEGREGATION EXPERIENCE 119–20 (Robert L. Hayman Jr. & Leland Ware eds., 1st ed. 2009). On Missouri's "boot-heel," see KLARMAN, *supra* note 196, at 353.

318. *See* MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961, at 235 (1994).

319. CLOTFELTER, *supra* note 313, at 24.

320. *Id.* at 24, 56.

321. *Id.* at 24

322. KLARMAN, *supra* note 196, at 345. While we quote Klarman to elaborate the assertion that the border states might have desegregated without *Brown*, we are not attributing this position to him. Indeed, in the full quote, it is clear that Klarman is only suggesting the possibility. The quote reads, "Border states . . . *might* have followed similar paths and desegregated even without court intervention." *Id.* (emphasis added).

was necessary to induce public officials to do what they would not have undertaken voluntarily but were not strongly resistant to doing."[323] Indeed, it is possible that "some counties with small black populations" may have "regarded *Brown* as a welcome 'excuse to do what they wanted' but were not permitted to do under state law."[324]

This reading is likely overstated. *Brown* was not gratuitous action by the Court. Opposition to desegregation was substantial and was successfully impeding reform efforts.[325] Prior to *Brown*, no border state had begun desegregating schools, and there was no indication that such developments were coming anytime soon. What's more, opponents of integration succeeded in holding off desegregation in policy areas that were less contested than education.

We can most helpfully gauge border-state opposition to desegregation by tracing the path of parallel reform efforts in public recreational areas: city parks, theaters, beaches, and golf courses. Like schools, these are social spaces where the threat of racial mixing was directly presented. There are, however, key differences that ought to have tempered southern white opposition and permitted desegregation without the courts. Unlike schools, no one is required to be present in such recreational spaces, and usage is typically intermittent. Furthermore, the bulk of the socialization that occurs takes place between pre-existing contacts—the friends with whom you arrive—thereby diminishing the possibility of bridging divides between racial groups. Were officials in the border states relatively open to desegregation absent judicial intervention, we might thus expect to see relatively uncontested efforts to desegregate public recreational spaces.

But the available evidence provides little indication that this was the case. Louisville, Kentucky, provides a representative example.[326] By the 1950s, Louisville had successfully desegregated its hospitals, county offices, universities, and city buses.[327] The next campaign for civil rights advocates was to force desegregation in city-owned theatres and parks, a type of public accommodation that preoccupied civil rights activists more than any other—with the exception of schools.[328]

---

323. *Id.* at 346.

324. *Id.* at 345.

325. Missouri is the most notable exception where desegregation efforts pre-*Brown* were on the whole successful desegregation. *See* Peter William Moran, *Border State Ebb and Flow: School Desegregation in Missouri, 1954–1999*, *in* WITH ALL DELIBERATE SPEED: IMPLEMENTING BROWN V. BOARD OF EDUCATION 175, 176 (Brian J. Daugherity & Charles C. Bolton eds., 2008).

326. There is little evidence on the state of desegregation in West Virginia and Oklahoma, but there are helpful secondary accounts on Missouri, Kentucky, Maryland, and Delaware. Of those states, only in Missouri is there evidence that desegregation was likely without *Brown*. *See supra* note 325 and accompanying text. We discuss Louisville and Baltimore below in text accompanying notes 335–48. On Delaware, see CHOOSING EQUALITY: ESSAYS AND NARRATIVES ON THE DESEGREGATION EXPERIENCE, *supra* note 317.

327. TRACY E. K'MEYER, FROM *BROWN* TO *MEREDITH*: THE LONG STRUGGLE FOR SCHOOL DESEGREGATION IN LOUISVILLE, KENTUCKY, 1954–2007, at 11–12, 23 (2016); KLARMAN, *supra* note 196, at 346.

328. TRACY E. K'MEYER, CIVIL RIGHTS IN THE GATEWAY TO THE SOUTH: LOUISVILLE, KENTUCKY, 1945–1980, at 28–29 (2009).

On this new front, civil rights advocates faced immense and unrelenting resistance from city officials. Frustrated with a failed sit-in and state court case in 1947, the NAACP filed a subsequent suit in 1950 arguing that segregation in public parks was unconstitutional.[329] Multiple lawsuits followed. Despite NAACP victories in the courtroom, "the park issue followed a long and torturous path toward resolution, in part because the city fought to maintain as much segregation as possible. From the beginning, city officials . . . defended park segregation."[330] Louisville fought and appealed the lawsuits, evaded and undermined the implementation of court orders, and even reversed policy on allowing racially integrated sporting events in Black parks.[331] Indeed, even after *Brown* was decided, the city's new mayor rebuffed appeals by the civil rights group to desegregate the parks.[332] In the end, the parks desegregated only because in two 1955 cases, the Supreme Court ruled that park segregation was unconstitutional, and the Kentucky Court of Appeals complied.[333] In Louisville, then, "the real force behind the integration of these public spaces came from federal court decisions."[334]

Another telling example is golf courses in Baltimore, where desegregation occurred despite the resistance of city officials and at the behest of the Court. In Baltimore, prior to *Brown*, desegregation efforts had some success, mostly when they could marshal forces outside of the city. An activists' picket succeeded in desegregating the downtown Ford and Lyric Theatre in part because of the boycott of the performers who came from out of town.[335] Through sit-ins, activists forced

---

329. *Id.* at 29–30.

330. *Id.* at 30.

331. *Id.* at 32.

332. *See id.*

333. *Id.* at 32–33. The relevant Supreme Court Case was *Mayor & City Council of Balt. City v. Dawson*, 350 U.S. 877 (1955). The case concerned racial segregation at public beaches and bathhouses, but the Court ruled broadly, declaring it "obvious that racial segregation in recreational activities can no longer be sustained as a proper exercise of the police power of the State." Dawson v. Mayor & City Council of Balt. City, 220 F.2d 386, 387 (4th Cir.), *aff'd*, 350 U.S. 877 (1955). Citing this exact sentence, the Kentucky Court of Appeals struck down segregation in public parks. Moorman v. Morgan, 285 S.W.2d 146, 146 (1955). On the same day as *Dawson*, the Supreme Court also delivered a decision striking down segregation in golf courses. Holmes v. City of Atlanta, 350 U.S. 879 (1955).

334. K'MEYER, *supra* note 328, at 33.

335. *See* Jennifer A. Ferretti, "*Temple of the Drama": The Five-Year Protest at Ford's Theater, 1947–1952*, *in* BALTIMORE REVISITED: STORIES OF INEQUALITY AND RESISTANCE IN A U.S. CITY 152, 152–53, 155–56 (P. Nicole King et al. eds., 2019) (noting the 1950 introduction of a nonsegregation clause into the biannual contract between the national Actors' Equity labor union and the Guild of Theatres and observing that "[s]ome of Baltimore's white theatergoers hoped that integration of the theater would result in more and better theater offerings"); Emmanuel Mehr, *Ford's Theater and the Struggle for Postwar Civil Rights in Baltimore City*, BALTIMORE HISTORIES WKLY. (May 6, 2023), https://baltimorehistories.substack.com/p/fords-theater-and-the-struggle-for [https://perma.cc/NP9U-UPSS] (noting that the campaign began with letters and petitions to "professionals in the theatre industry . . . [and] to stars with upcoming shows in Baltimore, urging them to show solidarity by boycotting the venue. . . . [P]rominent theater industry folks responded to activist outreach and joined the desegregation cause by cancelling appearances, with at least one going as far as to join the picket line themselves").

desegregation at many—though not all—downtown Jim Crow lunch counters because those chains had stores and ownership outside the city that became the target of boycotts.[336] At that point, progress stalled. One historian notes:

> The success of . . . [the] campaigns against Jim Crow lunch counters downtown, most of which were not locally owned, could not fully prepare it for the challenges yet to come toward the end of the decade. Moving to other public accommodations, Baltimore [Congress for Racial Equality] found itself in protracted campaigns against obstinate, locally anchored white racist resistance.[337]

Of all public recreational spaces, golf should have been the least controversial. As one white Baltimore golfer put it, golf courses' "sheer size . . . offered plenty of space for both whites and blacks to peacefully coexist."[338] In Baltimore, there was one separate, inferior course for Black residents, while white golfers had several higher-scale options.[339] City officials had previously been open to desegregating public courses but quickly learned that doing so would have a significant cost. In 1934 and again in 1942, white backlash was so intense that city officials were forced to resegregate—the first time after three days and the second in less than a month after integration.[340] Indeed, after the second desegregation experiment, white use of the golf course dropped by 25%.[341] Never again would city officials voluntarily take action to desegregate the golf courses without a court order.

After a failed lawsuit in 1942, Black golfers sued in federal district court and won. The judge ordered the Baltimore Parks Commission to either end segregation or create a staggered schedule so that all courses would be divided into "white" days and "black" days.[342] "[A]damantly against integration," the Commission chose the latter by a vote of 4–1, with the dissent coming from its lone Black member.[343] The problem with the policy was that it was both a burden on white golfers and a financial loss for the city. Whereas before, white golfers could access all the city's courses on any day, their access was now considerably more limited. On "white" days, the courses were "jam-packed," while on some of the "Black" days, there were often just a few groups with the entire course to

---

336. DAVID TAFT TERRY, THE STRUGGLE AND THE URBAN SOUTH: CONFRONTING JIM CROW IN BALTIMORE BEFORE THE MOVEMENT 167–71 (2019). I discuss the campaign to desegregate golf, as it was the lowest hanging fruit and occurred pre-*Brown*, but similar difficulties plagued other campaigns. A central campaign that began in 1955 by Black students at Morgan State University, Maryland's largest historically Black college, to desegregate various local businesses in the nearby Northwood Shopping center took years with the Ice Cream Shop desegregating only in 1959, the Northwood Movie theatre in 1963, and the Rooftop Dining room even later. *Id.* at 211–12.

337. *Id.* at 168.

338. James E. Wells et al., *Separate but Equal? Desegregating Baltimore's Golf Courses*, 98 GEOGRAPHIC REV. 151, 161 (2008).

339. TERRY, *supra* note 336, at 143; Wells et al., *supra* note 338, at 160; Sara Schuster, The City in a Swing Set: The Desegregation of Public Parks in Baltimore 50–51 (Jan. 1, 2011) (M.A. thesis, University of Maryland) (ProQuest).

340. Wells et al., *supra* note 338, at 157–60.

341. *Id.* at 160.

342. *Id.* at 162–63; Schuster, *supra* note 339, at 60–62.

343. Schuster, *supra* note 339, at 62; Wells et al., *supra* note 338, at 163.

themselves.[344] The resulting under-use of the city's courses was mocked in newspaper headlines.[345]

Irked by reduced access, white opposition to desegregation began to weaken.[346] At the same time, the city continued to lose revenue. White golfers were the majority, but they now bought tickets on only certain limited days. Still, in 1950, Baltimore rejected a Black golfing group's petition to give up their exclusive days at one park and play alongside white golfers on a trial basis. Eventually, however, the "absurdity of the arrangement broke the park board's will."[347] Or, at the very least, it weakened their resolve. After the group's petition was rejected, they threatened to sue the city, and the city finally relented and desegregated in 1951.[348] This desegregation was hardly voluntary: it was the courts that created the conditions of declining revenue and white dissatisfaction that put golf segregation on the edge. And what pushed it over that edge was the threat of future legal action.

Justice Stanley Reed, who reluctantly joined the opinion in *Brown*, declared that "segregation in the border states [would] disappear in 15 or 20 years" without judicial intervention.[349] Against this backdrop, saving Black people from the brutality of Jim Crow for two decades is an accomplishment worth celebrating. It is impossible to predict exactly when desegregation in the border states would have ended. But the available evidence suggests that progress had clearly stalled when it came to public recreation. For civil rights activists, spaces that would be even more difficult to desegregate laid ahead, such as schools, swimming pools, and restaurants. In the border states, the Supreme Court played an essential and successful role in ending Jim Crow.

C. The Civil Rights Act of 1964

Progressive critics of judicial review are surely correct that *Brown* alone did not achieve desegregation, and that the actual proximate cause for the demise of Jim Crow occurred ten years later with the passage of the Civil Rights Act of 1964. But the critics move all too quickly from that observation to the conclusion that *Brown* was irrelevant to desegregation. After all, the legislation did not pass in a counterfactual world where the Court never ruled on the issue. As scholars have long debated, the key question thus concerns the relationship between *Brown* and the Civil Rights Act of 1964: would the legislation have been likely to pass without the Court's intervention in *Brown*? Only if the answer to this question is yes do the progressives have a strong case.

Although the answer to this question remains unsettled, on balance the evidence suggests that *Brown* was necessary to the passage of the Civil Rights Act of 1964. Indeed, this was the reigning scholarly consensus for the vast majority of the twentieth century.[350] There were a variety of theories. Among them were that

344. TERRY, *supra* note 336, at 145.
345. Schuster, *supra* note 339, at 63.
346. *Id.* at 64; TERRY, *supra* note 336, at 145–46.
347. TERRY, *supra* note 336, at 146.
348. Wells et al., *supra* note 338, at 163–64.
349. KLARMAN, *supra* note 196, at 308, 345.
350. Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 75 (1994).

Brown gave the issue of school desegregation "[political] salience, press[ed] elites to act, prick[ed] the conscience of whites, legitimate[d] the grievance of blacks, and fire[d] blacks up to act."[351] In his classic 1991 book, *The Hollow Hope*, political scientist Gerald Rosenberg subjected each of these claims to lengthy and rigorous empirical scrutiny and found the evidence lacking. Rosenberg concluded that "the burden of showing that *Brown*" is causally related to the successes of the civil rights movement "now rests squarely on those who for years have written and spoken of its immeasurable importance."[352] While many took issue with Rosenberg's book, it was nonetheless immensely influential and successfully shifted the burden towards those who defended *Brown*'s importance to eventual desegregation.

Leading legal historian Michael Klarman sought to meet that burden by positing a new variable—white backlash—as the source of a causal link between *Brown* and the passage of the Civil Rights Act of 1964. Whereas Rosenberg sought to sink the conventional wisdom, Klarman's objective was "to show that the conventional wisdom, linking *Brown* with the landmark civil rights legislations of the mid 1960s, is correct, but for the wrong reason: *Brown* was indispensable to the timing of this legislation[.]"[353]

On this view, *Brown*'s importance lies in the fact that it prompted a violent backlash in the South against the civil rights movement, which so enraged public opinion outside the region that Congress responded with remedial legislation. Before *Brown*, moderate segregationists dominated southern politics. These politicians, Klarman argues, were "economically populist and, although segregationist, they downplayed race while accommodating gradual racial reform."[354] None of these men would have ever condemned segregation or pushed for desegregation in schools, but they had achieved or were open to reforms in domains such as voting registration, public hiring and transportation, jury selection, sports, and graduate and professional schools.

By bringing together Black boys with white girls, the argument goes, *Brown* touched on the most sensitive part of desegregation, inflamed public opinion, and thus gave birth to a new class of rabidly segregationist, demagogic politicians who challenged these moderates from the right.[355] In the ensuing elections, moderates either retired, shifted right, or were not reelected. Whereas moderates might have quietly suppressed the civil rights movement, the new or converted hard-right segregationists—most notably, Birmingham, Alabama, Commissioner of Public Safety Theophilus "Bull" Connor, Arkansas Governor Orval Faubus, and Alabama Governor George Wallace—responded to the protests and sit-ins with

---

351. ROSENBERG, *supra* note 284, at 156.

352. *Id.* On scholarly acceptance of Rosenberg's claim, see generally Malcolm M. Feeley, *Hollow Hopes, Flypaper, and Metaphors*, 17 LAW & SOC. INQUIRY 745 (1992); Michael W. McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQUIRY 715 (1992).

353. Klarman, *supra* note 350, at 76.

354. KLARMAN, *supra* note 196, at 385–86.

355. *See id.* at 391. *But see* Ruth Bloch Rubin & Gregory Elinson, *Anatomy of Judicial Backlash: Southern Leaders, Massive Resistance, and the Supreme Court, 1954–1958*, 43 LAW & SOC. INQUIRY 944, 946 (2018) (arguing that the backlash was not a grassroots phenomenon but instead was a primarily top-down direction from a cadre of southern political elites in Congress).

brutal and barbaric force. According to Klarman, "by encouraging extremism, *Brown* increased the likelihood that once direct-action protest developed it would incite a violent response."[356] And that violent response had consequences for politics that were favorable to the securing of Black civil rights. The "nationally televised scenes of southern law enforcement officers using police dogs, high pressure fire hoses, tear gas, and truncheons against peaceful, prayerful black demonstrators (often children)" so altered northern public opinion as to create great pressure for Congress to pass the Civil Rights Act of 1964. For Klarman, the Court was key to achieving desegregation, as "only the violence that resulted from *Brown*'s radicalization of southern politics enabled transformative racial change to occur as rapidly as it did."[357]

If this is the mechanism that links *Brown* to the Civil Rights Act of 1964, how much, if any, credit does the Court deserve? Klarman characterized the "chain of causation" as "strikingly indirect, and indeed almost perverse."[358] Is it not odd to count in the Court's favor consequences that were both unintentional and in the short-run brutally violent?

Our answer to this question is to underscore that *Brown*'s consequences were consistent with the strategy adopted by the direct-action wing of the civil rights movement, which preached the idea that progress on a social issue involves inflaming conflict in ways that are likely to be ugly.[359] In King's celebrated *Letter from a Birmingham Jail*, he wrote that while it "may sound rather shocking," the "purpose of direct action is to create a situation" that is so "crisis-packed" that a community is "forced to confront the issue."[360] King was responding to moderate white clergymen who, even as they condemned the "hatred and violence" of white supremacists, felt that the use of civil disobedience "to incite hatred and violence" was part of the problem.[361] For King, white supremacy contained within it a latent violent element, acting as a constant threat to keep Black people subordinated. The goal was to expose this violence to white audiences in the North by choosing to protest in the exact locations where protesters were most likely to be greeted with the most brutal response. Gene Sharp, in perhaps the most widely read tract on

---

356. KLARMAN, *supra* note 196, at 385.

357. *Id.* at 442.

358. Klarman, *supra* note 350, at 76.

359. To be sure, the NAACP did not intend to create a southern backlash and in general were wary of, though not directly opposed to, direct action. *See* KLARMAN, *supra* note 196, at 313, 319, 377–80. The most prominent proponents of direct action were King and his organization, the Southern Christian Leadership Conference, and the even more aggressive student movements such as the Student Nonviolent Coordinating Committee. *See generally* CLAYBORNE CARSON, IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960S (1995); ADAM FAIRCLOUGH, TO REDEEM THE SOUL OF AMERICA: THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE AND MARTIN LUTHER KING, JR. (2001).

360. Martin Luther King, *Letter from a Birmingham Jail*, *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES 289, 290 (James M. Washington ed., reprint ed. 2003).

361. Letter from C.C.J. Carpenter et al. to Martin Luther King, Jr., MORNINGSIDE CTR. FOR TEACHING SOC. RESP. (Apr. 12, 1963), https://www.morningsidecenter.org/sites/default/files/files/Excerpts%20Clergymen%20%26%20King%20letters.pdf [https://perma.cc/9BS9-2X3N].

nonviolence, proposed that the start of public demonstrations "will almost always sharpen the conflict, cause the conflicting groups to become more sharply delineated, and stimulate previously uncommitted people to take sides."[362] Or, as the civil rights scholar Doug McAdam put it: "[W]hat supremacists such as Connor brought to the movement were highly dramatic symbols of segregation contributing greatly to the insurgents' ability to mobilize the resources of both the black community and elite support groups."[363]

What we might say, then, is that the strategy adopted by civil rights proponents required a favorable intervention from somewhere within the national government to catalyze this process of conflict-sharpening. That the intervention came from the Court can thus best be understood as an example of the judiciary performing a necessary step in the pursuit of justice.

D. Why the Court?: The Role of Educational Polarization

The Supreme Court's vanguard role on school desegregation is best explained by the liberal bias of elite lawyers in that era. In general, on culture-war issues such as race, those with a college degree are more liberal than those with less education.[364] This orientation shows up strongly in poll numbers taken shortly after the *Brown* decision: 73% of college graduates approved of *Brown*, while only 45% of high school dropouts did.[365] Even in the South, where a majority across all educational lines opposed *Brown*, those with more education and more elite jobs were significantly more likely to approve of the decision.[366]

As members of the educated elite, lawyers since the New Deal have shared the era's liberal leanings. Lawyers who worked in the Roosevelt and Truman Administrations left government with invaluable experience in a host of new agencies that was of great value to law firms and corporations.[367] At this same moment, law schools began to professionalize and grow the ranks of their faculties. Many New Deal liberal lawyers took academic positions, greatly changing the political character of their schools.[368] Lastly, a decline in anti-Semitism meant that elite law schools removed their cap on Jewish students and law professors. The resulting class of Jewish lawyers were far more liberal than the largely Protestant

362. GENE SHARP, HOW NONVIOLENT STRUGGLE WORKS 83 (2013); MARK ENGLER, PAUL ENGLER & BILL MCKIBBEN, THIS IS AN UPRISING: HOW NONVIOLENT REVOLT IS SHAPING THE TWENTY-FIRST CENTURY 205 (2017) ("True, disruptive actions are polarizing. But . . . [i]t is central to how they work."). For a take on the relationship between activism and polarization that emphasizes how it may realign the political parties, see generally FRANCES FOX PIVEN, CHALLENGING AUTHORITY: HOW ORDINARY PEOPLE CHANGE AMERICA (2006).

363. DOUG MCADAM, POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930–1970, at 174 (1982).

364. *See* LAWRENCE BAUM & NEAL DEVINS, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 85 (2019).

365. KLARMAN, *supra* note 196, at 309.

366. Murakami, *supra* note 297, at 25–26.

367. STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 25 (2010).

368. *Id.* at 26–27.

establishment they replaced.[369] While originally defined by their commitment to government intervention in the economy, during the 1940s and 1950s, New Deal supporters became liberals on the issue of civil liberties, including the rights of Black Americans.

It was this very liberal characteristic of elite lawyers that prompted conservative griping a generation later. President Richard Nixon perhaps put it most strikingly when, after informing then-Eighth Circuit Judge Harry Blackmun of his nomination to the Court, he warned Blackmun "that the 'Georgetown crowd' will do their best to elbow in on you. You will be wined and dined and approached."[370] Several years later, after appointing William Rehnquist to the Court, Nixon similarly expressed his hope that Rehnquist "[wasn't] going to be moved by the Georgetown set."[371]

In *Brown*, the Justice who most had to be "moved" was Stanley Reed. After the case was reargued, he was the sole Justice who unambiguously favored upholding *Plessy*. However, believing that unanimity was desirable on such a controversial issue, he nevertheless voted with the majority.[372] Reed's position most likely reflected his upbringing in the border state of Kentucky, where school segregation was still legal. In his personal life, Reed refused to be a part of integrated social events.[373]

Nonetheless, Reed's position on race shows the likely influence of the trend toward greater liberalism in the legal profession. Reed had been an elite lawyer, most notably serving as Solicitor General in the Roosevelt Administration.[374] And even Reed thought that the notion of Black inferiority was absurd, suggesting instead that Black Americans were likely "handicapped by lack of opportunity."[375] As Klarman argues, "[I]t speaks volumes that an upper-crust Kentuckian who had spent much of his adult life in the nation's capital would have said such a thing. Most white Southerners—less well educated, less affluent, and less exposed to the nation's cultural elite—would have demurred."[376] While Reed had initially opposed *Brown*'s assault on school segregation, he had consistently joined the majority in previous pro-civil-rights decisions concerning white primaries, segregation in

---

369. *Id.* at 26.

370. BAUM & DEVINS, *supra* note 364, at 89.

371. *Id.*

372. KLARMAN, *supra* note 196, at 302; Mark Tushnet & Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867, 1905, 1907, 1924 (1991). For other important accounts, see generally RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 585–619 (2004); Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1, 34–44 (1980). We refer here to the justices' positions after re-argument, but their positions after the first argument were more complicated, but still evinced an overall either political or legal distaste for segregation.

373. KLARMAN, *supra* note 196, at 300.

374. For Reed's years as Solicitor General, see generally JOHN D. FASSETT, NEW DEAL JUSTICE: THE LIFE OF STANLEY REED OF KENTUCKY 59–207 (1994).

375. KLARMAN, *supra* note 196, at 310.

376. *Id.*

graduate and professional schools, and judicial enforcement of racially restrictive covenants.[377] On these issues, Reed was out of step with most of his fellow white Southerners, but likely more in harmony with the views of "well-educated, relatively affluent, southern white lawyers."[378] Thus, while Reed's decision to join the *Brown* majority reflects his collegiality and concern for the Court's institutional standing, it likely also reflects the reality that he was not intensely opposed to the decision in the first place.[379] In the national political environment of the immediate postwar years, it should thus not be surprising that it was the judiciary that initially catalyzed action on civil rights.

V. *ROE*

In *Roe v. Wade*, the Supreme Court accomplished what state legislatures could or would not: the widespread legalization of abortion. The Court's decision and its peculiarly doctor-centered reasoning reflect the progressive sentiment of the professional classes who had reluctantly converted from their former position favoring limited liberalization of abortion on medical grounds to support for a woman's right to choose abortion for any reason.

A. The Court as Progressive Vanguard

While progressive critics of judicial review often emphasize *Brown*'s failure to achieve school desegregation, they are more circumspect about *Roe*. This is for good reason. For progressive critics, *Roe* is a harder case than *Brown* because its implementation was ultimately not a problem. Although many hospitals delayed making elective abortions available, private clinics met the demand for abortions after *Roe*.[380] Indeed, due to the presence of such private clinics, the number of legal abortions skyrocketed.[381] Not only was *Roe* more practically effective than *Brown*, but its impact was also far more widespread. *Brown* attacked the outlier practices of one region of the country; *Roe* changed abortion law and practice in all but two states.[382]

Still, critics refuse to credit the Court for giving progressives a significant victory by suggesting that *Roe* was unnecessary to achieve abortion rights. Moyn, for instance, writes, "As for the struggle for women's . . . rights, there is also no

---

377. *Id.* at 195.

378. *Id.*

379. *See id.* The influence of educational polarization went beyond Reed: it affected the clerks too. All of the law clerks that year except Rehnquist's—including all of the southern ones—strongly favored overturning *Plessy*. *Id.* at 309. At some point, Reed had to ask his clerks to stop pestering him about the case as he became irritated with their strong feelings on the issue. *Id.* at 309–10.

380. ROSENBERG, *supra* note 284, 189–98; Archon Fung, *Making Rights Real:* Roe*'s Impact on Abortion Access*, 21 POL. & SOC'Y 465, 474 (1993).

381. ROSENBERG, *supra* note 284, at 178–79; Fung, *supra* note 380, at 481–83.

382. *Roe* struck down the abortion regimes of all but two states. At the time of *Roe*, only four states—Hawaii, Alaska, New York, and Washington—offered elective abortion. Of those four, Hawaii and Alaska set the cut-off point at viability and thus were essentially unaltered by *Roe*; however, New York and Washington had to begin providing abortions at later stages of pregnancy than their legislation previously permitted. ROSENBERG, *supra* note 284, at 263.

doubt the Supreme Court played a role. But the counterfactual is always: compared to what alternative method?"[383] In looking for an alternative, Moyn looks outside the United States, noting that "[f]eminists abroad made greater strides than ever occurred in the United States without generalized recourse to judges."[384] He further emphasizes that in the contemporary era, and particularly in the aftermath of the Court's decision to overrule *Roe* in *Dobbs v. Jackson Women's Health Organization*, legalizing abortion could plausibly be done through democratic politics.[385] Given the salience of the issue, and putting aside the Senate filibuster, congressional Democrats could at some conceivable point in the not-too-distant future command sufficient votes to codify *Roe* in federal legislation.[386] Legislatures, on this account, were both historically and currently just as likely to legalize abortion as courts.

Moyn's posing of the counterfactual harkens back to Ruth Bader Ginsburg's and Mary Ann Glendon's highly influential assertions that the *Roe* simply sped up the inevitable. In a widely cited 1984 speech, then-D.C. Circuit Judge Ginsburg argued that when it came to abortion "the political process was moving in the early 1970s, not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting."[387] A few years later, Glendon argued that "[b]y the time of *Roe v. Wade* in 1973, abortion law in the United States . . . was in ferment."[388] Absent judicial intervention, "statutes of the . . . type struck down in *Roe* and *Doe* [*v. Bolton*] would not have survived long."[389] Both Ginsburg and Glendon relied heavily on the fact that prior to *Roe*, 17 states had recently liberalized their abortion laws through legislative means.[390] Both analogized the change in abortion law to the spread of no-fault divorce laws that began with individual states but eventually "establish[ed] no-fault divorce as the national pattern."[391] Glendon concluded by speculating that if not for judicial intervention, the "great majority" of states would have likely followed a European pattern of wide-spread availability of abortions within the first trimester.[392]

As these accounts suggest, it is undoubtedly correct that the abortion-liberalization movement had notable successes beginning in 1967. But it is also plain that after 1970 the movement stopped in its tracks. From 1971 until *Roe*, it "won no political victories," and "prospects for making any sort of [legislative] headway with

---

383. Moyn, *supra* note 5.
384. *Id.*
385. *See* Moyn, *supra* note 2.
386. *Id.*
387. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 385 (1985).
388. MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 48 (1989).
389. *Id.*
390. *Id.* at 48–49; Ginsburg, *supra* note 387, at 380, 385.
391. Ginsburg, *supra* note 387, at 380; *see also* GLENDON, *supra* note 388, at 48.
392. GLENDON, *supra* note 388, at 49. To be clear, Glendon did not believe that without *Roe* abortion would be an elective procedure. Rather, it would result in a "middle way" in which abortion would be allowed only for specific reasons, but such reasons would be either stated or interpreted so broadly as to effectively allow abortion to be available to any woman who wanted it. *See id.* at 15–22, 48.

abortion . . . looked very bleak."[393] What changed were the demands of the pro-abortion movement and the strong backlash those demands elicited. Once the movement transitioned from an elite group of professionals pushing for limited liberalization on medical grounds to a broader movement with the aim of legalizing elective abortion, the Catholic Church mobilized, and the pro-abortion movement's momentum dissipated. The historical record makes clear that the Court went against, rather than with, then-prevailing political trends.[394]

The elite professional class, especially doctors and lawyers, served as the key driving forces for abortion reform in the 1960s. The status quo was, from their perspective, a bleak one. By 1890, abortion was essentially illegal in all states unless performed by a doctor who deemed it necessary to save the life of the mother.[395] Because threats to the life of the mother were so varied, however, doctors in practice possessed significant discretion about when to grant abortions.[396] By the end of World War II, this discretion shrunk considerably—most notably as a result of new medical advances that made pregnancy much safer.[397] Prosecutions of doctors correspondingly increased.[398]

At the same time, the public was exposed to widely publicized and sympathetic stories of women being denied abortions in cases where the baby was likely to suffer birth defects caused by the rubella virus or thalidomide.[399] Building on public sympathy, feeling under threat, and seeking more clarity from the law, doctors began to push for reform.[400] As fellow members of the professional elite, lawyers were sympathetic. In 1962, the American Law Institute ("ALI") released influential model legislation that recommended expanding protected reasons for

---

393. David J. Garrow, *Abortion Before and After* Roe v. Wade*: An Historical Perspective*, 62 ALB. L. REV. 833, 841 (1999) (emphasis omitted).

394. We are referring to political trends in state governments and in the federal government, not public opinion. After all, the counterfactual we address is what would have happened had the Court not acted. Public opinion is not a reliable indicator of what elected officials will do for a variety of reasons, including catering to their base or to maintain party unity on a cross-cutting issue. Abortion in the 1970s was exactly the kind of issue that parties often seek to avoid. *See* Graber, *supra* note 13, at 53–61. On how abortion split the democratic party, see DANIEL K. WILLIAMS, DEFENDERS OF THE UNBORN: THE PRO-LIFE MOVEMENT BEFORE *ROE V. WADE* 8 (2016).

395. JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF A NATIONAL POLICY 233–35 (1979).

396. KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 33, 45, 77 (1984).

397. *Id.* at 54–56; *see* LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973, at 160–64 (1998) (attributing increased prosecutions in the 1940s to new specialized abortion offices, medical advances that made abortion safer, and reinforcement of traditional gender roles in response to women's increased participation in the workforce during World War II).

398. *See* REAGAN, *supra* note 397, at 16.

399. *See* DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 300–01 (1994); LUKER, *supra* note 396, at 62–65.

400. REAGAN, *supra* note 397, at 218–22; LUKER, *supra* note 396, at 67–91.

abortion.[401] Rather than allowing abortions only to safeguard the woman's life, the new legislation would allow an abortion whenever pregnancy would "gravely impair the physical or mental health of the woman."[402] It also permitted abortion in cases of pregnancy resulting from rape or incest, or if the child would be born with a grave physical or mental defect.[403] The release of this legislation became the blueprint for this self-styled "reform movement" of elite professionals who sought to legalize abortion in cases where a medical justification was present.[404]

Between 1967 and 1970, 12 states passed ALI-style reform laws, mostly by overwhelming margins and with little controversy.[405] Their success was remarkable, but it should not be exaggerated. ALI-style bills failed on floor votes in eight states, albeit by close margins.[406] Still, in 1969 or 1970, "it probably would have been reasonable for contemporaries to judge the elite reform movement to be immensely successful, even unstoppable."[407]

It was in 1970, however, that the abortion-rights movement's momentum shifted.[408] In this year, the reform movement receded, with legislative action increasingly centering on feminist demands for laws permitting abortion for any reason within a limited time frame. For feminists, abortion was primarily about women's rights and equal citizenship.[409] To strip women of that choice and place it in the hands of a doctor was patronizing, relegating women to an inferior position in society. Accordingly, feminists tended to be ambivalent or even hostile to elite reformers because the reformers' medical model was inconsistent with and even antagonistic to feminist messaging.

This approach garnered the support of many members—perhaps even the majority—of the reform movement. These defectors from reform believed that due to overly strict interpretation of the newly passed reform laws, even women who clearly met the law's criteria were unable to get abortions.[410] Doctors also resented the new medical boards established by these reform laws, whose approval was necessary for an abortion to go forward.[411] In consequence, a new abortion

---

401. *See* GENE BURNS, THE MORAL VETO: FRAMING CONTRACEPTION, ABORTION, AND CULTURAL PLURALISM IN THE UNITED STATES 163 (2005); REAGAN, *supra* note 397, at 221.

402. The quoted language is from ALI model legislation: MODEL PENAL CODE § 230.3(2) (AM. L. INST. 1962). *See* BURNS, *supra* note 401, at 165; REAGAN, *supra* note 397, at 221.

403. BURNS, *supra* note 401, at 164; REAGAN, *supra* note 397, at 221.

404. BURNS, *supra* note 401, at 163–68.

405. *Id.* at 176–85.

406. *See id.* at 196–205 (discussing the failure of passage of bills in Florida, Arizona, North Dakota, Maine, Michigan, Oklahoma, Vermont, and New Hampshire).

407. *Id.* at 213.

408. *Id.* at 214.

409. *See* REAGAN, *supra* note 397, at 222–34; LUKER, *supra* note 396, at 92, 96–100.

410. *See* BURNS, *supra* note 401, at 211–12; REAGAN, *supra* note 397, at 233–34; EVA R. RUBIN, ABORTION, POLITICS, AND THE COURTS: *ROE V. WADE* AND ITS AFTERMATH 26–28 (1987).

411. *See* REAGAN, *supra* note 397, at 233.

liberalization movement with a more feminist message arose, dedicated to passing legislation permitting women to choose to have an abortion from a licensed physician for any reason within a restricted period of time. This vision roughly corresponded to the basic contours of what the Supreme Court in *Roe* understood to be the constitutional right to abortion.

In 1970, this new pro-choice movement succeeded in convincing four states to pass laws permitting elective abortion within a restricted time period: Hawaii at fetal viability or 28 weeks, Alaska at fetal viability or 28 weeks, New York at 24 weeks, and Washington at 16 weeks. With the exception of Hawaii and unlike debates over reform bills, the legislation was immensely controversial and passed by thin margins. In New York's lower house, for example, the vote was tied until a Jewish representative from a majority-Catholic district ended his political career by switching his vote to "yes."[412] In Alaska, after the legislature passed the bill by one vote, the governor vetoed it.[413] Somewhat unexpectedly, the legislature overrode the governor's veto.[414] In Washington, the legislature failed to pass a bill liberalizing abortion the year before, so proponents proceeded through a referendum that created a "rancorous, very public debate."[415] By the end of 1970, the tame and elite movement for reform laws was dead, and the debate now was a polarized and emotional one focusing on the right to have an elective abortion.[416] Would pro-choice forces be able to build on their success and expand beyond these four states?

It is in this political context that after 1970, the momentum of the pro-choice movement is said to have "ground to a halt."[417] Popular referendums in Michigan and North Dakota that had been expected to pass instead failed miserably, with Michigan's measure losing 39% to 61% and North Dakota's 23% to 77%.[418] In Michigan, public support seemed to ebb after the Catholic Church mobilized.[419] In New York, one of the four states that permitted elective abortion, only Governor Nelson Rockefeller's veto prevented the restoration of the state's nineteenth-century abortion ban.[420] Even more extreme, in Pennsylvania, the governor vetoed the legislature's attempt to beef up enforcement of its nineteenth-century ban by requiring all abortions to protect a woman's health to be approved by a board of three doctors.[421] The proposal likely had more than two-thirds support in the state legislature, which most anywhere would have guaranteed passage. But this was

412. BURNS, *supra* note 401, at 216; Bonnie Eisner, *How a Jewish Legislator's Vote Legalized Abortion in New York in 1970*, THE FORWARD (July 6, 2022), https://forward.com/news/509062/jewish-legislator-abortion-vote-new-york-1970/.

413. *Id.* at 216.

414. *Id.* at 216–17.

415. *Id.* at 217; *see Abortion Law: Marilyn Ward Recalls the Campaign to Reform It in Washington*, HIST. LINK (Aug. 26, 2000), https://www.historylink.org/File/2675 [https://perma.cc/BM5H-MNX7].

416. The only reform law passed after 1970 was in Florida in 1972. This was not the result of a legislative or social movement initiative, but rather was required by a state supreme court ruling. BURNS, *supra* note 401, at 215.

417. *Id.* at 27–28, 208.

418. GARROW, *supra* note 399, at 577.

419. *See* BURNS, *supra* note 401, at 218.

420. Garrow, *supra* note 393, at 841.

421. GARROW, *supra* note 399, at 578.

insufficient in Pennsylvania only because the state constitution required the unusually high threshold of 75% to overcome the governor's veto.[422] In view of these dynamics, one prominent abortion proponent declared: "We are being steamrolled."[423]

It is impossible to know how state legislation on abortion might have developed had the Supreme Court not given it constitutional protection. But insofar as Ginsburg's and Glendon's method of extrapolating from then-prevailing trends suggests a reasonable methodological way forward, we should have considerable doubt about this claim. The trends offer no indication of progress on the legalization of abortion. Had the debate deadlocked, 4 states would have had elective abortion, and 13 would have had ALI-style reform. But it is entirely possible that countermobilization would have led to the reversal of even these victories. In either scenario of stability or retrogression, without the Supreme Court, most women would not have had the right to abortion except for situations when their lives were at risk.

B. Professional Elites and Abortion

Roe was out of sync with legislative politics because it was in sync with the changing and progressive sensibilities of the elite professional class toward abortion in 1973. Justice Harry Blackmun wrote the majority opinion in *Roe*. As a lawyer at the highest level, Blackmun was of the same social and professional class as most members of the reform movement. He also took pride in and thought of himself as having deep connections to doctors. Blackmun grew up wanting to become a doctor, had deep respect for the profession, and served as general counsel for the Mayo Clinic.[424] In the justices' conferences on cases involving medicine, Blackmun was more assertive than his colleagues, consistently invoking his knowledge and experience in the field.[425]

The companion cases of *Roe v. Wade* and *Doe v. Bolton* starkly presented to Blackmun the dilemma of choosing between so-called reform laws and elective abortion laws.[426] *Roe* concerned a nineteenth-century statute that permitted abortion only to protect the life of the pregnant woman.[427] Not surprisingly, and consistent with the sensibilities of the reform movement, Blackmun wanted to strike down this outdated law. It was an easy case. But Blackmun was far more ambivalent about *Bolton*, which concerned an ALI-style reform law in Georgia, allowing for abortion

---

422. *Id.*

423. *Id.* at 579. For more extensive reflections on whether the backlash to abortion preceded Roe on the national rather than the state level, see Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028, 2028 (2010).

424. LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 18 (2005); Nan D. Hunter, *Justice Blackmun, Abortion, and the Myth of Medical Independence Symposium*, 72 BROOK. L. REV. 147, 147 (2006).

425. Hunter, *supra* note 424, at 162.

426. In addition to consulting the justices' conference notes, this Section on the justices' deliberations benefitted from the detailed accounts of GARROW, *supra* note 399, at 473–608; GREENHOUSE, *supra* note 424, at 72–101; Hunter, *supra* note 424, at 170–88.

427. Roe v. Wade, 410 U.S. 113, 117–19 (1973).

to protect the health of the mother, in cases of rape or incest, and when there was grave threat of birth defects.[428] Would Blackmun follow the reform movement's original line that abortion was a medical decision limited to certain circumstances and thus uphold the Georgia law? Or would he strike down the statute—a ruling consistent with the emerging consensus even among many reformers that elective abortion laws were necessary?

Blackmun initially leaned towards upholding the Georgia law, but eventually decided to strike it down. In the initial December 16, 1971 conferences on *Roe* and *Bolton*, Blackmun commented that Georgia had a "fine statute"[429] and reflected that the state's "[a]ct strikes a balance that is good."[430] After the conference, Chief Justice Warren Burger assigned Blackmun to write both *Roe* and *Bolton*.[431] Six months later, Blackmun distributed his first draft of *Roe* to the other justices.[432] Although the draft struck down the nineteenth-century law, it did so on narrow grounds and avoided the issue of the right to privacy.[433]

In the cover letter, Blackmun expressed some hesitation about how he would draft the opinion in *Bolton*, writing that "[t]he Georgia case, yet to come, is more complex."[434] While Blackmun promised a draft, he was "tentatively of the view" that the Georgia case should be reargued because two of the seats on the Court were then vacant.[435] Staunch liberals William Brennan and William O. Douglas vehemently objected both to how Blackmun's draft opinion in *Roe* avoided the "core constitutional question" of the right to privacy and to the idea that the Georgia case should be reargued.[436] Six days after delivering his draft in *Roe*, Blackmun distributed the *Bolton* draft.[437] To the relief of Brennan and Douglas, Blackmun struck down the Georgia law as a violation of a woman's right to privacy. Much wrangling continued, but Blackmun never wavered again on this point.[438] Ultimately, Blackmun chose to follow the newly emerging consensus in favor of elective abortions rather than the waning one that favored ALI-style laws.

But even as Blackmun struck down ALI-style laws, he invoked their medical logic to legitimize the opinion. As many have heavily criticized, the *Roe*

---

428. Doe v. Bolton, 410 U.S. 179, 182–83 (1973).

429. William O. Douglas, Douglas Conference Notes, Roe v. Wade 94 (Dec. 16, 1971) (unpublished conference notes) (on file with the Library of Congress, Douglas Papers, Box 1590).

430. William O. Douglas, Douglas Conference Notes, Doe v. Bolton 91 (Dec. 16, 1971) (unpublished conference notes) (on file with the Library of Congress, Douglas Papers, Box 1590).

431. Hunter, *supra* note 424, at 172.

432. GARROW, *supra* note 399, at 547.

433. *See* Hunter, *supra* note 424, at 172.

434. Memorandum from Just. Harry A. Blackmun to the Conf. 108 (May 18, 1972) (on file with the Library of Congress, Douglas Papers, Box 1590).

435. *Id.*

436. Letter from William J. Brennan, Sup. Ct. Just., to Harry A. Blackmun, Sup. Ct. Just. (May 18, 1972) (on file with Library of Congress, Douglas Papers, Box 1590).

437. *See* GARROW, *supra* note 399, at 547–51.

438. *See id.* at 551–62, 574–87; GREENHOUSE, *supra* note 424, at 88–99; Hunter, *supra* note 424, at 172–75.

decision focuses more on the rights of the doctor rather than on the rights of the woman. Blackmun declared:

> [T]he decision vindicates the right of the *physician* to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a *medical* decision, and basic responsibility for it must rest with the *physician*.[439]

While this language may sound odd today, it perfectly expresses the ambivalence of many elite professionals in the 1970s towards elective abortion. That sensibility embraced elective abortion as a second-best solution to a medical problem that ALI-style laws had failed to fix. Relative to state legislatures, the Court's decision was radical, but unsurprising in relationship to the widely held opinions on abortion among elite professionals.

VI. LESSONS

So far, this Article has focused on the past—challenging the traditional narrative about the Supreme Court's politics in canonical cases. But how should our findings shape how we understand judicial politics today and into the future? Progressive critics of judicial review reach the conclusion that the powers of the judiciary should be severely curbed or even destroyed on the basis of the Court's ostensibly reactionary influence on our history. But if they are wrong about the Court's record, as we think they are, what follows? Do the conditions that once pushed the judiciary to the left of congressional majorities still hold? What can we say about the role that judicial review can play in advancing progressive politics now? Here, we concede that despite the persistence of educational polarization among legal elites, it no longer exercises the same restraint on judges nominated by Republican Presidents. Nonetheless, we maintain that so long as core progressive priorities lack majority support (even within the Democratic Party), the judiciary will have a crucial role to play in advancing the progressive agenda.

A. Judicial Review's Present and Future

In contrast to decades past, the Supreme Court is now staunchly conservative. This is perhaps most apparent in comparing the Court's decisions in *Roe* and *Dobbs*. Decided in 1973 and written by a Nixon appointee, *Roe*'s result and reasoning put the legal profession's distinct liberalism on display. But 50 years later, *Dobbs*—authored by George W. Bush appointee Samuel Alito—overturned the federal constitutional right to abortion,[440] moving policy in a markedly more conservative direction in apparent defiance of public opinion.[441]

---

439. Roe v. Wade, 410 U.S. 113, 165–66 (1973) (emphasis added).

440. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

441. *Majority of Public Disapproves of Supreme Court's Decision to Overturn* Roe v. Wade, PEW RSCH. CTR. (July 6, 2022), https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade

What explains this dramatic reversal? The root cause of *Roe*-era progressive dominance over the law remains. Lawyers continue to be more liberal than the general population and considerably more so than other highly educated professionals.[442] Graduates of the nation's most prestigious law schools are even more liberal than their peers at less selective institutions.[443] To the extent the drivers of a progressive judiciary still exist, the explanation for the conservative resurgence in the law and on the Court must lie in the rise of new countervailing forces.

One such force is the maturation of conservative institutional counterweights that offset the liberal slant of the legal profession. No doubt there are other causes too, but no explanation would be complete without highlighting the crucial role that organizations—perhaps most importantly, the Federalist Society—have played in buttressing conservative confidence in their mission.[444] The Federalist Society, in particular, has influenced the ideology of the judiciary through three mechanisms. First, it built an alternative pipeline in law schools to attract and cultivate conservatives who felt (and still feel) apart from their liberal peers who represent the majority of student opinion. Participation in the Society taught conservatives that "they were not alone in the world" and ensured that they did not need to change or moderate their political beliefs to acquire social or political capital.[445] Second, the Federalist Society set up a de facto screening process for judicial appointees. Republican administrations today routinely consult with members of the Society when choosing among potential nominees to the Supreme Court (and lower courts); indeed, significant connections to the group have become a key credential for any plausible candidate.[446] Lastly, the Federalist Society incentivizes judges to remain steadfast to conservative doctrine by linking their social standing to their jurisprudence. In a social network formed through innumerable conferences, symposia, dinners, and spill-over social events, judges maintain their professional popularity by adhering to conservative legal ideology (however it is conceived at the time).[447] In the twenty-first century, through effort

---

[https://perma.cc/3TXS-QRYZ]; Zoha Qamar, *Americans' Views on Abortion Are Pretty Stagnant. Their Views on The Supreme Court Are Not.*, FIVETHIRTYEIGHT (July 1, 2022, 6:00 AM), https://fivethirtyeight.com/features/americans-views-on-abortion-are-pretty-stagnant-their-views-on-the-supreme-court-are-not [https://perma.cc/K9XD-6D22].

442. BONICA & SEN, *supra* note 14, at 125.

443. *Id.*

444. The most important additional explanation is political polarization. *See* Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. 261, 264–70 (2019).

445. AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 160 (2015).

446. *See generally* TELES, *supra* note 367, at 135–80. Federalist Society influence over judicial nominees reached a new peak when then-presidential candidate Donald Trump pledged to select Supreme Court nominees from a list provided to him by Leonard Leo, a recent vice president of the Federalist Society. *See* Nolan D. McCaskill, *Trump Releases Updated Short List of Potential Supreme Court Nominees*, POLITICO (Nov. 17, 2017, 7:37 PM), https://www.politico.com/story/2017/11/17/trump-supreme-court-nominees-247441 [https://perma.cc/8XEE-63YM].

447. *See* BAUM & DEVINS, *supra* note 364, at 132–36.

and mobilization, conservatives have overcome the exclusionary effects of the legal profession's liberal leanings.

Notwithstanding the Court's increasing conservatism, in the long term, many of the benefits of judicial review for progressive causes endure. In the past, the Court was necessary to win on culture-war issues such as racial zoning, desegregation, and abortion because the elected branches either had a more conservative position or wanted to avoid the issue altogether. The next generation of progressive priorities in the culture war is likely to encounter the twin threats of an unfriendly public and limited overt support among elected officials. On issues like mass incarceration, capital punishment, and transgender rights, the voting public has proven unreceptive to reform. For the most part, Republican voters are overwhelmingly opposed to addressing these issues, while Democratic voters are split. Even if Democrats gain power and seize unified control of government, limited public support for progressive policies means they are unlikely to devote the political capital necessary to accomplish progressive aims. A future progressive Court could again act as a vanguard on those issues the elected branches are reticent to take up.

Take mass incarceration as an illustrative example. The United States accounts for 5% of the world's population but 20% of the world's prisoners and an incarceration rate that tops those of authoritarian regimes in China and Russia.[448] For many years, it seemed plausible that the elected branches could address this situation without judicial intervention. Perhaps the public would accept the claims of prison advocates who argued that high levels of incarceration resulted principally from the criminal justice system's unduly harsh treatment of low-level, nonviolent offenders.[449]

But most scholars now believe that this characterization of the prison population is misleading at best and false at worst. The increase in the prison population is a consequence of imprisoning those convicted of violent crimes.[450] Indeed, those charged with violent crimes are responsible for almost two-thirds of the growth of the prison population since 1990.[451] Many Americans are not sympathetic to—and fear the release of—violent offenders. Consequently, elected officials must tread carefully. They are likely to face significant career consequences when they are held responsible for policy changes that release incarcerated

---

448. Roy Walmsley, *World Prison Population List*, WORLD PRISON BRIEF 2, 6, 17 (12th Ed. 2018) https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf [https://perma.cc/5NGY-6P6V]. The data in the list is current through September 2018.

449. The most prominent book to make this argument is MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012).

450. John Pfaff, *A First Look at Sentence Length: Shorter Than Many May Think, and It's All About Violent Crimes*, PRISONS, PROSECUTORS, & THE POL. OF PUNISHMENT (Nov. 13, 2023), https://johnfpfaff.com/2023/11/13/a-first-look-at-sentence-length-shorter-than-many-may-think-and-its-all-about-violent-crimes [https://perma.cc/4CXM-UUYV].

451. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL'Y INITIATIVE (Mar. 14, 2023), https://www.prisonpolicy.org/reports/pie2023.html [https://perma.cc/CQ5V-VWHJ] (commenting on the "myth" that "[r]eleasing 'nonviolent drug offenders' would end mass incarceration").

individuals who then go on to commit serious crimes. But they are likely to receive no corresponding reputational benefit when an individual is freed earlier and does not recidivate.[452] Given the role violent crime plays in mass incarceration, the incentives of electoral politics are not favorable to fixing the problem.

Enter the courts. As an array of scholars have argued, judges can restrict the presently unregulated discretion of prosecutors who wield the threat of charging a vast array of crimes with lengthy prison sentences to win plea bargains.[453] How?

One option would be to enforce a more effective right to counsel. Under the current system, overly powerful prosecutors can bully defendants into accepting terms they would not otherwise agree to if they had better counsel. According to the Department of Justice, "approximately 66% of felony Federal defendants and 82% of felony defendants in large State courts were represented by public defenders or assigned counsel."[454] But lawyers for these indigent defendants are notoriously underfunded and must shoulder atrociously large caseloads. Courts could shift the standard for effective counsel from an individual assessment to a systemic one. The current legal standard, set forth in *Strickland v. Washington*, works on a case-by-case basis, assessing whether a lawyer's performance fell below "an objective standard of reasonableness" by determining whether there is a "reasonable probability" that deficient counsel affected the outcome of the case.[455] In contrast, as the Obama Administration's Department of Justice suggested in a legal filing, a new system-wide standard could be adopted. Under such a standard, the Sixth Amendment would be violated "[w]hen on a systemic basis, lawyers for indigent defendants operate under substantial limitations, such as a severe lack of resources, unreasonably high workloads, or critical understaffing of public defender offices."[456] Were the courts to endorse such a standard, it might even the playing field between prosecutors and public defenders.

A second option would be to have the judiciary declare that excessively punitive statutory maximums are forms of cruel and unusual punishment. While statutory maximums themselves are not likely the main culprit for mass incarceration, they contribute to the core problem of prosecutorial aggressiveness. Prosecutors can use the threat of a long sentence as leverage to coerce the defendant

---

452. *See* DAVID C. ANDERSON, CRIME AND THE POLITICS OF HYSTERIA: HOW THE WILLIE HORTON STORY CHANGED AMERICAN JUSTICE 23 (1995).

453. *See* RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 51–54 (2019); EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 134–35 (2020); JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 133, 135–36, 158 (2017); Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration*, 94 S. CAL. L. REV. 1123, 1128, 1136 (2020); Andrew D. Leipold, *Is Mass Incarceration Inevitable*, 56 AM. CRIM. L. REV. 1579, 1617–18 (2019).

454. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES (2000), https://bjs.ojp.gov/content/pub/pdf/dccc.pdf [https://perma.cc/VZK4-GNF4].

455. 466 U.S. 668, 687–88, 694 (1984).

456. Statement of Interest for the United States at 1, Hurrell-Harring v. State, No. 8866-07 (N.Y. Gen. Term dismissed Mar. 1, 2015).

to agree to unfair plea bargains.[457] Judges might also declare that constitutional due process requires prosecutors to leave a public record of the sentences they threatened to seek if a defendant refused to accept a plea. The possibility of political blowback for making unreasonable threats might compel prosecutors to think twice before manipulating statutory maximums to obtain a guilty plea.[458]

It is likely that some readers will dismiss these reforms on the ground that they are unlikely to be implemented. Perhaps they are right. But if that intuition is to be credited, then it is incumbent on critics to make a plausible argument for why similar reforms would be more likely to be championed by the elected branches. We think the evidentiary reeds are thin.

Indeed, mass incarceration is just one of many policy areas elected officeholders are likely to neglect because public opinion and internal party politics often encourage conservatism. On the death penalty, for example, reliable polling data suggests that 55–60% of the public supports capital punishment. This may in fact be an underestimate, as the voting public is likely to take a harder line in the wake of episodes of mass violence or particularly prominent violent crimes.[459] And

---

457. PFAFF, *supra* note 453, at 133, 135.

458. *See id.* at 155.

459. *See Death Penalty*, GALLUP, https://news.gallup.com/poll/1606/Death-Penalty.aspx [https://perma.cc/2Y6D-B6S6] (last visited Dec 6, 2023); *Most Americans Favor the Death Penalty*, *supra* note 17.

Given the Supreme Court's failed effort to prohibit the death penalty in the 1970s, some might argue that the Court would be foolish to try again to defy public opinion on this matter. In its fractured 1972 ruling in *Furman v. Georgia*, 408 U.S. 238 (1972), the Court effectively struck down the death penalty as applied, which resulted in a moratorium most believed would lead to the abolition of the death penalty. Within the next four years, 35 states and the federal government passed statutes to remedy the problems identified by the Court. In response to the perceived political backlash, the Court essentially lifted its death penalty moratorium four years later in *Greggs v. Georgia*, 428 U.S. 153 (1976). Hayden Thorne, *From Backlash to Backtrack: How the Supreme Court Reneged on the Promise of* Furman v Georgia, 9 LAW & HIST. 158, 158 (2022).

Would it be best for the Court to avoid meddling with the death penalty in order to avoid incurring the same backlash? Although most Americans continue to support the death penalty, there are importance differences between public opinion today and in the 1970s. First, the Court's timing in 1972 was unfortunate, as it was preceded by seven years of skyrocketing increases in crime that averaged out to approximately 8,700 murders per year. John Hanley, *The Death Penalty*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY, *supra* note 297, at 108, 118. In 1972, the year *Griggs* was decided, there were nine homicides per 100,000 people. JAMES ALAN FOX & MARIANNE W. ZAWITZ, BUREAU OF JUST. STAT., HOMICIDE TRENDS IN THE UNITED STATES 9 (2010), https://bjs.ojp.gov/content/pub/pdf/htius.pdf [https://perma.cc/2WJ8-SQ5L]. Long ago that rise reversed itself. Since 1995, the yearly homicide per capita rate has been substantially lower than the 1972 rate, and the temporary pandemic-era spike in murders, which never approximated the levels of the 1970s, has abated. *See id.* at 10. Second, public opinion suggests that despite support for the death penalty in theory, there are new misgivings with its application in practice. For the first time since the question was asked in 2000, a majority of respondents (47–50%) believe that the death penalty is applied unfairly. Megan Brennan, *New 47% Low Say Death Penalty Is Fairly Applied in U.S.*, GALLUP (Nov. 6, 2023), https://news.gallup.com/poll/513806/new-low-say-

while Republicans are almost uniformly supportive of capital punishment, Democrats are divided on the issue and for that reason have every incentive to avoid taking it up.[460] In this political context, the judiciary's cautious erosion of capital punishment, including in opinions from the last two decades limiting its use in a variety of contexts, is likely progressives' best hope for action.

Another illustrative example is legislation targeting transgender people. Perhaps most concerning, 22 states ban gender-affirming care, resulting in 39.4% of transgender youth living in states where they have no access to this form of medical treatment.[461] Given that Americans overwhelmingly believe that "whether a person is a man or a woman" is determined by birth and that a strong plurality supports bans on gender-affirming care, federal legislation is unlikely to pass on this anytime soon.[462] Moderate Democrats have strong political incentives to avoid the issue, else risk overshadowing their positions on a range of less controversial topics.[463] Lower courts, however, have blazed a path for judicial protection of transgender people. The most systematic review reveals that in the lower courts, transgender plaintiffs "have been stunningly successful in raising equal protection and due process claims, achieving success on the merits in the vast majority of cases . . . [a]cross almost all

---

death-penalty-fairly-applied.aspx [https://perma.cc/AWC7-Z48L]. In a separate poll, 56% agreed that Black people are more likely than white people to receive the death sentence. *Most Americans Favor the Death Penalty*, *supra* note 17. These data suggest that the intensity in support for the death penalty might have diminished over time.

A separate point worth raising is whether critics of the Supreme Court are right to blame the backlash to the *Furman* decision for the increase in support for the death penalty. The surge may have been inevitable, regardless of the Court's actions, given that "growth in support for capital punishment predated *Furman*, and a slower but unambiguous increase persisted throughout the late 1980s." John Hanley, *The Death Penalty*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY, *supra* note 297, at 119.

460. Surveys indicate that 46% of Democrats favor the death penalty, and that number rises to 51% when the question is phrased as asking whether the death "is morally justified" when "someone commits a crime like murder." *Most Americans Favor the Death Penalty*, *supra* note 17.

461. *Attacks on Gender Affirming Care by State Map*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/attacks-on-gender-affirming-care-by-state-map [https://perma.cc/Q2RJ-JS6S] (last visited Oct. 17, 2024).

462. Kim Parker et al., *Americans' Complex Views on Gender Identity and Transgender Issues*, PEW RSCH. CTR. (Jun. 28, 2022), https://www.pewresearch.org/social-trends/2022/06/28/americans-complex-views-on-gender-identity-and-transgender-issues [https://perma.cc/GSF2-6S3H]; *see* Carrie Blazina & Chris Baronavski, *How Americans View Policy Proposals on Transgender and Gender Identity Issues, and Where Such Policies Exist*, PEW RSCH. CTR. (Sept. 15, 2022), https://www.pewresearch.org/short-reads/2022/09/15/how-americans-view-policy-proposals-on-transgender-and-gender-identity-issues-and-where-such-policies-exist [https://perma.cc/X4CK-KKF9].

463. So far only one bill has been introduced, solely in the House of Representatives and it is a purely symbolic one that would "[r]ecogniz[e] that it is the duty of the Federal Government to develop and implement a Transgender Bill of Rights." H.R. Res. 269, 118th Cong. (2023).

contexts."[464] This is true of judges appointed by Republican Presidents, including Trump appointees.[465]

Lastly, on school prayer, it seems that the Supreme Court is one of the few institutions holding out against school boards intent on reviving the practice. With a whopping 61% of Americans in support of "allowing daily prayer to be spoken in the classroom," it seems far more likely for elected officeholders to champion school prayer than to oppose it.[466]

There will also be issues that are supported by the Democratic Party as well as the broader public that nevertheless fail to secure legislative majorities, as is the case for both restrictions on gerrymandering and prohibitions against voter suppression. Most Democratic voters back both initiatives but federal lawmakers have tried and failed three times to pass federal legislation.[467] Two of those efforts passed the House but could not secure the necessary votes to end debate in the Senate, making it unlikely that such legislation will pass under current rules in the upper chamber.[468]

Finally, we think it important to appreciate that not all good things go together. For progressive critics of judicial review, the goods of economic redistribution and protection of marginalized groups serve as twin political lodestars. But history suggests that advancing economic and racial progress

---

464. Katie Eyer, *Transgender Constitutional Law*, 171 U. PA. L. REV. 1405, 1408 (2023).

465. *Id.* at 1408, 1411.

466. Rebecca Riffkin, *In U.S., Support for Daily Prayer in Schools Dips Slightly*, GALLUP (Sept. 25, 2014), https://news.gallup.com/poll/177401/support-daily-prayer-schools-dips-slightly.aspx [https://perma.cc/RQ29-TB2U]; *see also* Alison Gash & Angelo Gonzales, *School Prayer*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY, *supra* note 297, at 62–63 (showing that the Supreme Court defied public opinion on school prayer and that majorities consistently support reviving the practice since then).

467. On the polling of Democrats' most recent bill to address these issues, see Ella Nilsen, *New Polling Shows Voters—Including Independents—Want Congress to Pass an Anti-Corruption Bill*, VOX (Jan. 3, 2019, 4:30 AM), https://www.vox.com/policy-and-politics/2019/1/3/18148633/hr1-voters-independents-anti-corruption-bill-poll [https://perma.cc/HZ6F-KKBB]; *67% of Americans Support HR.1 For The People Act*, DATA FOR PROGRESS (Jan. 22, 2021), https://www.dataforprogress.org/blog/2021/1/22/majority-support-hr1-democracy-reforms [https://perma.cc/RV3G-QYER]. Members of both parties are against partisan gerrymandering, though they lack strong beliefs about the redistricting processes in their state. *See* John Kruzel, *American Voters Largely United Against Partisan Gerrymandering, Polling Shows*, THE HILL (Aug. 4, 2021, 12:48 PM), https://thehill.com/homenews/state-watch/566327-american-voters-largely-united-against-partisan-gerrymandering-polling [https://perma.cc/P2LP-A4A5]; Bradley Jones, *With Legislative Redistricting at a Crucial Stage, Most Americans Don't Feel Strongly About It*, PEW RSCH. CTR. (Mar. 4, 2022), https://www.pewresearch.org/short-reads/2022/03/04/with-legislative-redistricting-at-a-crucial-stage-most-americans-dont-feel-strongly-about-it [https://perma.cc/6FEB-KVQZ]. On Democrats inability to pass legislation on these issues, see Zack Beauchamp, *Democrats' Voting Rights Push in Congress Is Over. The Fight for Democracy Isn't*, VOX (Jan. 20, 2022, 8:50 AM), https://www.vox.com/policy-and-politics/22876361/freedom-to-vote-act-senate-filibuster-what-next [https://perma.cc/KK7M-9XM6].

468. *See* Beauchamp, *supra* note 467.

simultaneously is rarely possible, as officeholders more often choose to prioritize one at the expense of the other to suit their particular constituencies. With members of the Court afforded life tenure, the judiciary does not face a similar tradeoff. The Court can instead serve as a vanguard on issues of race and sexuality, making progress where the legislature and President cannot or will not.

B. Broader Implications

What are the broader implications of our claim that scholars sympathetic to left-of-center goals have misunderstood the role that judicial review can play in advancing progressive politics? To begin, we agree with progressive critics that Americans ought to abandon the "storybook truth" of an impartial, apolitical judiciary.[469] But we think it unwise to assert that the Court categorically cannot or will not advance progressive aims, while Congress (or the President—an institution less central to the contemporary progressive critique) always can and will.

Our central worry is that progressive critics are at risk of replacing a hagiography of the judiciary with an equally uncritical view of the elected branches—and especially the legislature. Legislative supremacism is currently in vogue in the legal academy.[470] In some ways, this trend has been salutary, prompting legal scholars to reckon anew with the pathologies of courts and our collective professional obsession with the internal workings of the Supreme Court. But if judges do not merit their status as the white knights of democratic politics, there is little evidence that members of Congress or the executive branch are more deserving of progressive veneration. The achievements, for instance, of the Civil Rights Act of 1964 are undeniable. Yet progressives must not forget that it took decades for Congress to muster majorities committed to civil rights, even as the public became increasingly supportive of liberalizing the nation's racial politics.

Indeed, much the same story that progressive critics seek to tell about the Court could be told about the elected branches of government. In the aftermath of the Civil War, the costs of maintaining a southern wing of the Republican Party constituted in part by freedmen came to be seen by elected officials as intolerably high. By the turn of the twentieth century, widespread party-tolerated disenfranchisement across the South—coupled with high levels of internal migration and European immigration that increased the ranks of white voters in the North and West—meant that neither Republicans nor Democrats believed they could profit from courting the votes of Black Americans. Nearly 50 years later, little

---

469. *See* James A. Morone, *Storybook Truths About America*, 19 STUD. AM. POL. DEV. 216, 216 (2005).

470. *See, e.g.*, Doerfler & Moyn, *supra* note 34, at 774 (suggesting that "courts both domestically and internationally are less disposed than other governmental bodies, particularly legislatures, to recognize and enforce positive as opposed to negative rights" and arguing that in consequence "legislative rather than judicial empowerment should predominate"). To be sure, as with most trends in the legal academy, there are earlier precedents for the arguments marshaled by judicial review's progressive critics (as there surely are for arguments in response). *See, e.g.*, REBECCA E. ZIETLOW, ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS 11 (2006) (arguing that "Congress is better suited to protect rights of belonging than are the federal courts").

had changed. The Democratic Party, which dominated Congress and the White House throughout the post-World War II period, owed its electoral hegemony to the support of white Southerners who remained committed to racial repression. Just as it would be wrong to say on the basis of this history that electoral politics is hopelessly broken, it is a mistake to dismiss judicial review outright.

Progressive critics of judicial review are also at risk of choosing their evidence in a way that misrepresents how the elected branches routinely operate. As we have seen, their evaluation of the judiciary's shortcomings is grounded in comparisons of the Supreme Court's record against short-lived progressive movements that bridged the divide between the legislature and executive. But as any observer of Congress will admit, the years immediately following the Civil War and the Great Society era are hardly representative. In both of these political moments, an absence of robust party competition permitted legislators and Presidents to "engag[e] in self-conscious acts of constitutional creation that rivaled the Founding Federalists' in their scope and depth."[471] Not only does one risk misrepresenting how the elected branches operate, but valorizing such unusual periods of one-party rule risks undue disdain for workaday politics. Given that most of our history has been characterized by fights over the place of government in the economy and the rights of politically disfavored minorities, it is not clear why we should focus our attention on those times when conservative opposition was unusually weak. For progressives to secure durable victories, particularly under conditions of high polarization, they will need to navigate periods of two-party competition as ably as they have transient moments of one-party rule.

CONCLUSION

Judicial review is not inherently conservative. In comparison to the elected branches and state governments, the Supreme Court has more often taken positions on culture-war issues such as race, gender, and sexual freedom that today would be coded as progressive. Our Article responds to a group of thinkers who disagree. Some of these critics advocate for a variety of radical measures, most notably aggressive jurisdiction-stripping, that would effectively end judicial review.[472]

We use the term "radical" purposefully here. The word originates from the Latin word "radix," which means "the root." Radicals often argue that if the root of the institution is rotten, everything that has grown from it is tainted. The only solution to an institution's inevitable and nasty course of growth is a revolutionary uprooting, so that politics can grow from a purer trunk. The story progressive critics of judicial review tell and the solutions they advocate fit with this radical way of thinking.

But the danger of such radical thinking is that it can obscure moments of discontinuity and change. Such moments may not be revolutionary, but as our tour through American history makes clear, some of the time they do point in a

471. BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 44 (1991).

472. *See, e.g.*, Doerfler & Moyn, *supra* note 39 (advocating for disempowering reforms to the Supreme Court like jurisdiction stripping).

progressive direction. In consequence, they must be considered as important context when progressives decide whether and how to attack the Supreme Court.

Our history of the political consequences of judicial review is sensitive to variation over time. We acknowledge that the Court often disappointed those who sought to preserve and extend Reconstruction. But progressive critics of judicial review greatly overstate the Court's contribution to Reconstruction's demise. Perhaps it would have been better had the Court not meddled with Congress's statutes, but such meddling was at least partially overcome in the case of *Cruikshank* and was largely beside the point in the *Civil Rights Cases*. The weight of the evidence strongly suggests that Reconstruction was likely doomed for reasons largely independent of the Court's rulings. The Court may well deserve blame, but far less than progressive critics of judicial review heap on it.

During the *Lochner* era, the Court was indeed committed to libertarian values that sometimes stymied regulation of working conditions, infuriating progressives. But one must avoid the anachronism of aligning the progressives of the past with those of today. Progressives of the late nineteenth and early twentieth centuries often had little concern, and even sometimes great hostility, to the rights of marginalized minorities. Indeed, almost all political forces in the *Lochner* era were either participants in or indifferent to the weaponization of the state against Black Americans. With the American state hostile to the interests of the marginalized, libertarian interventions by the Court redounded to their benefit.

Lastly, in the post-World War II era, lawyers' emerging liberal bias helps to explain why the Court became a force for progressivism. In *Brown*, the judiciary defied the politics of both national parties by declaring segregation unconstitutional. That decision was more effective than commonly remembered. It significantly contributed to desegregation efforts in the border states and unleashed the politics that culminated in the Civil Rights Act of 1964. In *Roe*, the Court constitutionalized abortion at the very moment when efforts to liberalize women's reproductive rights had stalled. Despite legalization in 17 states, prospects for further progress were limited and, in many states, resistance was brewing. *Roe* likely saved abortion. Over its long history, the Court's legal and political commitments changed, but overall, those commitments benefitted progressive policies on issues of race, sex, and sexual freedom.

Given this history, should progressives devote their finite energies to eliminating judicial review? Our account makes clear that for those fighting on the progressive side of culture-war issues, there has been substantial upside in having judicial review. That point opens up a variety of other questions that foreground tradeoffs. Has such upside on culture-war issues been worth the possible damage judicial review may cause on issues of economic redistribution? Should progressives' calculus change now that the Federalist Society has managed to temper the elite liberal bias of the judiciary? And is the long-run possibility of regaining the Court as a vanguard on the culture war worth the cost of enduring the very definite short-term harms? Our account of the past cannot answer such questions, but it has clarified that these ought to be progressives' central concerns. The history laid out by progressive critics of judicial review forecloses these crucial inquiries. Their history overdetermines the present. For them, judicial review always

is, always has been, and always will be reactionary, so its destruction is desirable and justified. But for us, history is crucial context for present-day debates whose resolution depends on the judgment of today's citizens.