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A Brief History of Race and the Supreme Court

Abstract
This essay, based on a lecture sponsored by the Penn Institute for Urban Research, presents a brief history of the Supreme Court on race issues, from the Marshall Court to the present, beginning by focusing on Brown v. Board of Education and the development in the mid-1970s of a narrow purposeful discrimination rule that has made it near impossible for minority claims of discrimination to succeed.

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A Brief History of Race and the Supreme Court

by David Kairys*

I sometimes begin presentations on the history of the Supreme Court on race issues by asking the audience or class to react to the names of two Supreme Court cases. I ask them to notice the associations they make with each case, and then to volunteer reactions of a few words.[1]

The first case: *Brown v. Board of Education* . . . .[2]

Here are some of the regular reactions: Ajustice,@ Aequality,@ Afreedom,@ Ait was about time.@ Some reactions are stronger and deeper B Arule of law at it=s best,@ Atriumph

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* James E. Beasley Professor of Law, Beasley School of Law, Temple University. This essay is based on a lecture on March 29, 2006 sponsored by the Penn Institute for Urban Research at the University of Pennsylvania. I appreciate the invitation from Susan Wachter and Eugenia Birch, Co-directors of the Institute, Elijah Anderson, and Richard Gelles, and the contribution of the discussant, Thomas Sugrue. Footnotes have been added mainly for citations referenced in the text and for my earlier works that elaborate on issues addressed in the essay. Copyright 8 2006 by David Kairys.

1 This essay is partially drawn from my works in the area: *More or Less Equal*, 13 Temple Political and Civil Rights L. Rev. 675 (2005), available online at **http://ssrn.com/abstract=715181**; *Unexplainable on Grounds Other Than Race*, 45 A.U. L. Rev. 729-49 (1996); *Race Trilogy*, 67 Temple L. Rev. 1 (1994); *Civil Rights*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES (Elsevier 2001); *Searching for the Rule of Law*, 36 Suffolk L. Rev. 307 (2003), available online at **http://ssrn.com/abstract=724341**; WITH LIBERTY AND JUSTICE FOR SOME, A CRITIQUE OF THE CONSERVATIVE SUPREME COURT (New Press 1993). See also *Freedom of Speech*, a chapter of THE POLITICS OF LAW, A PROGRESSIVE CRITIQUE (David Kairys, ed., Pantheon 1982), available online at **http://ssrn.com/abstract=727903**; *Introduction*, THE POLITICS OF LAW, A PROGRESSIVE CRITIQUE (David Kairys, ed., 3d ed., Basic Books 1998), available online at http://ssrn.com/abstract=841469. For a collection of the Supreme Court's race decisions with excerpts, see Abraham Davis & Barbara Graham, THE SUPREME COURT, RACE, AND CIVIL RIGHTS (Sage 1995).

2 347 U.S. 483 (1954). Critical race theory has yielded a range of significant analyses of *Brown* and race issues generally. See Kimberle Crenshaw, Neil Gotanda, Garry Peller, & Kendall Thomas, CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (New Press 1996); Richard Delgado & Jean Stefancic, CRITICAL RACE THEORY: THE CUTTING EDGE (N.Y.U. 2001); Angela Harris, Richard Delgado & Jean Stefancic, CRITICAL RACE THEORY: AN INTRODUCTION (N.Y.U. 2000); Derrick Bell, SILENT COVENANTS, BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM (Oxford 2004); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind*," 44 Stan. L. Rev. 1 (1993); Cheryl Harris, *Whiteness as Property*, 116 Harv. L. Rev. 1707 (1993). See also Michael Omi & Howard Winant, RACIAL FORMATION IN THE UNITED STATES (Routlege, 2nd ed. 1997).

of law,@ Areason over bigotry,@ AAmerican justice@ B with *Brown* sometimes sounding like a transformative event or cultural icon in addition to a major constitutional decision. Others share the goal B equality B but criticize the strategy, like leading scholar Derrick Bell, who has suggested that focusing on the equal in separate but equal might have been preferable.[3] Still others, but very few, disapprove, with reactions like Ajudicial activism,@ Adestruction of states= rights,@ and Asocial science, not law.@

The second case: *Memphis v. Greene* . . . .[4]

The usual reaction is something like AMemphis what?,@ even among legal audiences. This 1981 decision is regularly ignored, along with the Court=s other decisions in which African Americans and other minorities challenged racial discrimination in the period from the mid-1970s through the 1980s.

At the request of residents of the Hein Park section of Memphis, Tennessee, the city erected a traffic barrier across West Drive, the main street through Hein Park, at the cross street that divides Hein Park from the neighboring black community. Hein Park is a development built before World War II that was conceived and advertised as all-white. There were restrictive covenants in all the deeds that forbade sale by the original or succeeding owners to nonwhites.

The black community had used West Drive to get to the city zoo, a park and other attractions. In the 1950s and 1960s, Memphis actively resisted integration, allowing

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3 Bell, supra note 2.
4 451 U.S. 100 (1981).

blacks access to the same public recreation facilities only after a unanimous Supreme Court decision ordered them to do so.[5] N.T. Greene, the lead plaintiff, testified that when he walked into Hein Park as a young man, he was picked up by police, thrown out, and told not to come back.

The process of city approval of the street closure was characterized by procedural and substantive irregularities. City regulations on street closure B previously limited to alleys and dead-ends, never before done to a through street B required the consent of all the adjoining property owners. But one of the white owners on West Drive refused to consent, reportedly because he thought the closure was racist. Some of the hearings and proceedings were conducted without notice to the black community.

The Memphis City Council concluded the process by selling a 25-foot wide strip of road across West Drive at the closure point to the two white landowners on either side, and passed a resolution that said the 25-foot wide strip was Aclosed to the public.@ No reason was given, but the apparent purpose was to make the closure and use of West Drive private rather than governmental matters, and thereby to insulate the government=s actions from legal challenge on constitutional grounds.

Greene and the other black plaintiffs challenged the city=s actions as discriminatory and as a step back toward segregation in violation of the thirteenth and

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5 Watson v. City of Memphis, 373 U.S. 526, 534, 538-39 (1963) (the Court found Aan unmistakable and pervasive pattern of local segregation, which, in fact, the city makes no attempt to deny@ and concluded that Athe city has completely failed to demonstrate any compelling or convincing reason requiring further delay in implementing the constitutional proscription of segregation of publicly owned or operated recreational facilities@). Segregated public recreation facilities were invalidated the year after *Brown*. Mayor and City Council of Baltimore v. Dawson, 350 U.S. 877 (1955).

fourteenth amendments.[6] The Supreme Court rejected the claims because the plaintiffs had not proved Apurposeful discrimination.@ The city asserted that the street was closed to remove Acar traffic@ from a residential area, not for any racial purpose. The only direct or explicit evidence otherwise was a statement at one of the hearings that the Hein Park residents wished to get rid of Aundesirable traffic.@ This could mean either the cars or the people in them were thought undesirable. In any event, it was not, as purposeful discrimination has been interpreted to require, attributable to the Hein Park Civic Association, which requested the street closure, or, more importantly, to the City Council members who voted for it, although Aclosed to the public@ in the city council resolution includes people and cars.

Isn=t governmental discrimination against minorities unconstitutional?

Starting in the mid-1970s B only 20 years after *Brown* B the Supreme Court developed an extremely restrictive rule for cases in which minorities claim race discrimination, a rule that has made it near impossible for those claims to succeed. This rule has been applied across the board and to the most basic discrimination issues. From the mid-1970s through the 1980s, discrimination claims brought by African Americans and other minorities were rejected for lack of proof of purposeful discrimination on the issues that significantly defined the not-very-distant segregated past: job discrimination, voting discrimination, housing discrimination, segregated schools, the death penalty.[7]

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6 On the thirteenth and fourteenth amendment claims in *Memphis*, see *More or Less Equal*, supra note 1, at 678-79, 678 n. 14, 686 n. 78.

7 *See* Washington v. Davis, 426 U.S. 229 (1976); Mobile v. Bolden, 446 U.S. 55 (1980);

Though the purposeful discrimination rule is often referred to as the Aintentional@ discrimination rule, it does not use a typical legal or civilian understanding of intent, by which one is deemed to intend the known or reasonable consequences of one=s acts. Further, although the Court has consistently said that circumstantial proof can be sufficient B relief is, in theory, not limited to explicitly racial measures B since the mid-1970s the Court has rejected inferences of purposeful discrimination against minorities in even the most compelling circumstances. For example, Mobile, Alabama=s unusual at-large electoral scheme assured that its city commission was all-white in spite of a substantial black population; but the Supreme Court found repeated use of it, which might meet an intentional standard, insufficient to make out a case in the absence of additional proof of a racial purpose.[8]

It is hard to imagine a circumstantial case stronger than *Memphis*, or to explain the Court=s conclusion that there was Ano evidence@ of purposeful discrimination. The rule and its interpretation by the Court focus on purpose or motive in the narrowest sense: whatever the consequences, and however much the circumstances resemble traditional racial discrimination or segregation, there is no constitutional violation unless there is also direct proof that the action or measure was taken for the specific purpose of discriminating against or with animus toward the minority.[9]

Arlington Heights v. Metro. Hous. Devel. Corp., 429 U.S. 252 (1977); Milliken v. Bradley, 418 U.S. 717 (1974); McCleskey v. Kemp, 481 U.S. 279 (1987).

8 Mobile v. Bolden, supra. The other ingredient that led to the lack of black representation was the consistent practice by whites of voting only for white candidates.

9 The ultimate of this reasoning is the case approving the imprisonment of all people of Japanese

Except in the rare circumstance that there is direct proof of racial purpose, the government does not have to explain its actions, even if they resemble segregation or traditional discrimination. In *Memphis*, the Court simply accepted the city=s assertion that the street closure was about car traffic. Memphis did not have to explain why it did not lower the speed limit or install street bumps to lessen and control traffic, or why it sold that 25-foot wide strip of street to two white landowners.[10]

There is also a counterintuitive but quite real way in which the purposeful discrimination rule facilitates purposeful discrimination. A purposeful discriminator can strategically avoid mentioning race or providing any proof of racial purpose and will never have to explain his or her actions specifically or in any detail. I have speculated elsewhere that this may have happened in the *Memphis* case.[11]

The plight of post-*Brown* minority claims of discrimination before the Supreme Court has been regularly ignored.[12] For example, the affirmative action debate proceeds with the assumption by both sides that discrimination against minorities was eliminated long ago and would be invalidated when and if it might occur again. That assumption is

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ancestry on the west coast during World War II, Korematsu v. United States, 323 U.S. 214 (1944), where even though the regulation was explicitly racial, the Court found no equal protection violation because the purpose was national security.

10 The Court=s approach, which I have called the Apurpose doctrine,@ now dominates not only discrimination issues but the range of civil rights and civil liberties. Rights that used to be vindicated if they were violated now can only be established if there is also proof that the government=s violation was done for a bad purpose. See note 1, supra.

11 See *More or Less Equal*, *Unexplainable on Grounds other than Race*, *Race Trilogy*, all supra note 1.

12 But it did not go unnoticed. See particularly Alan Freeman, *Legitimating Racial Discrimination with Anti-Discrimination Law*, 62 Minn. L. Rev. 1049 (1978); Alan Freeman, *Antidiscrimination Law: A Critical Review*, in THE POLITICS OF LAW (1982), supra note 1.

false.

This brings me to the first of three points I want to make. The period of invalidation of discrimination against African Americans and other minorities following *Brown* was short-lived and essentially limited to explicitly racial measures or actions, leaving on the ground and untouched the social reality that was the legacy of segregation, Jim Crow and slavery. The remnants and effects of past discrimination and segregation and ongoing discrimination **B** which were not limited to the explicit, virulent epithets of the Ku Klux Klan **B** were not eliminated.

In this period, nonexplicit forms of discrimination grew rather than diminished in number and significance, and were more easily nonexplicit, as related social changes left African Americans increasingly separated geographically from whites. Whites in the new white suburbs got discriminatory, preferential treatment on home financing, schools, healthcare, work, insurance, veteran's benefits, and the costs of just about everything – much of it implemented or facilitated by governmental policies and practices. Discrimination and minority disadvantage were perpetuated and extended in new, usually nonexplicit ways.[13]

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13 *See, e.g.*, Ira Katznelson, WHEN AFFIRMATIVE ACTION WAS WHITE, AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA (Norton 2005); Douglas Massey and Nancy Denton, AMERICAN APARTHEID, SEGREGATION AND THE MAKING OF THE UNDERCLASS (Harvard 1998); Michael Brown, et al., WHITE-WASHING RACE, THE MYTH OF A COLOR-BLIND SOCIETY (California 2003); Bell, supra note 2. Katznelson frames the advantages to whites as a form of affirmative action. There is another, regularly overlooked form of affirmative action extended earlier to whites who had suffered discrimination: preferences in hiring and employment by our major cities. Germans, Irish and Italians, for instance, got good city jobs and a step into the middle class by discriminatory hiring practices that favored them. For example, the police department in Philadelphia was almost all of German ancestry, then almost all Irish, then largely Italian. The elevation of Frank Rizzo to police commissioner

The Supreme Court pulled back, which significantly contributed to the insulation of discrimination against minorities from political as well as legal challenges and to the social and cultural shift in which the stigma of racial impropriety moved from discrimination against minorities to challenging nonexplicit discrimination against minorities, or, as we so often hear it characterized these days, to 'playing the race card.' We are still living with this failure and lost opportunity. Many of our current woes, including the range of racial and urban problems, are traceable in part to the failure in this period to deal with contemporary or future discrimination and the effects of past discrimination and segregation.

So what is going on? How did the ultimate justice become legitimation of an unjust status quo and further injustice? These are my two remaining points: How and why were *Brown* and *Memphis* decided? Which might be fairly characterized as typical of the Supreme Court=s history on race issues, which as an aberration?

How are constitutional decisions made?

There are a great variety of models, methods, theories and approaches directed at the how and why of judicial decision making: originalism, textualism, what might be called contextualism, legal realism, judicial restraint, law and economics, and so on. Some prioritize particular rights or issues, others stress morality, still others prioritize

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in 1967 was controversial within the department because he was the first commissioner of Italian ancestry, and many doubted that an Italian could do the job. See S.A. Paolantonio, FRANK RIZZO: THE LAST BIG MAN IN BIG CITY AMERICA (Camino 1993).

methods or the judicial process. Some attempt to explain judicial decision making, while others establish norms or priorities for the exercise of judicial review or other judicial functions.[14]

The categorization I find most helpful for present purposes is a continuum with objective/determinate on one end and subjective/indeterminate on the other. Objective/determinate emphasizes legal doctrine and legal reasoning and recognizes little or no discretion. Law is seen as separate from politics, morality, values. Subjective/indeterminate emphasizes context and values, the lack of required rules or results, judicial discretion. Law is seen as a social process, and understanding law or judicial decision making involves the usual disciplines that focus on social processes: sociology, history, political science, anthropology, economics, social policy.

The judicial stance and the content of opinions issued by courts are emphatically objective/determinate. Even when judges find the Alaw@ murky, they resort to analysis of Apolicy@ that they present as objective and unrelated to their or anyone=s values. The theme of most every judicial opinion is >the law made me do it.=[15]

This leads to a basic contradiction that was on display recently in the controversy over the appointment of Samuel Alito to the Supreme Court. Alito=s supporters could not

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14 Some approaches or models, including some listed above, have explanatory and normative versions. For example, law and economics is sometimes used to explain why decisions are made and other times to establish norms for decision making.

15 Those old enough may remember the comedian Flip Wilson, who had a routine that led me to this formulation. He excused all sorts of bad conduct with Athe devil made me do it.@ No further explanation or justification was offered or necessary. He won the 1970 Grammy for best comedy album, "The Devil Made Me Buy This Dress." See http://theenvelope.latimes.com/extras/lostmind/year/1970/1970grammy.htm.

seem to make up their minds if they like him because he doesn=t apply values or because they like the values he applies. This contradiction is not limited to conservatives; liberal discourse, on Alito as well as judges they like and on law generally, has the same basic contradiction. This tends to mask and rationalize the unusually large role and power of courts in our system, which includes, in addition to resolution of disputes and broad powers of interpretation, resolution of all questions of freedom, democracy and equality, our most cherished principles.[16]

I place legal decision making at the subjective/indeterminate end, for three easy reasons. First, language and interpretation do not yield required meanings of texts. Second, the law embraces principles, values, and policies that conflict with no required prioritization or method for determining which takes precedence in particular circumstances. Third, the law embraces a range of methods and strategies of argumentation without requiring any particular one or set of them in particular circumstances. The result is discretion, choice, which is necessarily based on some values or priorities not required by legal analysis or legal reasoning.[17]

Often the law on a particular issue or in a particular circumstance can be clear or

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16 See note 1, supra; David Kairys, AAlito=s Discrimination Problem,@ Jurist, January 28, 2006, **http://jurist.law.pitt.edu/forumy/2006/01/alitos-discrimination-problem.php**.

17 Other aspects of judicial decision making yield additional discretion. "The facts" depend on a variety of judgments about admissibility, relevance, credibility and weight of evidence; "procedural" issues without required outcomes can be determinative; judges are aware of the identities of the parties and the significance of an issue or case to various nonparties; and judges have the discretion to decide what they decide. There are constraints, including disapproval of peers, public criticism, reversal, impeachment; and judges can be unaware of their discretion and perceive themselves as doing what is required. A judge applying straightforward, longstanding rules to uncontested facts can easily perceive a required result; but the discretion is there, nevertheless, and would be more apparent if the matter were or became controversial among lawyers, judges or the public, or for the judge personally. See note 1, supra.

longstanding, which makes it appear to be required. But this is because the issue is not currently controversial.[18] Maybe there is a consensus, or maybe folks have gotten tired of fighting about it. If it becomes controversial later, the lack of a required rule or result will be apparent. Law might be usefully characterized as a form of record-keeping of interrupted fighting. Despite the elaborate explanations and the frequent references to highest principles, it=s never really over B victories often have to be defended and defeats can always be challenged, in a range of ways and places including but not limited to courts. The recorded version usually tends to stand until it is challenged or becomes controversial.

So if we want to understand *Brown* and *Memphis*, and judicial decisions generally, we should look at legal doctrine and legal texts, but also at the social context, social trends, attitudes and movements, the particular justices, and so on, and determine and assess the various options available to the justices.[19]

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18 There is also a common tendency to view decisions with which one agrees as Aright@ and required and to view justices with whom one agrees as smarter, fairer or more in touch with the Constitution, usually with the opposite tendency when one disagrees.

19 See note 1, supra, particularly *Freedom of Speech* (1982), at 159-63. For recent works with similar approaches and sometimes similar, sometimes different conclusions, see Michael Kent Curtis, FREE SPEECH,"THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (Duke 2000); James Pope, *The Thirteenth Amendment versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957*, 102 Colum. L. Rev. 1 (2002); Laura Kalman, THE STRANGE CAREER OF LEGAL LIBERALISM (Yale 1996); Kenneth Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 Yale L. J. 256 (2005); Michael Klarman, FROM JIM CROW TO CIVIL RIGHTS (Oxford 2004). For example, Professor Klarman=s approach and conclusions are often similar. Compare particularly Michael Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 Va. L. Rev. 1, 34-46 (1996) (on the history of free speech) and my *Freedom of Speech* (1982), supra note 1. But in *From Jim Crow to Civil Rights* he draws a sharp distinction between more-or-less required law and subjective or political considerations (while also acknowledging that law often depends on subjective or political considerations, which would seem to undercut the sharp distinction); and he has a very limited view of the effects of *Brown*, suggesting that it

In *Brown*, precedent was opposed B *Plessy v. Ferguson*, which approved of segregation on trains, was the leading case B and historical research showed it was doubtful that supporters of the fourteenth amendment believed that the equal protection clause forbade segregated schools.[20] But there had been some sporadic movement in the Supreme Court toward more meaningful equality and toward a contemporary interpretation of the fourteenth amendment: exclusion of African Americans from juries was invalidated in 1880; equal protection was applied to effects and applications of non-explicit legislation in 1886; a law explicitly establishing segregated neighborhoods was invalidated in 1917; an all-white primary was invalidated in 1927; restrictive covenants, which the Hein Park development used, were ruled unenforceable in 1948; and equal in separate but equal was given more teeth in a law school admission case in 1950. There was backsliding after most of these, and none of them went as far as *Brown*, but *Brown* was not a total eruption, as it is often depicted.[21]

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had little or nothing to do with the Montgomery bus boycott or with the passage of the civil rights acts in the 1960s, except by provoking southern extremism which, televised, engendered widespread support for the acts. On the Montgomery bus boycott, see, e.g., Martin Luther King, Jr.=s stirring speech in 1955 at the mass gathering that decided to proceed with the boycott: AIf we are wrong, then the Supreme Court is wrong. If we are wrong, then the Constitution of the United States is wrong. If we are wrong, then Great God Almighty is wrong.@ AAwakenings (1954-56),@ Episode 1, *Eyes on the Prize, America=s Civil Rights Years* (PBS Video 1986). On the 1960s, viciousness toward African Americans in the south and elsewhere did not need any provocation or start with or increase only after *Brown*; any significant move toward equality, not just *Brown*, received a strong, often violent reaction; and the new moral repugnance toward racism and segregation in this period, to which *Brown* surely contributed significantly, drew media attention to race issues and racial viciousness that were previously ignored.

20 See Mark Tushnet, *Brown v. Board of Education*, a chapter of Annette Gordon-Reed, RACE ON TRIAL (Oxford 2002); Klarman, *From Jim Crow to Civil Rights*, supra note 18.

21 *See* Plessy v. Ferguson, 163 U.S. 537 (1896); Strauder v. W. Va., 100 U.S. 303 (1879); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Buchanan v. Warley, 245 U.S. 60 (1917); Nixon v. Herndon, 273 U.S. 536 (1927); Shelley v. Kraemer, 334 U.S. 1 (1948); Sweatt v. Painter, 339 U.S. 629 (1950). The year after *Brown*, the Court ruled that American Indians do not have any fifth amendment rights to

World War II brought social and economic change, and black men returned from fighting in a segregated army but with heightened expectations. The accomplishments of black people in many fields exceeded and belied the racial stereotypes. There was activism against segregation long before the 1960s or 1954, including sit-ins in the 1940s and boycotts decades before that. We were a leading nation whose moral leadership and position was widely criticized and challenged because of segregation.

The individual justices are, of course, important to a development like *Brown* B their backgrounds, education, experiences, values. They usually come from the elite of American society, though they weren=t always born there. Many were picked by presidents because of concrete expectations about how they would rule on some particular issues or how they would approach their roles. Some wrote explanations of why they did what they did, and sometimes there are notes or memories of what they said about decisions.

One can assess these factors and others and arrive at available options and reasons why one or another might be preferred. The assessment and results are probabilistic. Of course, knowing what they did and how they explained it in their opinions helps; predicting is far more difficult. And much is, as in history and life, unexpected and

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compensation if Congress takes their land, or apparently any individual rights beyond discretionary benefits that may be provided to tribes:

> No case in this Court has ever held that taking of Indian title or use by Congress required compensation. The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization. They seek to have the Indians share the benefits of our society as citizens of this Nation. Generous provision has been willingly made to allow tribes to recover for wrongs, as a matter of grace, not because of legal liability.

Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 281-82 (1955).

arbitrary. For example, Chief Justice Vinson died just before the *Brown* decision, probably making unanimity possible; Justice Robert Jackson, who carried considerable weight in legal circles and with the public, died only months after.

The various factors and *Brown* itself are usually both cause and effect, and it is not easy to separate the two. For instance, rising black expectations contributed to *Brown*, and *Brown* contributed to rising black expectations. One of the most important social and cultural changes that *Brown* significantly contributed to was a new consensus that racism and prejudice are morally, socially and politically wrong. From before World War II to sometime after *Brown*, racial epithets and explicitly racial politics went from common and uneventful to wrong. Even factions of the Ku Klux Klan came to realize that explicit racism limited recruitment because it became so universally condemned. One can almost feel sorry for David Duke B how do you gain support for the Klan and what it stands for if you can no longer use catchy racist rhetoric? This also played a significant role in the later extension of equality to other groups, women, youth, people with disabilities, sexual preference minorities.

If we look at *Memphis* the same way, but more briefly here, politics, public attitudes and electoral results had shifted in a conservative direction, and race was one of the issues central to the shift. AColorblindness,@ which speaks to an unrealized ideal rather than racial and social reality, became the formulation for the winning electoral strategy and became the racial policy of government and the courts. Judicial appointments were actively screened on race issues, often phrased in terms of opposition

to affirmative action or Aquotas.@ Conservative presidents consistently selected justices who seemed clearly in that mold – more consistently and openly than on any other issue, including abortion. This continued even in the brief interlude after the Watergate scandal when President Gerald Ford appointed a "moderate," Justice John Paul Stevens, who wrote the majority opinion in *Memphis*.[22] A lawyer who opposed the earliest steps toward equality and integration B including opposition to *Brown* itself B became a Supreme Court justice, and later Chief Justice.[23]

Which is the aberration?

It is not hard to sketch out a brief racial history of the Supreme Court because it is fairly consistent and has few big changes. Chief Justice Marshall=s court upheld and legitimated slavery in a range of decisions, including holding in 1825 that although slavery violates the Alaw of nature,@ it is legal and constitutional in the United States and does not violate international law. In 1842, the Court upheld the Fugitive Slave Act and

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22 See http://www.supremecourthistory.org/myweb/justice/stevens.htm. Justice Stevens, now as close to liberal as they come on the Supreme Court, changed; it is possible that he would not vote the same way today.

23 Chief Justice William Rehnquist wrote in a memo as a law clerk for Justice Robert Jackson, regarding cases that would become *Brown*, that the Aseparate but equal@ principle was Aright and should be reaffirmed.@ He urged in another memo that Jackson approve of all-white primaries: AIt=s about time the Court faced the fact that the white people of the South don=t like the colored people.@ As a young attorney in Phoenix, Rehnquist opposed a public accommodations law proposed in response to the city's embarrassment when at a national meeting of lawyers a top hotel refused to admit Jewish guests; he was active in "poll watching teams" accused of obstructing voters in African American and Hispanic neighborhoods; and he opposed a school integration proposal with the argument that "[w]e are no more dedicated to an 'integrated' society than we are to a 'segregated' society." In the Reagan justice department, he vehemently opposed the proposed equal rights constitutional amendment guaranteeing equality for women. See David Savage, TURNING RIGHT, THE MAKING OF THE REHNQUIST SUPREME COURT ch. 2 (John Wiley & Sons 1992). In the 1950s and 1960s, opposition to integration and to the civil rights acts defined conservatism. For example, the Civil Rights Act of 1964, which prohibited discrimination in public accommodations, was opposed in the House by a moderate conservative from Texas, George H.W. Bush.

invalidated Apersonal liberty@ laws adopted in several states that in some circumstances granted freedom to slaves in their jurisdictions. The infamous *Dred Scott* decision in 1857 reaffirmed slavery, essentially denied the humanity of people of African descent, destroyed the Missouri Compromise, and significantly contributed to the Civil War. African Americans, the Court said, have Ano rights the white man is bound to respect.@[24]

In the late 1800s, the Supreme Court undercut if not destroyed the post-Civil War amendments and betrayed the results and sacrifice of the War. The Court essentially nullified the Aprivileges and immunities@ clause of the fourteenth amendment, struck down a public accommodations law passed by Congress, and upheld segregation on trains with broad reasoning that would legitimate segregation until *Brown*.[25]

The first half of the 20th century saw mostly a continuation of the Supreme Court=s rejection of minority claims and rights, with some exceptions and swings back and forth, and the sporadic beginnings of significant change noted earlier, particularly from the mid-1930s to the mid-1940s. The Court invalidated legally segregated neighborhoods in 1917, and swung back and forth on all-white primaries. In the mid-1930s to the mid-1940s, there were inconsistencies,[26] but the Court significantly established meaningful rights for criminal defendants mostly in cases involving racial issues, required some

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24 *See* The Antelope, 23 U.S. (10 Wheat.) 66 (1825); Prigg v. Comm. of Penna., 41 U.S. (16 Pet.) 539 (1842); Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857).

25 *See* Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873); Civil Rights Cases, 109 U.S. 3 (1883); Plessy v. Ferguson, 163 U.S. 537 (1896).

26 Probably the worst rejection of minority rights in the 20th century came in 1944 when the Court upheld the World War II imprisonment of all people of Japanese ancestry on the west coast. Korematsu v. United States, 323 U.S. 214 (1944). See *With Liberty and Justice for Some*, supra note 1, ch. 1.

equality amongst segregated schools, and made some strides on public accommodations.[27]

After *Brown*, there was some integration of public schools (including the Baltimore high school I attended), and for a couple decades the Court mandated desegregation in cases challenging recalcitrant school systems. In other areas, the Court invalidated a range of explicitly racial governmental regulations and actions and some nonexplicit governmental and private discrimination; upheld the civil rights acts of the 1960s; strengthened and expanded free speech and voting rights; and protected civil rights and other protest groups from governmental and private repression. This period deserves the oft-repeated designation as a civil rights revolution.[28]

But the triumph of the narrow purposeful discrimination rule from the mid-1970s through the 1980s, epitomized by *Memphis*, made it near impossible for a minority to establish a case of race discrimination, no matter how strong the resemblance to traditional discrimination or to pre-*Brown* segregation. In this same period, school integration stalled. The "all deliberate speed" scheme for school integration adopted by

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27 *See* Newberry v. United States, 256 U.S. 232 (1921); Grovey v. Townsend, 295 U.S. 45 (1935); United States v. Classic, 313 U.S. 299 (1941); Smith v. Allwright, 321 U.S. 649 (1944); Buchanan v. Warley, supra; Powell v. Alabama, 287 U.S. 45 (1932); Norris v. Alabama, 294 U.S. 587 (1935); Moore v. Dempsey, 261 U.S. 86 (1923); Brown v. Miss., 297 U.S. 278 (1936); Miss. ex rel. Gaines v. Canada, 305 U.S. 337 (1938); Mitchell v. United States, 313 U.S. 80 (1941).

28 *See* Brown II, 349 U.S. 294 (1955); Cooper v. Aaron, 358 U.S. 1 (1958); Green v. School Board of New Kent County, 391 U.S. 430 (1968); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961);Gomillion v. Lightfoot, 364 U.S. 339 (1960); Harper v. Va. Board of Elections, 383 U.S. 663 (1966); U.S. v. Guest, 383 U.S. 745 (1966); Griffin v. Breckenridge, 403 U.S. 88 (1971); Whitus v. Ga., 385 U.S. 545 (1967); Heart of Atlanta Motel v. U.S., 379 U.S. 241 (1964); NAACP v. Alabama, 357 U.S. 449 (1958); Garner v. La.., 368 U.S. 157 (1961); Edwards v. S.C., 372 U.S. 229 (1963); Cox v. La., 379 U.S. 536, 379 U.S. 559 (1965); Brown v. La., 383 U.S. 131 (1966). The Court also famously expanded the rights of criminal defendants.

the Court in 1955 made it difficult for even cooperative lower federal judges to produce results without constant monitoring and pressure. In the 1970s, the Supreme Court backed off the mandate, and later the Court rewarded evasion and stalling with decisions that allowed segregated schools because current purposeful discrimination wasn't proved or because too much time had passed.[29]

Much had changed, including the eradication of legally enshrined segregation and the emergence of a sizable black middle class. But most African Americans and other minorities still faced the legacy of segregation, Jim Crow and slavery: involuntarily segregated lives, including inadequate and largely still segregated schools, discrimination, and often extreme deprivation.

After the mid-1970s, the Supreme Court refused to invalidate ongoing discrimination against minorities in its various forms or to deal with the effects of past discrimination and segregation. Then the Court prohibited legislative and executive attempts to do so **B** invalidating good faith affirmative action and good faith remedial efforts as if they were constitutionally and socially the same as the white-imposed segregation and discrimination of the not-so-distant past. From the mid-1970s to the present almost all of the winning plaintiffs in racial equal protection cases decided by the Supreme Court have been white, and the small number of non-whites who won almost all challenged remaining explicit discrimination or the unrepresentativeness of juries, which involves the integrity and legitimacy of the legal system as well as the usual

29 *See, e.g.*, Milliken v. Bradley, 418 U.S. 717 (1974); Missouri v. Jenkins, 515 U.S. 70 (1995).

discrimination issues.[30]

In the Court=s majority opinions in "reverse discrimination" cases over the last few decades, there has been a reversal of social roles: whites are the victims, and blacks are the discriminators. This reversal has been justified, with more than a little irony, by the new abhorrence of racism and the success of the civil rights movement. The opinions are more morally based and rhetorical than opinions generally these days, including appropriation of the history and moral force of the various struggles against white supremacy in the U.S. and many other parts of the world.

The conservative justices (a label they all accept) are on a moral crusade against racism: their duty and mandate, they tell us, is to Asmoke out@ racism. They characterize the small number of majority-black districts drawn under the Voting Rights Act B to counter the *all* majority-white districts purposely drawn previously (but insulated from challenge by their narrow purposeful discrimination rule for minority claims) B as a form of Aapartheid.@ This is a strange time and place in American history to start a moral crusade against racism.[31]

Taken together, the Court's race decisions over the past few decades make it quite easy for white plaintiffs to make out a claim of reverse discrimination – to invalidate

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30 *See* City of Richmond v. Croson, 488 U.S. 469 (1989); Adarand v. Pena, 515 U.S. 200 (1995); Shaw v. Reno, 509 U.S. 630 (1993); Miller v. Johnson, 515 U.S. 900 (1995). The most significant exception is Grutter v. Bollinger, 539 U.S. 306 (2003), on affirmative action in education, where the difference was Justice O=Connor=s not going along with the trend, probably based on amici briefs from the military and major corporations on the importance of diversity.

31 *Croson*, 488 U.S. at 493 (Asmoke out@ racism); *Shaw*, 509 U.S. at 647 (Auncomfortable resemblance to political apartheid@).

good faith legislative and executive efforts to make equality meaningful – but near impossible for minority plaintiffs to make out a claim of discrimination, even if the circumstances closely resemble traditional discrimination against minorities or pre-*Brown* segregation. The Court has essentially established two distinct sets of rules, assumptions and approaches that depend on whether whites or minorities are claiming discrimination, which I have characterized as a "dual system" rather than the uniform system the Court purports to apply to all discrimination claims.[32]

Looking at the whole history of the Supreme Court's decisions in race cases, there are some exceptions before *Brown*: the *Amistad* case[33] and the sporadic decisions leading up to *Brown* mentioned earlier are examples. But these decisions often involved other issues, tended to avoid direct challenges to slavery, Jim Crow or segregation, and were in no sense comparable to *Brown*. The aberration is *Brown v. Board of Education*.

Civil rights, equality and the rule of law

Justice Robert Jackson, former attorney general and solicitor general and lead prosecutor at the Nuremberg trials, said in 1941: ANever in its entire history can the Supreme Court be said to have for a single hour been representative of anything except the relatively conservative forces of its day.@[34] That is no longer true, due in part to

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32 See *More or Less Equal, Unexplainable on Grounds other than Race*, *Race Trilogy*, *With Liberty and Justice for Some*, all supra note 1. These materials explain how a dual system developed from what purports to be uniform application of the purposeful discrimination rule, including very different approaches to "pre-scrutiny scrutiny," the analysis by which the Court decides whether strict scrutiny is applicable.

33 United States v. The Amistad, 40 U.S. (15 Pet.) 518 (1841).

34 Robert Jackson, THE STRUGGLE FOR JUDICIAL SUPREMACY 187 (Knopf 1941). One could

Jackson=s elevation to the Court, but our deep-seated and seemingly timeless conception of courts and law as protectors of civil rights emerged later, within the last half century or so. But even in the 1960s, most of the dismantling of segregation and prohibition of discrimination came from Congress, not the Supreme Court B Congress prohibited, most significantly, discrimination in voting, employment, housing, and public accommodations.[35]

We have idealized courts and, particularly, the Supreme Court as guardians of minorities, dissenters, and anyone oppressed or treated unjustly. Human rights are regularly treated as tied to the hip of courts and the rule of law, as if courts and the rule of law are a fountain from which human rights necessarily and automatically flow. A reliable, fair legal system can certainly facilitate human rights, but if the laws (or judges) are oppressive, following the rules laid down with the fairest legal process still yields oppression. Consider South Africa under apartheid or the United States before 1954.[36]

An honest, unsentimental look at the legal history of the United States[37] reveals

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conclude that it has continued to be true depending on how "relatively conservative forces" is defined.

35 Civil Rights Acts of 1960, 1964, 1965, and 1968, 42 U.S.C. '' 1971, 1973, 1975, 1985, 2000, 3601 (1991). See generally Introduction, THE POLITICS OF LAW (3d ed.), supra note 1.

36 *See* Robert Cover, JUSTICE ACCUSED, ANTISLAVERY AND THE JUDICIAL PROCESS (Yale 1975).

37 I formulated this understanding of the history of civil rights and civil liberties in the U.S. in writings mostly focused on the history of freedom of speech. See *Freedom of Speech* (1982), supra note 1, and other works cited in note 1, supra, emphasizing the role of the labor movement in the establishment of free speech as we know it, which did not occur until the 1930s. Legal history, particularly as practiced in legal academia, tends to be limited to the realm of legal doctrines and ideas, as if they were originated, developed and adopted based on legal analyses, and can be understood separate from and independent of what goes on in the rest of society and what we commonly call history. In the area of free speech, this has included historical accounts that are otherwise contextual and insightful. See David Rabban, FREE SPEECH IN ITS FORGOTTEN YEARS (Cambridge 1997); Samuel Walker, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU (Southern Illinois University Press, 2d ed. 1999). See also Paul

only two periods characterized by sustained, systematic protection of civil rights and civil liberties by the Supreme Court: from about 1937 to 1944 and from about 1961 (or 1954 including *Brown*) to 1973.[38] And these two periods occurred because justices held and forcefully applied particular values **B** progressive values and a progressive conception of civil rights and civil liberties **B** not because of any absence of values or any legal analysis.

It is hard not to notice, but it regularly goes unnoticed, that these are also periods in which powerful movements built on those same values – the labor movement in the 1930s and the civil rights movement in the 1960s – demanded such rights and were successfully moving public and private institutions, government officials and public opinion in their direction. I am not suggesting a linear or direct relationship between

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Starr, THE CREATION OF THE MEDIA, POLITICAL ORIGINS OF MODERN COMMUNICATIONS, ch. 8 (Basic Books 2004), an otherwise path breaking account of the history of the media; Eric Foner, Review of Geoffrey Stone, IN PERILOUS TIMES, The Nation, Dec. 6, 2004. Rabban's history of free speech is known for his recognition that speech as we know it was not legally protected until the 20th century. However, his account ends when the 'right' ideas and doctrines are articulated in the 1920s, in the form of dissenting and concurring Supreme Court opinions, reversed lower-court opinions, and theoretical writings by Holmes, Brandeis, Hand and others, instead of when a majority of the Supreme Court actually adopted them. The inspiring dissents were not inevitably to be adopted by the Supreme Court – because they were 'right' or based on any legal analysis. They were not adopted until the 1930s, and still have not been adopted in any other western country despite articulate advocates. A major change occurred in the 1930s, in the Supreme Court as well as society generally. In the latest version of his history, Rabban seems to address this not by focusing on the 1930s but by placing the change in 1927. He cites Fiske v. Kansas, 274 U.S. 380 (1927), as the first of "the initial Supreme Court decisions protecting speech" and "the first case recogniz[ing] the free speech claim of a radical defendant." Rabban, at 373-74. This is quite a stretch. *Fiske*, decided along with and specifically confirming a typically repressive decision of the period, Whitney v. California, 274 U.S. 357 (1927) (not overruled until 1937 and the occasion for one of the famous Holmes-Brandeis opinions differing with the majority), held that there was no proof introduced at trial that the group the defendant belonged to advocated unlawful means to political ends, not that one had a speech right to do so or an associational right to belong to a group that so advocated.

38 On racial issues the beginning of the second period was 1954, but on many other human rights issues, it was, as I have usually suggested, 1961, since the late 1950s saw a retrenchment of speech and political rights. *See, e.g.*, Yates v. United States, 354 U.S. 298 (1957). The two periods are connected; for example, many of the values and leaders from the labor and New Deal era, including justices of the Supreme Court, played a significant role in the civil rights era.

Supreme Court decisions and movements or public opinion; other powerful movements have not had such success because Supreme Court decisions rest on a range of factors, as discussed earlier. But that is how unusual sustained, vigorous protection of civil rights and liberties is and how much it took to attain.

Movements affect court decisions, and vice versa, because both are about power, legitimacy and contemporary values.[39] The mechanics can be complex. In one sense, a successful movement, particularly one that is prominent for a long time, simply changes public attitudes, perceptions and values (and sometimes electoral results), including the attitudes, perceptions and values of justices and the presidents who appoint them. Movements that gain some success can confer legitimacy and mainstream status on attitudes, perceptions and values that were previously ignored, unpopular, or despised.[40]

Movements that accomplish significant social change affect individuals, including judges, through mass media, public and private associations, professional groups, peer pressures, and so on. Judges' views change not because of more legal research or because they have gotten more in touch with the framers of the Constitution; as people living and working in society, they are affected by historical and social changes and the events and people surrounding them. As judges, they tend to express a new social consciousness in legal terms.

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39 See *Freedom of Speech* (1982), supra note 1, at 159-63, 159-60 n. *, which includes a discussion of the ways movements affect judges and of methodological issues. See also David Kairys, Book review of Michael Tigar, LAW AND THE RISE OF CAPITALISM, 126 U. Pa. L. Rev. 930, 943 (1978).

40 Movements in the United States are often about the law and specifically the meaning or interpretation of the Constitution, and often focus directly on court decisions and judges.

Successful movements also shift power and become a force to be reckoned with for those who disagree as well as validation and support for those who agree. Some who disagree will be unchanged or more vehement in their opposition; others, though also unchanged, will compromise. Some in Congress and on the Supreme Court, as well as many leaders of business and industry, took the latter course in response to the labor movement in the 1930s, choosing to incorporate it into the system rather than continuing the increasingly risky struggle to suppress or destroy it.[41] For justices of the Supreme Court, the risks include alienating the public undercutting the legitimacy of the courts.

Conservative and progressive movements work in much the same way – the Supreme Court, like the contemporary conservative movement, is now some 30 years into a judicial regime characterized by conservative values, perceptions and approaches that were generally viewed as extreme and marginal in the early 1970s. But there is a difference. The Supreme Court appears to have a default position, and it's hard to change the settings. The default position is not easy to define, but for most times and contexts Justice Jackson's formulation – the values and approaches of the "relatively conservative forces" – is a pretty good description. A successful conservative movement can move it

41 Many progressive victories have come with the eventual support of corporate leaders usually identified with the opposition. For example, Andrew Carnegie paid the legal expenses of some labor leaders, see James Weinstein, THE CORPORATE IDEAL IN THE LIBERAL STATE 49 (Beacon 1968), and was instrumental in the founding of the American Law Institute because "[t]here is today general dissatisfaction with the administration of justice. . . . that it . . . often results not in justice but injustice . . . [which] breeds disrespect for law, and disrespect for law is the corner-stone of revolution." *Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law*, ALI PROCEEDINGS 1 (1923).

significantly more to the right,[42] and, as we have seen, a successful progressive movement can move it through the middle and to the left, though that has not happened often.[43]

So what should we make of the last half century of the Supreme Court's race decisions, or of its civil rights and civil liberties decisions more broadly? It is possible that the 1930s, *Brown* and the 1960s herald a new era, a new paradigm for the Supreme Court. Or the Court, in the context of distinct popular shifts on basic issues driven by progressive mass movements, may have taken a new path for two short periods and then returned to the old pattern. What stands out is those successful progressive movements that provided the exceptional circumstances in which sustained, systematic protection of a progressive vision of civil rights and civil liberties became possible – and the lack of such protection in the absence of such movements. Then in the mid-1970s, the Supreme

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42 In the current context, this generally means: corporate and business interests predominate; labor, safety and environmental protections erode; common interests succumb to the individual interests of the most powerful; services and benefits provided by government are disfavored; equality fades; religion rises; the individual rights of people of ordinary means shrink and the rights of the wealthiest expand, to the extent that, in the current conservative period, money became protected speech. See Introduction and Freedom of Speech, in *The Politics of Law* (1998). On speech issues, *compare* Buckley v. Valeo, 424 U.S. 1 (1976), protecting the right to spend as much money as one wishes and has to support political speech based on the unprecedented rationale that money is speech – although Congress had concluded that unrestricted campaign financing was putting elections up for sale and undercutting democracy – *with* International Society for Krishna Consciousness v. Lee, 505 U.S. 672 (1992), finding the money people of ordinary means use to support political speech, often raised by requests for donations from supporters in public places, as unprotected and the inconvenience it may cause to others as a basis for denying the right to speak. French writer Anatole France captured part of this in THE RED LILY (1894): "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." He probably wouldn't mind if I add: and allows the poor as well as the rich to spend enormous amounts of money to get their favorite candidates elected.

43 This is an observation considering the whole history of the Supreme Court. It is unsurprising in the sense that legal systems almost always and everywhere tend to support and preserve traditional principles, hierarchies and institutions – the status quo – and to resist change. Change that upsets the status quo by prioritizing common interests and the interests of the majority in the midsection of the social ladder seems particularly unlikely to be initiated by courts.

Court returned more or less to the role described by Justice Jackson in 1941.[44]

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44 This may not be a welcome conclusion for many for whom the progressive vision of civil rights and civil liberties is fundamental. It means that the widespread notion that courts reliably protect such rights has been a relatively recent illusion, but it does not undercut their meaning or importance. There will be progressive victories here and there, and larger shifts back and forth, and the contest over values that goes on in courts is no less important. In that contest, the analysis and conclusions presented here, although they challenge persistent but baseless allusions to the progressive vision of human rights as if it started with the founders and was only occasionally interrupted, can be used to emphasize its importance and to highlight the embarrassing pedigree of much contrary Supreme Court decision-making. But systemic or meaningful change in a progressive direction, including protection of civil rights as discussed here, probably requires what I have elsewhere called a revitalization of democracy. This includes reform of our archaic, unrepresentative and questionably democratic electoral system and a reconceptualization of democracy in contemporary society, which seem achievable only by progressive movements. Meaningful democracy should be valued as both a means and an end in itself, and our history suggests that success will be most likely if fundamental democratic reforms are high on the agendas of progressive movements seeking a range of other goals, as free speech was high on the agendas of the labor and civil rights movements (see note 37, supra). The basic electoral reforms are proportional representation (a system developed after our Constitution and currently used by most democracies that parcels out power in proportion to electoral strength, and does away with most redistricting and majority-white or -black districts); instant runoff voting (so winners have the support of a majority and third-party votes aren't "wasted"); removal of barriers to voting and to multiple parties; exclusive government funding of elections, and limited, free media time as a condition of electronic media licensing; vote-counting methods that count all votes and are verifiable; direct election of the president, and perhaps some form of the virtues of a parliamentary system – ongoing proportional power rather than winner-take-all, change when supported by a large majority, and replacement of a president who has lost such support. The goal would be to eliminate winner-take-all, plurality (less than majority), money driven, unrepresentative, votes-selectively-counted, districted-so-incumbents-are-almost-all-guaranteed-re-election elections, to which we have become shockingly accustomed. See Introduction, *The Politics of Law* (1998), *With Liberty and Justice for Some*, at 83-97, 199-211, and other authorities, supra note 1; David Kairys, *Conservative Legal Thought Revisited*, 91 Colum L. Rev. 1847 (1991); *Why Not Democracy?*, 4 Poverty & Race 13 (1995). On electoral reform, see the website of the Center for Voting and Democracy, http://www.fairvote.org/. Progressives generally support such measures, but usually view them as of secondary or minimal importance, although it is hard to envision meaningful or sustained progressive change without such reforms. There has been some recent interest among constitutional scholars in less judicial power and more popular power, although usually without serious attention to electoral reform or to one of the best examples of a mass movement driving constitutional change, the establishment of free speech as we know it in the 1930s (see note 37, supra). See Larry Kramer, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (Oxford 2004); Jamin Raskin, OVERRULING DEMOCRACY, THE SUPREME COURT VS. THE AMERICAN PEOPLE (Routledge 2003) (addressing electoral reform); Mark Tushnet, TAKING THE CONSTITUTION AWAY FROM THE COURTS (Princeton 1999); Bruce Ackerman, WE THE PEOPLE: TRANSFORMATIONS (Harvard 1998).