

PART III

*The Future of
Progressivism*

CHAPTER FIVE

What's a Progressive to Do? Strategies for Social Reform in a Hostile Political Climate

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AMERICAN PROGRESSIVES SEEKING social justice face a real dilemma in the current political climate. In prior periods, they looked to the president, the Congress, or the courts to advance their agenda. The New Deal administration of Franklin Delano Roosevelt, the Democratic Congress of the 1960s, 1970s, and 1980s, and the Warren Court of the 1950s and 1960s each offered significant opportunities for instituting progressive social reforms. Today, however, progressives face a hostile president, a hostile Congress, and a hostile Supreme Court. There is literally nowhere to turn. What is a progressive to do?

In this essay, I seek to address one specific iteration of this question—namely, what is progressivism's relation to law at the turn of the twenty-first century? As Alexis de Tocqueville observed almost 200 years ago, in the United States, most political disputes inevitably evolve into legal disputes. Given this apparently inescapable fact of (at least American) life, the relationship between progressivism and law is a critical issue. And ever since the NAACP Legal Defense and Educational Fund's victory in *Brown v. Board of Education*, progressives have often looked to the courts, to lawyers, and to litigation as principal tools in achieving social justice.

The progressive's relationship to law has changed markedly over the past fifty years. This change has had both substantive and tactical components. On the substantive level, progressives have been compelled to hone their claims for justice. Bold assertions of social and economic rights, and of substantive equality in general, have given way to more limited claims of equal *opportunity*. Instead of seeking to define and protect affirmative rights, progressives have argued that, at least where the state protects rights, those rights should be defined and implemented in such a way that they are enjoyed equally by all. At the same time, the language of rights has been buttressed by the language of social costs and benefits. Progressives have increasingly framed arguments for rights in utilitarian terms, arguing that denying basic rights ultimately imposes substantial costs on the majority. These substantive redefinitions of rights (and of the justifications for rights) are, in part, a grudging acknowledgment that the broader claims have less appeal these days, especially in court; but they are also more than that. The redefinitions constitute a recognition that achieving equality through law poses serious challenges to other progressive values, such as liberty and democracy. As a result, equality, the central normative commitment of progressives, demands a more nuanced and qualified approach. At the same time, the progressive's reliance on utilitarian and pragmatic arguments reflects an important lesson about the need to appeal to a broad audience in order to achieve real change.

At the tactical level, progressives have proposed a variety of strategies for coping with hostile courts. All agree that federal court litigation is no longer the primary source of social change. Some, such as Mark Tushnet, have argued that the Constitution should be "taken away from the courts," questioning the notion that courts should have the final say on what the Constitution means.¹ Other progressives

1. Mark Tushnet, *Taking the Constitution Away From the Courts* (Princeton, NJ: Princeton University Press, 1999).

have looked to state courts and legislatures when federal reforms have failed. Perhaps the most widely shared conclusion of the past fifty years is that courts are unlikely to be the centerpiece of a progressive reform strategy; instead, courts should be seen as one tool among many in what must be a multitiered effort to achieve social change.

A promising avenue for progressives that has been less broadly explored is presented by the era of globalization, in which domestic issues may be linked to global ones and global attention may be brought to bear on domestic concerns. Progressive advocates may increasingly need to look outward in order to make progress at home. Americans have often thought of international human rights as addressing other nation's problems and have paid little attention to comparative constitutional law, assuming that our constitutional doctrine sets the benchmark for all others. But if this view was ever justified, it is becoming less and less so. This is particularly so where the international community has advanced beyond American law. Thus, progressives should employ international human rights law, fora, and tactics to press for social reform on the domestic front.

While many of the substantive and tactical changes described below have been necessitated by hostility to progressive values from the three branches of the federal government, and especially from the courts, the need to adapt has, in my view, made progressivism stronger and smarter. Honing arguments against formidable foes often forces one to make one's arguments better. Because of that challenge, the lessons learned from the past fifty years of struggle have left progressives better situated to advance social reform in the fifty years to come.

The Old and the New

In the old days, everything was so much simpler (or so it seems in retrospect). For years, the NAACP Legal Defense and Education Fund's classic strategy for dismantling segregation in the South was

the gold standard of progressive legal reform efforts. In the 1960s and 1970s, progressive activists increasingly became public interest lawyers and formed organizations devoted to using courts to push social change. Women's rights advocates, led by Ruth Ginsburg working on behalf of the ACLU's Women's Rights Project, carefully crafted a strategy to educate the Supreme Court about sex discrimination, leading to the Court's adoption of heightened scrutiny for sex-based classifications.² Progressive movements came to be defined in terms of group rights—immigrants' rights, children's rights, disability rights, gay rights, and so forth.

The source of, and inspiration for, this vision was the Supreme Court under Chief Justice Earl Warren. During Warren's tenure, from 1953 to 1969, and continuing for a substantial part of Chief Justice Warren Burger's tenure, from 1969 to 1986, the Supreme Court was, in fact, a significant force for progressive social change. The Court declared an end to de jure segregation, aggressively advanced the rights of African Americans, radically expanded the concept of privacy and the rights of criminal suspects and defendants, and declared sex discrimination presumptively invalid. It sought to implement broad-based structural reform through decisions like *Brown v. Board of Education*, barring segregated public education, and *Miranda v. Arizona* and *Gideon v. Wainwright*, which extended the right to a lawyer, paid for by the state, to all indigent persons under interrogation or indictment in the criminal system.

Law professors wrote books and articles extolling the role of courts in implementing social change. Although published a decade after Chief Justice Warren's resignation, John Hart Ely's *Democracy and Distrust*, inspired by that Court's work, offered a sustained and compelling intellectual rationale for the Warren Court approach.³ Ely

2. See David Cole, "Strategies of Difference: Litigating for Women's Rights in a Man's World," *Journal of Law & Inequality* 2 (1984): 33.

3. John Hart Ely, *Democracy and Distrust* (Cambridge, MA: Harvard University Press, 1980).

argued that federal courts, as countermajoritarian institutions in a liberal democracy, served their highest purpose when they protected the political process from itself by zealously safeguarding those rights critical to a functioning democracy, in particular the First Amendment and the right to vote, and by protecting those who could not protect themselves through the political process, in particular, “discrete and insular minorities.” In 1976 and 1979, Abram Chayes and Owen Fiss wrote influential articles in the *Harvard Law Review* arguing that courts should be understood not merely as adjudicators of private disputes but also as appropriate forums for “public law litigation” seeking systemic institutional reform.⁴

But just as the ideas of Ely, Fiss, and Chayes were taking hold in law schools, Ronald Reagan was elected president of the United States, and everything changed. Reagan aggressively attacked “judicial activism” and appointed hundreds of federal judges committed to a conservative agenda and hostile to the kind of judicially mandated institutional reform that progressives had learned to love. The first President Bush continued this effort. Facing a Republican Congress for much of his tenure, President Clinton chose not to fight back in the field of judicial appointments and instead nominated mostly moderate judges who were not committed to a progressive agenda for social change. The second President Bush revived the ideological litmus test appointments of President Reagan, and although Democrats in the Senate have used the filibuster to block several of Bush’s most extreme nominees, the vast majority of his judicial appointments have been confirmed.

As a result, progressive lawyers today face a legal landscape radically altered from the one their counterparts faced in the 1960s and 1970s. The Republicans control the White House and Congress, and, as President Clinton’s tenure showed, a Democratic president with a

4. Owen Fiss, “The Forms of Justice,” *Harvard Law Review* 93 (1979): 1; Abram Chayes, “The Role of the Judge in Public Law Litigation,” *Harvard Law Review* 89 (1976): 1281.

Republican Congress is sharply limited in his ability to achieve social progress. The Supreme Court today consists of three radically conservative Justices (Rehnquist, Scalia, and Thomas), two traditional conservatives (Kennedy and O'Connor), and four moderates (Stevens, Souter, Ginsburg, and Breyer). With the possible exception of Justice Souter, the Court has no justice today as liberal as Justices Warren, Blackmun, Douglas, Brennan, or Marshall. On most controversial issues, the conservative bloc prevails, as it did, most notably by blocking the Florida recount to ensure that George W. Bush would be elected president. A "victory" for progressives in the Supreme Court these days consists largely of holding on to prior gains (e.g., the 2003 decision not to declare all affirmative action in education unconstitutional and the 2001 decision not to reverse *Miranda*). The lower courts are also composed predominantly of conservative and moderate judges.

At the same time, outside the area of gay rights, many of the most extreme and explicit examples of injustice and discrimination have already been addressed, leaving in their wake a wide range of subtler and more difficult issues. For example, de jure racial segregation, explicit sex-based barriers to economic and educational opportunities, and race-based selection of criminal juries have all been barred. Profound problems of race, sex, and class-based inequality remain, but they take forms that are usually less explicit and more daunting to remedy.

In the face of these more systemic problems, the courts have grown skeptical of judicially managed institutional reform. In significant part, this skepticism reflects the increasingly conservative bent of federal judges, but it also reflects the legendary difficulties confronted in the effort to dismantle racial segregation. The implementation of *Brown v. Board of Education* has been much criticized, and although there are no longer formal racial barriers in public education, segregated education remains a persistent fact of life throughout the United States. Judicial oversight over desegregation orders has some-

times lasted for more than three decades, often without much apparent progress. In part, this failure can be attributed to the Supreme Court's unwillingness to take on de facto segregation and its refusal to permit interdistrict remedies, thereby making it nearly impossible to address the phenomenon of white flight to the suburbs. In part, however, it has to do with the entrenched reality of racial inequity and segregation in our society. Residential segregation, for example, plays a significant role in much public school segregation these days, but apart from a largely unsuccessful effort with busing, the courts have, for the most part, been unwilling to address the effects of residential segregation on public education.

Sometimes the courts appear to fear "too much justice," as Justice Brennan put it in a dissent in a death penalty case in 1987. In that case, *McCleskey v. Kemp*,⁵ the defendant's lawyers commissioned a sophisticated statistical study of the administration of the death penalty in Georgia and found that even after controlling for thirty-nine potentially correlated nonracial variables, a defendant who killed a white victim was 4.3 times more likely to receive the death penalty than a defendant whose victim was black. The Court rejected McCleskey's claim that these racial effects rendered imposition of the death penalty discriminatory or cruel and unusual. The Court said that for McCleskey to prevail, he would have had to show not merely systemwide disparities but also discriminatory intent specific to his personal case. The Court noted that were it to rule otherwise, the entire criminal justice system might be called into question because race and sex disparities can be found in the administration of many, if not most, criminal laws. The Court's analysis was plainly driven by its sense that the problem presented was larger than the Court could possibly handle; therefore, it defined it as not a constitutional problem.

These days, rights discourse is used as often to stifle progressive

5. 481 U.S. 279 (1987).

reform as to facilitate it. Challengers claim that race-based affirmative action violates equal protection, that environmental regulations intrude on property rights, that campaign finance reform and laws governing corporations violate First Amendment speech rights, and that federal statutes—such as the Age Discrimination in Employment Act, the Americans With Disabilities Act, the Family and Medical Leave Act, the Violence Against Women Act, and the Religious Freedom Restoration Act—designed to extend rights to various groups, intrude impermissibly on states' rights. As in the *Lochner v. New York*⁶ era, when the Supreme Court relied on states' rights, rights of contract, and rights of property to invalidate progressive economic legislation designed to protect workers from exploitation, the language of rights today all too often operates as an impediment to, rather than a catalyst for, social change.

Normative Adjustments

The reality described above presents significant obstacles to any campaign for progressive social reform through law. That fact has led to a number of shifts in progressive thinking and activism. Those shifts can be seen as both substantive, in the sense of changing what progressives ask for, and tactical, or changing the means employed to achieve what progressives want. This division is, in some sense, artificial, for the relationship between substantive demands and tactical strategies is dynamic. The means available for change often dictate how much one can ask for. A civil rights bill introduced in a Congress controlled by Democrats will necessarily look very different from a civil rights bill introduced in a Republican Congress, even if the bill is introduced by the same member of Congress with the support of the same civil rights groups. In some sense, all reform efforts today—whether legislative, executive, or judicial—must contend with the real-

6. *Lochner v. New York*, 198 U.S. 45 (1905); see also Cass R. Sunstein, "Lochner's Legacy," *Columbia Legal Review* 87 (1987): 873.

ity of limited possibilities. It is nonetheless useful to identify both changes in the ends sought and means chosen to further progressive reform.

Asking for Less

The most important normative commitment of progressives is to equality. But equality is not self-defining. In the heyday of the Warren Court, progressives argued for “substantive equality” over “formal equality,” by which they meant not merely the elimination of formal race and sex-based barriers but also the elimination of practices, even facially neutral practices, that have the *effect* of maintaining or increasing racial, sexual, or class-based subordination. According to this view, if a race-neutral college admissions policy leads to underrepresentation of black students, the progressive commitment to equality not only permits but also *demand*s that the college adopt admissions standards that remedy that underrepresentation. Had this view of equal protection prevailed, race-based affirmative action would be not only permissible but also mandatory, as long as, in the absence of affirmative action, minorities were underrepresented.

Similarly, progressives in the past often advocated an affirmative, rather than a negative, understanding of rights. The right to engage in a certain activity should entail not only the negative right to stop the government from interfering with the exercise of the right but also the affirmative right to government assistance where, absent that assistance, the right cannot be exercised. The right to counsel in criminal cases is an example of an affirmative right: the state bears the obligation to permit criminal defendants to bring their own paid lawyer into court and to appoint a lawyer, at the state’s expense, if the defendant is indigent and cannot afford to hire a lawyer. However, the right to counsel is a rare exception to the norm. In general, courts have been reluctant to view rights as affirmative. More typical is the Supreme Court’s ruling that Medicaid programs need not fund abortions, even though the result in practice is that only women with

access to adequate resources have a meaningful right to terminate their pregnancy.⁷ The right to privacy, the Court insisted, barred the state from interfering with a woman's choice but did not require it to fund her choice.

Progressives in the past also advocated economic and social rights, in addition to civil and political rights. They argued that the rights to speak, associate, and vote do not mean very much if you don't have food to eat, clothes to wear, or a roof over your head. Rights to public education, shelter, health care, and child care are all forms of economic and social rights. Notably, none of these rights is expressly guaranteed in the U.S. Constitution, although constitutions of other countries (and of some of the fifty states) do guarantee some forms of social and economic rights. State constitutions, for example, often guarantee a right to an adequate or effective public education.

Each of these conceptions of justice has largely failed to take root in American constitutional jurisprudence. Courts have been reluctant to take on the difficult questions of how one defines such concepts as "substantive equality," "affirmative rights," and "social and economic rights." What is the appropriate baseline, for example, for measuring underrepresentation of minorities in a particular college? How much does the state have to pay to provide its indigent citizens with an "affirmative right" such as the right to counsel? And how would a court define a "right to health care"? Must everyone have access to a doctor, the specialist of his or her choice, or the best in the field?

Affirmative rights, substantive equality, and social and economic rights also pose real difficulties of implementation. The right to counsel provides an excellent example of these difficulties. As noted above, in this one area, the Court has guaranteed an affirmative right. As countless reports and studies have shown, however, the Court has

7. *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977).

failed to make this right a meaningful one. While the Court requires criminal legal assistance to be “effective,” its standard for effectiveness is so low that most indigent defendants do not receive competent counsel with sufficient resources to defend them adequately. Courts have found no violation of the right to counsel, even when indigent defendants have been represented by lawyers with no prior experience in criminal law; by lawyers who have been drunk, on drugs, or asleep during portions of the trial; and by lawyers paid no more than \$2,000 for all their out-of-court work on a death penalty trial.⁸ The fact is that society has been unwilling to pay what it would cost to provide truly effective lawyers to the indigent, and the courts have been unwilling to require society to do so.

Thus, claims for substantive equality, affirmative rights, and social and economic rights have not fared well, and progressives have been forced to reframe their normative demands. A more limited line of progressive legal argument appeals not to abstract and absolute demands of equality, nor to affirmative or economic rights, but to the obligation to define rights equally for all. For example, I have argued that within the criminal justice system, however one strikes the balance between protecting liberty and privacy from state intrusion and affording the police sufficient authority to protect the citizenry from criminals, the balance ought to be struck in the same place for all.⁹ We ought not protect a more robust conception of privacy for the rich than for the poor or for the white majority than for racial minority groups. Everyone should have the same rights to privacy and liberty, regardless of class or skin color. Similarly, in the area of national security, we ought not strike the balance between liberty and security by imposing on foreign nationals burdens and obligations that the citizenry does not equally share, at least with respect to basic rights like the right not to be detained arbitrarily, the right to due process,

8. David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* (New York: New Press, 1999), 63–100.

9. *Ibid.*

and the freedoms of speech and association.¹⁰ Such arguments insist that we spread the cost evenly so that the majority has a stake equal to that of the minority in the rights at issue.

These arguments suppose that in a democracy, the majority is unlikely to be willing to impose onerous burdens upon itself except where those burdens are truly necessary. By closing off the option of imposing the costs selectively on a vulnerable minority for the benefit (or perceived benefit) of the majority, they seek to force the polity to strike the balance fairly. Once that escape route is blocked, this approach surmises, the political process is much more likely to get the balance right because everyone's interests will be taken into account on both sides of the scale. Thus, for example, after September 11, the increased security measures at airports, which affect all travelers, were adopted with careful attention to not imposing too much indignity, cost, or time on travelers. By contrast, the preventive detention campaign undertaken after September 11, which eventually rounded up some 5,000 foreign nationals in antiterrorism initiatives, was fraught with egregious rights violations, including secret arrests and hearings, denial of access to lawyers, arrests without charges, detention without hearings, and physical abuse. The tactics employed against the 5,000 foreign nationals likely would not have been possible had they been applied more broadly, especially to citizens. Thus, insisting that sacrifices in rights be shared equally is likely to ensure that the sacrifices will be less extreme and more carefully justified and implemented.

Progressive campaign finance reform also appeals to the notion that people should have an equal right to exercise their rights. The movement is predicated on the notion that the constitutional ideal of "one person, one vote" is threatened by unlimited use of money in political campaigns. Money corrupts the political process by essentially

10. David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (New York: New Press, 2003).

giving those with substantial resources more than “one vote.” Therefore, progressives argue, it is essential to regulate campaign spending to ensure equality in the right to choose one’s representatives. This debate, like the arguments about equality in the criminal justice and national security areas outlined above, also has an instrumental aspect. If the democratic process truly provides equal representation, then the majority will have a greater opportunity to insist that the privileged elite share some of their resources through more redistributive taxing and spending policies.

The gay rights movement also couches its arguments in terms of the right to enjoy equally the rights that others already enjoy. The gay marriage controversy involves the claim that same-sex couples should have the same right to marry that different-sex couples have. In addition, the successful 2003 Supreme Court challenge to a Texas antisodomy statute argued, in part, that gays and lesbians have a right to sexual intimacy equal to that enjoyed by heterosexuals.¹¹

Thus, in a variety of settings, progressive arguments have shifted from grand claims of substantive equality, affirmative rights, and social and economic rights to more limited claims that rights enjoyed by some should be equally enjoyed by all. To be sure, progressives have not given up entirely on the more ambitious notions of equality and rights, but they have acknowledged that these more ambitious conceptions of equality pose substantial costs, both in terms of liberty—because they require affording substantial power to government—and in terms of administrability—because they pose extremely challenging line-drawing decisions not readily susceptible to principled resolution. Not all progressives have given up on the more ambitious understanding of equality, but even those who retain those commitments have largely abandoned the pursuit of them through the courts.

11. *Lawrence v. Texas*, 123 S. Ct. 2476 (2003).

Rights in a Utilitarian and Pragmatic Frame

Progressives have also shifted the focus of their normative arguments about rights, both in courts and in the public arena. Reverend Martin Luther King Jr. spoke in terms of absolute ideals and basic conceptions of justice. Although today's progressives sometimes invoke the rhetoric of Dr. King, they are just as apt to add more utilitarian arguments for rights. Thus, not only do defenders of a living wage or equal educational opportunity argue that these are the right things to do to respect human dignity and to meet the demands of equality, but they also frequently maintain that inequality in these areas imposes substantial costs on society as a whole. Inadequate education, for example, fails to prepare citizens for the demands of the working world and results in a less productive workforce and a less healthy economy. Likewise, denying basic living assistance to poor children may lead to substantial health problems that will eventually be borne by society at large. Having the highest incarceration rate in the world is costly in terms of the outlays required to house people for decades, as well as the devastating effect incarceration has on inmates' job and career prospects upon release. This, in turn, may lead to recidivism, which imposes further costs on the community at large.

These arguments appear to have some traction. For example, arguments about the economic importance of providing everyone with an adequate public education have generally proved more successful in spurring educational finance reform than more absolutist claims about rights to equality. Arguments about the costs, both direct and indirect, of mass incarceration have led the public to favor reductions in criminal sentences. What unites such appeals is that they seek to show that while denials of rights may seem to save on costs in the short run, they have the effect of increasing costs for all in the long run. In this way, progressive advocates appeal to the self-interest of the majority and of privileged elites as a way to justify upholding rights of the minority and the disempowered.

This form of argument is especially visible in the area of national security and civil liberties after the terrorist attacks of September 11. While civil liberties advocates (of which I am one) often appeal to the public's sense of basic justice and human rights, they also argue that the deprivation of liberties actually makes us less secure. For example, the response to the horrifying images of torture inflicted on Iraqi detainees at Abu Ghraib prison was twofold. First, of course, advocates insisted that the guards' behavior was shameful, immoral, and wrong. This moral condemnation was often coupled with a second claim about the deleterious effects the conduct would have on the progress of the U.S. war on terror. The Abu Ghraib scandal is now widely seen as having dealt a devastating blow to U.S. efforts because it fostered resentment against the United States. In turn, that resentment made potential allies less eager to cooperate with us and provided recruiting incentives for al Qaeda and other terrorist groups that have turned their attention on us.

This latter contention illustrates a critically important utilitarian and pragmatic defense of rights; namely, rights play a crucial role in fostering the legitimacy of any official enterprise. If the justice system is seen as legitimate, for example, authorities will find less need to resort to force because people are much more likely to comply with legal regimes that they view as legitimate. Similarly, if the U.S. response to terrorism is seen as measured, careful, and respectful of human rights and the rule of law, cooperation from the rest of the world would be much more forthcoming and the threats we face would be much more likely to diminish. If, by contrast, we adopt methods that are seen as illegitimate, our enterprise will be compromised in fundamental ways, requiring more reliance on hard power rather than "soft power"; on force rather than consent.

These arguments reflect a recognition that in the modern era, absolutist claims are received more skeptically, and therefore appeals to cost, to self-interest, and to the majority's well-being are increasingly important. This is not to say that progressives have abandoned,

or should abandon, appeals to moral principle. Principles such as equality, autonomy, liberty, and privacy remain powerful ideals in the American grain. But progressives increasingly seek to buttress those more absolutist appeals with utilitarian and pragmatic claims that the protection of rights, over the long run, is actually in the best interest of the whole community.

Different Strategies

In addition to adjusting their normative claims and arguments, progressive lawyers, scholars, and activists have proposed a variety of changes in strategy to adapt to the reality of a predominantly hostile federal judiciary, headed by a very conservative Supreme Court. The reactions have varied from advocating abandonment of the courts to shifts to state courts. Some reactions make more sense than others, but all share a recognition that we aren't going to see many decisions like *Brown v. Board of Education* and *Miranda v. Arizona* from the U.S. Supreme Court in the foreseeable future. Therefore, progressives have no choice but to think about and pursue alternative strategies.

Taking the Constitution Away From the Courts

One response of progressives to their inhospitable audience in the federal judiciary has been to look to the other branches of government, or to the people themselves, as a locus for advancing constitutional values. Professors Mark Tushnet, Larry Sager, and Robert Post have all argued, in varying degrees, that our understanding of the Constitution is too court-centric. Sager and Post maintained that because of the courts' institutional limitations, many constitutional norms are likely to be underenforced by courts.¹² Doctrinal limits on

12. Larry Sager, "Fair Measure: The Legal Status of Underenforced Constitutional Norms," *Harvard Law Review* 91 (1978): 1212; Robert Post, "Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act," *Yale Law Journal* 112 (2003): 1943.

who can bring constitutional claims, when those claims are ripe for decision, and what kinds of constitutional claims courts can decide mean that a variety of constitutional issues will rarely, if ever, come before the courts. As relatively passive adjudicators of disputes brought before them by others, the courts also lack the agenda-setting power and resources to undertake widespread investigations of systemic problems. Thus, Sager and Post argued, even if the courts have final say on many constitutional issues, there is considerable room for the political branches to fill in the gaps left by constitutional adjudication.

Indeed, the Fourteenth Amendment, which guarantees equal protection of the laws and due process to all persons in the United States, expressly authorizes Congress “to enforce, by appropriate legislation, the provisions of this article.” Thus, the Fourteenth Amendment seems to acknowledge a special role for Congress to play in enforcing at least those rights encompassed within its terms. Congressional enforcement of rights has several advantages over judicial enforcement. Unlike the courts, Congress can set its own agenda and engage in expansive investigations of systemic problems. Its power is not restricted by the justiciability doctrines that limit courts’ authority to act. Congress has more information-gathering powers than do the courts, which generally (although not exclusively) must rely on the advocates before them. And because Congress passes laws rather than renders constitutional decisions, it can be more experimental, flexible, and tentative in its actions. Statutes enforcing the Fourteenth Amendment, unlike judicial decisions, are not governed by *stare decisis*. That flexibility may encourage Congress to try things that the courts would feel reluctant to undertake.

Mark Tushnet took Sager and Post’s arguments still further, arguing against judicial supremacy.¹³ Where Sager and Post argued for Congressional latitude when Congress has been authorized to act and when the judiciary underenforces constitutional norms, Tushnet’s goal

13. Tushnet, *Taking the Constitution Away From the Courts*.

is more radical: to “take the Constitution away from the courts.” He disputed the widely accepted notion that the Supreme Court should have final say on constitutional matters and urged a more populist understanding of constitutionalism, in which, at least with respect to certain constitutional rights, the Court is only one player in the constitutional game, lacking final say on what those rights consist of.

One need not go so far as Tushnet. One can acknowledge that there are important reasons for the Court to have final say on constitutional matters while still insisting on the importance of looking beyond the courts as a focal point for progressive constitutional politics. In some instances, the appeal to constitutional values can take a populist form, bypassing the courts altogether. An inspiring example of the latter strategy is the campaign led by the Bill of Rights Defense Committee (BORDC) to get local towns and cities to adopt resolutions condemning the civil liberties abuses of the Patriot Act and the war on terror. This campaign began in Amherst, Massachusetts, shortly after the Patriot Act was signed into law. A small group of people concerned with the threats to civil liberties posed by the Patriot Act, and dismayed by how quickly and easily Congress adopted it, decided to launch a grassroots campaign. The campaign focused on the local level and gave ordinary people an opportunity to take concrete action in defense of their liberties. Although it began in all the usual places—Amherst, Northampton, Berkeley, Santa Monica—by mid-2004, more than 340 towns, cities, and counties had adopted such resolutions, including most of the biggest cities in the country—New York City, Los Angeles, Chicago, Detroit, Philadelphia, San Francisco, even Dallas. Four states—Vermont, Hawaii, Alaska, and Maine—have also adopted such resolutions.

The resolutions don’t have much legal force, but they appear to have had remarkable political influence. Since the Patriot Act was enacted, Congress has done little to question it. The executive branch has refused even to disclose how it is using many of the act’s most controversial provisions. Only one court has declared any part of the

Patriot Act unconstitutional.¹⁴ Yet the Patriot Act's political valence has changed dramatically. When it was adopted, only one senator—Russ Feingold from Wisconsin—voted against it. Today, many of those who voted for it have expressed reservations and doubts. Several bills have been introduced to amend it. Virtually every Democratic presidential candidate criticized the Patriot Act in their stump speeches, including those who voted for it as senators. A Republican introduced a bill in the House to cut off funding for one controversial provision (authorizing secret searches), and the bill passed by a margin of almost 200 votes. The Bush administration was forced on the defensive. It did not seek to advance most of the provisions of a bill leaked in February 2002 and quickly dubbed "Patriot 2." It also sent John Ashcroft on a national speaking tour to defend the Patriot Act. You don't need to send the Attorney General out to defend a statute that only one senator opposes. Obviously, the tides had turned, and if one looks for the cause of that turn, the BORDC's resolution campaign is the most likely candidate.

In my view, this is an example of popular constitutionalism outside the courts at its very best. The resolution campaign appeals to people's sense of constitutional values of liberty, privacy, checks and balances, and transparency. It bypasses the courts altogether, instead asking local communities to take a stand on what they understand the Constitution to require. Each time a resolution is proposed in a local jurisdiction, it provides an opportunity for public education and debate about constitutional values and their place in the war on terror. Each time a resolution campaign is undertaken, it creates a network of concerned citizens who can be mobilized the next time something like Patriot 2 is pulled out and presented to Congress in response to a terrorist attack.

Although efforts such as these to look beyond the courts for con-

14. *Humanitarian Law Project v. Ashcroft*, 399 F.Supp.2d 1185 (C.D. Cal. 2004).

stitutional norm enforcement are important, they share an inherent problem. Nonjudicial approaches to constitutionalism ultimately rely on majoritarian processes to advance what are often countermajoritarian values. Yet, we have a Constitution that cannot be changed by ordinary legislation precisely because the ordinary political process is often inadequate to protect certain kinds of rights and values. For example, while we understand that, in general, the rights of the criminal process are important for ensuring that innocent people are not convicted and that police power is properly constrained, we also know that, in particular cases, we are likely to be sorely tempted to reject those protections as “technicalities.” Similarly, while we understand that a democracy depends on freedom of speech, we also recognize that in times of crisis the majority may be tempted to suppress dissenting voices, as we did most dramatically during World War I and the McCarthy era.

If constitutional values are enshrined in the Constitution because we cannot rely on majoritarian processes to protect them, then a theory of constitutionalism that ultimately relies on those majoritarian processes is inherently problematic. Although political processes may work better to protect some rights than others, especially those rights in which the majority has an immediate interest, such as privacy, they are unlikely to work very well at protecting the rights of dissenters or minorities. Accordingly, while it is absolutely critical that progressives look beyond the courts, in particular to grassroots initiatives and organizing, it is also essential that they do not lightly abandon the notion that courts have special authority and special responsibility to protect the rights of those who cannot protect themselves through the political process.

Looking to the States

Some advocates for progressive social change have suggested that if the federal courts are hostile, litigants should look to state constitutions and courts to advance their claims. The states are bound by the

Constitution's Supremacy Clause to respect a floor of constitutional rights set by Supreme Court doctrine, but they are free to go above that floor by adopting more expansive rights protections than exist at the federal level. On a variety of issues, progressives have adopted this strategy with some success. Although such localized and decentralized strategies are certainly less efficient than a federal victory, looking to the states is an important option when the federal courts have denied relief. In addition to finding more hospitable forums, state and local initiatives may provide opportunities for building a base of committed and engaged citizens around campaigns for social change. Citizens are often more likely to feel that they can make an impact at the local level than at the federal level. As the cliché goes, "all politics is local." Moreover, because state court decisions do not require immediate application to the entire nation, state courts may feel more latitude in experimenting with novel arguments and approaches to common problems.

Progressives have relied on state constitutional litigation to advance social reform and individual rights beyond the U.S. Supreme Court's baseline in two areas in particular—public school finance and criminal justice. Although there are significant success stories in both areas, the state litigation strategy has also proven less of a panacea than some might have hoped.

In the criminal justice area, state courts have interpreted their own state constitutions in ways that afford substantially more protection to citizens in the law-enforcement setting than has the U.S. Supreme Court. State courts have adopted more rights-protective rules in rules governing searches and seizures,¹⁵ police interrogation and confessions,¹⁶ and the right to counsel. On the whole, however, state

15. See generally George Bundy Smith and Janet A. Gordon, "Police Encounters With Citizens and the Fourth Amendment: Similarities and Differences Between Federal and State Law," *Temple Law Review* 68 (1995): 1317.

16. See generally Mary A. Crossley, "Note: *Miranda* and the State Constitution: State Courts Take a Stand," *Vanderbilt Law Review* 39 (1986): 1693.

courts have followed the lead of the Supreme Court on criminal defendants' rights.

The success stories are impressive. For example, several states have declined to follow the Supreme Court in creating various exceptions to the "exclusionary rule," which generally forbids the use of evidence obtained in violation of the Fourth Amendment against a defendant in a criminal case. In 1984, the Supreme Court created a substantial exception to this rule—the "good faith" exception. In *United States v. Leon*,¹⁷ the Court ruled that evidence obtained by officers who reasonably relied on an illegal warrant mistakenly issued by a magistrate is admissible in court, in spite of the constitutional violation. A number of state courts, however, have refused to adopt a similar good faith exception to state constitutional exclusionary rules.¹⁸ For example, in *People v. Bigelow*,¹⁹ the New York Court of Appeals reasoned that an exception to the exclusionary rule would frustrate the rule's purpose by providing an incentive for illegal police conduct.

States have also parted company with the Supreme Court on rules that govern police–citizen encounters. For example, although the Supreme Court has condoned both consent searches and pretext stops, two practices that facilitate racial profiling, state courts have read their own constitutions to be more protective. The Supreme Court's "consent search" doctrine holds that police may approach anyone and request consent to search without any basis for suspicion. In addition, the Court has ruled that police need not inform the individual that he or she has the right to decline consent. The "pretext stop" doctrine permits police to use the pretext of a traffic violation, or indeed any other violation, to justify a stop or arrest, even where the police have no interest in enforcing the law that ostensibly justified the stop and

17. 468 U.S. 897 (1984).

18. 497 N.Y.S.2d 630, 637 (N.Y. 1985).

19. See, for example, *State v. Novembrino*, 519 A.2d 820 (N.J. 1987); *State v. Marsala*, 579 A.2d 58 (Conn. 1990); *State v. Carter*, 370 S.E.2d 553 (N.C. 1988); *State v. Guzman*, 842 P.2d 660 (Idaho 1992).

would not have stopped the individual for that particular infraction if not for some ulterior motive. Because these doctrines essentially permit law-enforcement officers to conduct stops and searches without objective individualized suspicion regarding the offenses they are actually investigating, they effectively permit police to rely on illegitimate criteria, such as race, to decide whom to stop and search.²⁰

State courts have been far more skeptical of such tactics. The New Jersey Supreme Court has held that for a consent search to be valid under its state constitution, the police must show not only that the consent was voluntary (which is all the U.S. Supreme Court requires) but also that the individual was aware of his or her right to refuse consent.^{21,22} Both New Jersey's and Hawaii's Supreme Courts have ruled that under their constitutions, police must have "reasonable and articulable suspicion" of criminal activity before requesting motorists to consent to a search.²³ Similarly, some state courts have held pretextual arrests impermissible under their own constitutions. For instance, the Arkansas Supreme Court held in *State v. Sullivan* that pretextual arrests—defined as arrests that would not have occurred but for an ulterior investigative motive—are unreasonable as a matter of state constitutional law.²⁴ The Washington Supreme Court has also rejected the federal rule in deciding pretextual arrest cases under its own constitution.²⁵ These decisions give individuals broader rights protections than they would otherwise have under federal law and substantially reduce opportunities for racial profiling.

State courts have also been more generous than the U.S. Supreme Court with respect to the right to counsel. The U.S. Supreme Court has held that the Sixth Amendment right to counsel prevents law-

20. See Cole, *No Equal Justice*, 27–41.

21. *Ibid.*

22. *State v. Johnson*, 346 A.2d 66, 68 (N.J. 1975).

23. *State v. Carty*, 790 A.2d 903 (N.J. 2002); *State v. Kearns*, 867 P.2d 903 (Haw. 1994).

24. *State v. Sullivan*, 74 S.W.3d 215, 220–21 (Ark. 2002).

25. See *State v. Ladson*, 979 P.2d 833 (Wash. 1999).

enforcement officers from deliberately eliciting statements from a suspect in the absence of counsel after he has been indicted or otherwise formally charged.²⁶ However, it has ruled that there is no Sixth Amendment right to counsel until the suspect has been formally charged, meaning that the right does not apply when an individual is being investigated or even after he has been arrested and taken into custody, as long as he has not yet been charged. Several state courts have disagreed. In *Blue v. State*, the Supreme Court of Alaska held that, under the state constitution, the right to counsel attaches during a preindictment lineup unless exigent circumstances exist such that providing counsel would unduly interfere with a prompt investigation.²⁷ In so holding, the court found that ensuring the suspect's right to fair procedures outweighed the need for prompt investigation in most circumstances.²⁸ Other state courts have interpreted their constitutions to extend the right to counsel before indictment in various contexts, such as at the taking of a blood-alcohol test,²⁹ the giving of a handwriting sample,³⁰ or the arrest itself.³¹

These examples illustrate that state courts can prove hospitable to rights claims rejected by the U.S. Supreme Court. However, these are isolated examples; most state courts simply follow the U.S. Supreme Court in interpreting their own constitutions on matters of criminal procedure. In addition, these decisions are usually not the result of a coordinated progressive campaign; rather, they reflect the work of individual criminal defense attorneys in individual cases around the country. Although state criminal defense lawyers and public defenders do share strategies and arguments, just as prosecutors do, these deci-

26. *Massiah v. United States*, 377 U.S. 201, 206 (1964); *Powell v. Alabama*, 287 U.S. 45 (1932).

27. *Blue v. State*, 558 P.2d 636, 642 (Alaska 1977).

28. *Ibid.*

29. See *Friedman v. Commissioner of Public Safety*, 473 N.W.2d 828, 835 (Minn.1991); *State v. Welch*, 376 A.2d 351, 355 (1977).

30. See *Roberts v. State*, 458 P.2d 340, 342 (Alaska 1969).

31. See *Commonwealth v. Richman*, 320 A.2d 351, 353 (Pa. 1974).

sions are usually not the result of a coordinated campaign for progressive legal reform.

Unlike criminal defense, there has been a sustained campaign to look to state courts for progressive reform on issues of school funding. Again, the impetus was an inhospitable Supreme Court. In 1973, the U.S. Supreme Court ruled that the Constitution did not guarantee a right to equal educational funding across school districts. In *San Antonio Independent School District v. Rodriguez*,³² the Court rejected an equal protection challenge to the Texas school funding scheme, which was based largely on local property taxes and which resulted in substantially more public funds per pupil for schools in wealthy districts than for schools in poor districts.

Advocates of educational equity had also filed suits in state courts, arguing that the state constitutions guaranteed more than the federal constitution. The state courts responded much more favorably than had the U.S. Supreme Court. Only thirteen days after *Rodriguez* was decided, for example, the New Jersey Supreme Court struck down its state education financing scheme, finding that it violated the state constitution's guarantee of equality.³³ In 1976, the California Supreme Court followed suit, ruling that California's funding scheme violated the California Constitution's equal protection provisions.³⁴ Other efforts were less successful, however: state supreme courts decided twenty-one school finance cases between 1973 and 1989, and plaintiffs won only six.

In 1989, the Kentucky Supreme Court shifted the focus of education finance litigation. In *Rose v. Council for Better Education*,³⁵ the court relied not on equality guarantees in the state constitution but on a provision guaranteeing "an efficient system of common schools." Finding that the state educational system failed to meet this consti-

32. 411 U.S. 1 (1973).

33. *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973).

34. *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976).

35. 790 S.W.2d 186 (Ky. 1989).

tutional requirement for all of its students, the court issued a detailed order specifying seven capacities that the state must provide for each student and nine essential features of an “efficient system of common schools.” After the Kentucky decision, supreme courts in several other states similarly found their educational systems inadequate, relying on constitutional guarantees to education rather than on equality provisions. In all, plaintiffs prevailed in twelve of twenty-four state education finance lawsuits between 1989 and 2000.

Victories in the state courts did not always translate into progress on the ground. The difficulty of implementing judicial decrees in the school finance litigation recalls the struggles the Supreme Court and lower federal courts faced in attempting to implement *Brown v. Board of Education*. Obstacles to institutional reform have proven persistent, even where courts have been willing to recognize a constitutional problem and mandate its resolution. New Jersey provides perhaps the best example: since the New Jersey Supreme Court ruled in 1973 that the school finance system violated the state’s constitution, the court has issued more than a dozen decisions on education finance. The legislature was initially reluctant to implement the court’s decree, and the court was forced first to order the legislature to comply by a set date and then to extend that deadline. The legislature did not act until faced with a court-created “provisional remedy” that would go into effect unless the legislature acted by a specific date. The court initially ruled that the legislative remedy cured the defects identified in the system, but in 1990, the court once again found the system unconstitutional and ordered increased spending in the state’s poor districts. In 1994, the court ruled that the legislature’s response to its 1990 decision was inadequate, leading to a new legislative overhaul of the system in 1996. The court found the 1996 overhaul insufficient as well and ordered still further remedies. The litigation is ongoing, and New Jersey ranks forty-second in overall equity in an *Education Week* ranking.

As this account suggests, shifting the focus of reform efforts to

state courts may not be enough to achieve progressive social reform, even in states with relatively receptive state supreme courts. Obstacles to broad structural change are substantial, no matter what judicial forum one finds oneself in. Structural reform efforts in state and federal judicial forums alike have made it clear that court victories are rare and that even where cases are won, they are usually not enough to achieve real change. Although litigation is important, and often necessary, it is rarely sufficient to resolve systemic social injustices at the state or federal level. Perhaps the most important lesson of the past fifty years is that the progressive lawyer must look beyond the courts altogether.

A Different View of Litigation

Many progressives continue to view federal litigation as playing an important role in struggles for social reform, but they tend to see lawsuits not as the centerpiece of reform efforts but as one part of a larger campaign. Those involved in the day-to-day work of social change have not given up on the courts entirely, but they have learned that successful social change requires a more comprehensive campaign addressed to a variety of forums at the same time. Whereas the NAACP Legal Defense Fund's desegregation strategy was focused on courts, progressives today understand lawsuits as playing a more humble role in the struggle for social change: the lawsuits may provide a focus for organizing and public education, a spur to political reform, or a way of dislodging information that can be used more broadly to pursue reform.

The campaign to end racial profiling provides one example of the modern, multifaceted approach to social reform. More progress has been made on the issue of racial profiling in the past five years than on probably any issue of equity in criminal justice enforcement over the past several decades. Before the mid-1990s, racial profiling was not even a recognized phenomenon outside minority communities. News stories occasionally reported anecdotes involving individual

African Americans who had been repeatedly stopped by the police for minor traffic infractions, but the problem was not understood as systemic. In the mid- to late-1990s, however, that understanding shifted. By the end of the decade, polls reported that 80 percent of Americans considered racial profiling wrong.

By 2004, more than half the state's legislatures had enacted bills addressed to racial profiling. Twenty states prohibited the practice; New Jersey made it a felony. Thirteen states mandated training for police to discourage practices and attitudes that lead to profiling. Seventeen states instituted some sort of reporting requirement. Countless city and local jurisdictions similarly adopted antiprofiling policies. Both President Clinton and President George W. Bush spoke out against racial profiling. President Bush issued a memorandum that generally forbade racial profiling by federal agents, although the memo provided no enforcement mechanism.

Much remains to be done, however. The public consensus on racial profiling was challenged by the terrorist attacks of September 11, 2001, after which polls reported that 60 percent of Americans now favored ethnic profiling of Arabs and Muslims. The Bush administration's policy statement on racial and ethnic profiling forbids it for ordinary law enforcement but permits it for border control and national security purposes. In addition, the Bush administration has, since September 11, embarked on the most massive ethnic profiling campaign seen since foreign nationals and American citizens of Japanese descent were interned during World War II; yet, public outcry has been muted.

The racial profiling reforms that have been achieved are by no means complete solutions. States have not always followed through on the legislative reforms they have adopted, and some of the reforms themselves were fundamentally flawed. Still, compared with other areas of race and criminal justice, where racial disparities have grown increasingly stark without much public protest outside minority communities, the progress made on racial profiling has been remarkable.

The practice of racial profiling undoubtedly raises serious constitutional concerns. It involves the use of racial generalizations as a factor in official state decisions—such as who the police stop, arrest, and search—and, under constitutional equal protection doctrine, any official reliance on race triggers the most stringent judicial scrutiny. Yet the progress described above has been made largely through the political branches rather than through the courts. Lawsuits have, in some instances, played an important role as a catalyst for change. However, the most successful suits have resulted not in rulings that racial profiling was illegal but in settlements that required the police to report on the demographics of their stop-and-search practices. One such settlement, in a suit by Robert Wilkins, a black Harvard Law School graduate who had been stopped unlawfully by Maryland state police, led in 1998 to the first systemic statistical demonstration that blacks and Hispanics were disproportionately stopped and searched.³⁶ That report led to pressure for similar studies in other states, and the campaign against racial profiling was off and running. A lawsuit in New Jersey played a similar role. And in New York City, Philadelphia, and other jurisdictions, lawsuits arising out of racial profiling incidents led to settlements that required training, reporting, or both. But the bulk of the change has come through the political branches—through state legislatures, local municipalities, and individual police chiefs. In the profiling area, then, cases were sometimes useful as a spur to change, or as a means to obtain information, but actual change almost always came through legislative or executive initiative rather than by court decree.

Why have progressives been able to make more progress on racial profiling than on other areas of inequity in criminal justice? This question underscores the ways in which progressives have rethought strategy in a less hospitable climate. Racial profiling was susceptible to political reform for a variety of reasons. First, the phenomenon

36. Cole, *No Equal Justice*, 34–36.

affects minorities of all classes, and therefore it cannot be dismissed or ignored simply because it affects the most vulnerable among us. Black and Hispanic doctors, athletes, lawyers, and teachers were frequently subjected to racial profiling, and because of their status in the community, their stories were often perceived as more credible and influential than a complaint of a poor young black man from the inner city. Second, racial profiling often manifests itself in a traffic stop, one of the few police–citizen encounters that most Americans have personally experienced. These facts about profiling mean that the issue resonated across a broader spectrum, and progressives were able to use that to their advantage to achieve political support for change.

Third, a key to the progressive strategy on racial profiling was not to ask for too much. By and large, the request for reform took the form of demanding studies. Who can be against studying a problem, particularly after virtually all of the initial studies revealed that the phenomenon was widespread and systemic? The studies' results usually disclosed substantial racial disparities in stop and, especially, search data, which then created pressure for further reform. Indeed, the mere existence of the studies may have had a positive effect on police behavior. The systemic nature of profiling suggests that much of it is based on unconscious or subconscious stereotypes about minority race and crime, stereotypes that are deeply ingrained in American culture. Without clear signals from one's superiors that such stereotypes should play no role in policing, they are almost certain to play a role, as the racial profiling studies suggest. The very fact that a state legislature or city council has mandated a study of profiling sends a message to police that profiling is wrong and that their actions will be monitored; and that message is likely to have some ameliorative effect on the practice of profiling.

Thus, the racial profiling campaign illustrates an understanding of lawsuits as just one small part of a larger campaign for change. Other, more classic examples of using litigation to facilitate political

reform include cases seeking to safeguard First Amendment rights to speech and association, which may help keep open the pathways for other progressive political change. Without the opportunities to debate, demonstrate, and organize, political change is virtually impossible. The classic example of this type of litigation comes from the civil rights movement, where lawyers frequently filed First Amendment lawsuits to protect civil rights demonstrators and organizers.³⁷

At the same time, progressives have increasingly been put in the position of using constitutional law defensively—not to demand political change but to defend progressive reform that is being attacked by conservatives on constitutional grounds. By necessity, progressives have been heavily involved in litigation over Congress's right to implement equal protection and due process rights under Section 5 of the Fourteenth Amendment, over the rights of state and federal governments to regulate campaign finance in the interest of reducing the distorting effects of concentrated wealth, over the ability of state universities to adopt and carry out affirmative action plans, and over environmental regulations challenged as interfering with property rights. These challenges are often brought by conservative public interest organizations, advocating rights of states, property, or equal protection. Progressives enter the fray to defend the prerogatives of the federal and state political branches to adopt legislation for social change. Here, as in First Amendment litigation, the progressive lawyer argues not that the courts should order social reform but merely that they should keep open other political avenues for social change.

Even where progressive lawyers ask the courts to order change directly, they usually see the lawsuits not as the main engine of reform but as an opportunity to advance political organizing or to galvanize public debate around a particular issue. Progressives have long understood that lawsuits will be successful only if there is substantial polit-

37. See, for example, *NAACP v. Alabama*, 357 U.S. 449 (1958); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Garner v. Louisiana*, 368 U.S. 157 (1961).

ical support for the causes they advocate. They have therefore sought to fill courtrooms with supporters, organize demonstrations, and run public education campaigns in the hopes of increasing the likelihood of victory in court. In the past, these efforts were seen as secondary, as supplements to the “main event” taking place in the courtroom. Today, however, progressives understand that the political support itself may be the engine of change exercised through channels other than the litigation. Thus, the lawsuit becomes not the focal point of the strategy but an opportunity for organizing, educating, and mobilizing forces for political change. On this theory, even lawsuits that are very likely to be losers in court may serve a progressive’s legal agenda.³⁸

The recent litigation challenging the detention of “enemy combatants” held at Guantanamo Bay, Cuba, illustrates the point. When lawyers from the Center for Constitutional Rights filed suit in 2002 on behalf of several Guantanamo detainees, most experts considered their chance of success virtually nil. The judicial precedents were dead set against them. The Supreme Court had ruled that foreign nationals who have not entered the United States have no constitutional rights. In World War II, the Court had ruled that the courthouse doors were closed to “enemy aliens” captured and tried abroad by the military for war crimes. Moreover, the Guantanamo clients, described by high-level administration officials as “the worst of the worst,” were hardly sympathetic. As the experts predicted, the district court and court of appeals unanimously rejected the detainees’ challenge, ruling that the plaintiffs were barred at the door.

However, the lawyers who brought these cases did not merely make arguments in the federal courts. They turned the lawsuits into a dramatic focus for galvanizing political support to the cause of the detainees, who were being held incommunicado and indefinitely with-

38. See Jules Lobel, *Success Without Victory: Lost Legal Battles and the Long Road to Justice in America* (New York: New York University Press, 2003).

out any sort of hearing whatsoever. Because the detainees were all foreign nationals, the lawyers focused much of their attention on international opinion. In Great Britain in particular, the cases became a cause célèbre and a political thorn in the side of the Tony Blair government. Political objections to Guantanamo were not limited to Great Britain; rather, they extended around the world. The United States came under increasingly harsh international criticism for its claim—in defending the lawsuit—that it had unchecked unilateral authority to hold the detainees forever without any legal limitations.

The international opprobrium occasioned by Guantanamo likely played a significant role in the Supreme Court's surprise decision to agree to review the case. The Court rarely accepts review of cases in which there is no conflict in the lower courts, and even more rarely where the federal government has won. Yet to almost everyone's surprise, the Court did grant review. The mere fact that the Court granted review, and thus posed the real possibility that the executive's authority might actually be subject to legal oversight and limitation, led the administration to adopt a range of ameliorative steps even before the Supreme Court ruled. It released the juveniles (some as young as 13 years old) who had been held in Guantanamo. It released many others, including two British detainees on whose behalf one of the Guantanamo cases had been filed. For the first time, it explained to the public and the world the internal processes it had employed to decide whom to incarcerate at Guantanamo Bay. It also instituted annual parole-type review procedures to assess whether detainees could be released. In the end, the Guantanamo detainees won in the Supreme Court, as the Court rejected the administration's position of unchecked power and ruled that the detainees could file challenges to the legality of their detentions in federal court. Even if the Guantanamo litigants had lost in the Supreme Court, however, the lawsuit was successful in galvanizing the international and domestic pressure that brought about significant change even *before* the Supreme Court had ruled.

The Guantanamo case was ultimately successful. But the more important point is that even before it succeeded in the courts, the case had served to galvanize public and world opinion around the issue of the indefinite detentions of foreign nationals at Guantanamo. Increasingly, progressives view lawsuits not so much for the direct results they might obtain from a judicial decree but from the vantage point of how the suits might contribute to a more comprehensive political/legal campaign. The Guantanamo detentions and racial profiling are two of the more prominent examples that illustrate a much broader theme in progressive law reform today—a theme that sees a much more humble role for courts and that demands a broader strategy for social change.

Looking Outward

The Guantanamo litigation also exemplifies a more novel strategic development in progressive reform movements, namely, looking outward to create pressure for change within. As noted above, much of the political pressure generated by the Guantanamo campaign came from abroad. Nothing more dramatically illustrated this than the fact that 176 members of Great Britain's Parliament filed an amicus brief in the Supreme Court on behalf of the Guantanamo detainees. Prime Minister Blair was compelled by the political pressure within Great Britain to advocate on behalf of the Britons held at Guantanamo, and President Bush was ultimately forced to agree to send several British detainees back to England, where they were promptly released.

The Guantanamo issue was particularly susceptible to international pressure, of course, because the detainees came from forty-two different countries and because the United States needs the cooperation of many of those countries if it is going to protect itself against al Qaeda and other potential enemies. In the age of globalization, progressive lawyers are increasingly realizing that the international arena might be an important part of the strategy for achieving social reform at home.

This shift in focus has substantive as well as strategic implications. Progressive lawyers increasingly cite international human rights norms in U.S. courts. The Guantanamo plaintiffs, for example, claimed that their indefinite incommunicado detention without a hearing violated not only due process but also the Geneva Conventions and the customary law of war. In *Turkmen v. Ashcroft*, a class action lawsuit filed by the Center for Constitutional Rights challenging the treatment of Arab and Muslim foreign nationals detained on immigration charges in connection with the investigation of the September 11 attacks, plaintiffs alleged not only constitutional claims but also violations of international human rights norms. Another lawsuit, *Arar v. Ashcroft*, arising from the U.S. deportation of a Canadian to Syria, where he was tortured and imprisoned for ten months without charges, also directly alleged violations of international human rights norms.

Lawyers also increasingly cite both international human rights norms and other nation's constitutional law decisions as a guide to the interpretation of U.S. law. In *Lawrence v. Texas*,³⁹ the Supreme Court in 2003 invalidated a Texas statute criminalizing homosexual sodomy on due process grounds, reversing its own precedent to the contrary from seventeen years earlier. In doing so, the Court cited a decision from the European Court of Human Rights similarly invalidating a criminal sodomy statute. If norms of due process are evolving, the way that other courts have resolved similar questions may inform the content of due process under our Constitution. Similarly, when critics have challenged the constitutionality of imposing the death penalty on juveniles and the mentally retarded, they have relied on international human rights norms and a comparative analysis of other nations sharing liberal democratic traditions to argue that inflicting the death penalty in these situations is cruel and unusual. It is not uncommon for courts of other nations to look to American and other nation's precedents as they confront questions under their

39. 123 S. Ct. 2476 (2003).

own constitutions; it is becoming less uncommon for our courts to reciprocate. Where other countries or the international human rights legal paradigm have advanced beyond American constitutional law in progressive directions, international human rights and comparative constitutional law are important tools in the progressive lawyer's arsenal.

The international human rights framework also has implications for the tactics employed by domestic progressive campaigns. International human rights groups such as Amnesty International and Human Rights Watch have typically relied much more heavily on public education and "shaming" than on filing lawsuits to advance their causes. In part, this is a matter of necessity. Domestic courts in countries with abusive human rights practices are often deeply compromised, and, with the exception of the European Court of Human Rights, international forums typically lack the power to make their judgments stick. But while human rights groups have typically employed the "reporting" approach against other nations, they are now increasingly employing it against the United States as well.

Issuing reports on human rights abuses in the United States can be a powerful tool for social reform. The United States has long sought to export democracy, human rights, and the rule of law, so it is particularly susceptible to criticism when it fails to live up to the standards it has sought to impose on others. Especially since the terrorist attacks of September 11, the United States is increasingly viewed around the world as ignoring international law and basic human rights, and that perception is undermining the U.S. standing in ways that are difficult to ignore. As a result, international shame may be a particularly powerful force for influencing change within the United States. This is especially true with respect to our treatment of foreign nationals, as other nations have a direct stake in monitoring and pressuring the United States with regard to the treatment of their citizens.

Conclusion

The heyday of progressive law reform has been over for nearly two generations. Progressives today face an inhospitable climate wherever they turn—Congress, the executive, and the federal courts. This reality has forced progressives to hone their arguments and adapt their strategies. In the end, however, progressivism may well be stronger for this adversity. Progressives have moderated their demands for substantive equality, not only because they face hostile forums but also because efforts to achieve equality over the past half century have revealed that the problem is more nuanced than we might have once thought—and requires more nuanced solutions. Claims of affirmative rights and substantive equality have given way to arguments that rights ought to be defined in such a way as not to exploit the vulnerable. Progressives have learned to supplement moral claims with more utilitarian and pragmatic contentions, arguing that respect for rights of the vulnerable, in fact, serves the interest of the majority in a variety of concrete ways.

At the same time, progressives have had to alter their tactics as they seek progressive reform through law. They have looked outside the courts altogether; sought more favorable forums in state courts; reconceived lawsuits as part of a larger, more comprehensive strategy for reform; and most recently, invoked international norms to increase pressure for change at home. Each of these strategies was adopted out of necessity, when it became clear that federal court litigation in and of itself was no longer (if it ever was) the answer. But these adaptations have made progressivism stronger, both in terms of the appeals it makes to the public at large and in terms of its ability to bring about change. For the moment, it means that progressives are not left empty-handed, despite facing difficult odds. And in the future, when the political tide turns back to a climate more friendly to progressive ideals, as it surely will, this experience of adversity will only make progressivism more effective in its effort to produce a more just and equitable world.

