

REVISED EDITION

THE

POLITICS OF LAW

A PROGRESSIVE CRITIQUE

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**THE POLITICS OF
CONSTITUTIONAL LAW**

MOST of us think about constitutional law in two ways. Often we think of constitutional law as the expression of the deepest and most enduring values of the people of the United States, embodying our commitments to justice, fairness, and the like. Yet, perhaps as often we think of constitutional law as a form of politics, describing justices as "conservative" or "liberal" in the same way that we describe senators as conservative or liberal. These two ways of thinking about constitutional law sit uneasily together, but to understand constitutional law, and particularly for political activists interested in social change, it's important to keep them clearly distinct. This chapter begins by sketching the structure of the Constitution and follows with a brief constitutional history of the United States, to show how the two ways of thinking about the Constitution have arisen and how they maintain themselves by capturing different aspects of the Constitution's structure and history. The final section deals in somewhat more detail with the idea of constitutional rights, using as its central example the Supreme Court's decision that our constitutional principle of free speech was violated by a statute making it illegal to burn a flag as part of a political protest.¹

The flag-burning case illustrates the tension between the two ways of thinking about the Constitution particularly well, because it is a typical "liberal" result, with an opinion, written by the liberal Justice William Brennan and a dissent written by the conservative Justice William Rehnquist, and yet the majority also included the conservatives Justice Antonin Scalia and Anthony Kennedy. A second focus will be the recent historical experience of the Warren Court in the 1960s, which suggests that, at least on occasion, the courts, and constitutional law, can be instruments of progressive political change used against reluctant politicians.

The combination of historical and structural arguments developed here may explain how the two perspectives operate. In the end, however, criticism and defense of the constitutional system must rest on political judgments

about its ability to sustain progressive values in the future. I will suggest that progressives ought to be skeptical about becoming too deeply committed to a defense of the existing constitutional system, though some commitment is appropriate in light of the historical evolution of constitutional systems. Progressives should, of course, continue to be sensitive to the possibility that the constitutional system provides certain strategic advantages in particular political struggles, but should be skeptical about a *general* defense of that system.

THE STRUCTURE OF THE CONSTITUTION

When the drafters of the Constitution met in Philadelphia in 1789, most of them agreed that the system of government under which they were living was seriously inadequate.² Most government occurred through the state governments, and these, most of the framers believed, were incompetent at best and dangerous at worst. They were primarily concerned that state governments were too easily dominated by popular majorities, who then enacted legislation that promoted their own interest at the expense of the interests of the more stable and nationally oriented members of the community. For example, after the Revolution, many small farmers and craftsmen went into debt so that they could expand their production to meet the demands let loose by the onset of peace. Economic conditions, particularly in connection with trade with Europe, were unstable, though, and these debtors frequently found themselves hard-pressed to pay back what they owed on schedule. As a result, they pressured their state governments to adopt various forms of debt relief, such as postponements of repayment or even complete suspension of debts. And, on one important occasion when debtors were unable to obtain relief from their state government, they took up arms in what is known as Shays' Rebellion. Farmers in western Massachusetts, led by Daniel Shays, marched on local courthouses and attempted to prevent creditors from using established legal processes to collect their debts. When Massachusetts was able to suppress Shays' Rebellion only with some difficulty, the framers took the lesson to be that a stronger national government was needed.

State governments were causing trouble in other ways. Again because they were controlled by local, ordinarily popular, interests, state governments adopted policies dealing with trade and manufacturing that attempted to advance local interests without concern for the impact on other states. Local regulations frequently interfered with the development of a secure system of international trade. Economic development seemed to require, in addition, the growth of a nationwide market, for which some sort of national monetary system seemed necessary. But, again, state governments issued their own

forms of money, sometimes refusing to recognize the money issued by other states.

As the framers saw it, perhaps people would eventually understand that the policies they had their state governments adopt were foolish, and that, by making economic development difficult, the people were not advancing their own long-term interests. But, the framers feared, it might take too long to learn that lesson. In the meantime, various European powers were watching the United States, eagerly awaiting the opportunity to dismantle the new nation and recolonize it.

The solution to these difficulties appeared to be a stronger national government. Such a government could override local interests and promote the broader national interest; it could have at its command sufficient military force to suppress internal rebellions and to thwart potential foreign conquerors; it could thereby open the way for secure economic development.

It was not all that difficult to identify what had to go into a new and more powerful national government, though working out the details in a way that satisfied all the interests within the nationalist coalition proved to be harder. First, the new Constitution should contain provisions that barred states from adopting the kinds of policies that had caused all the difficulties. To prevent the recurrence of the adoption of debtor relief statutes, the Constitution says that states may not adopt laws that impair the obligation of contracts. It also keeps them from issuing their own money. In an important provision that was the subject of later controversy, the Constitution also authorizes Congress to regulate commerce among the several states, or with foreign nations. For many years after the Constitution was adopted, lawyers and judges believed that this provision, on its own, made it unconstitutional for states to enact any laws regulating interstate commerce; it certainly authorized Congress to override localistic laws; and the courts soon took it to mean that they could invalidate local legislation that interfered with interstate and international commerce even if Congress had not acted.

The commerce clause, though, signals an important problem that the framers had to face. To accomplish their goals, they had to create a national government that was strong enough to override local policies of the sort that had caused the problems they were reacting to. Those policies, however, were adopted by popular majorities in the states. The framers then faced two problems. First, how were they to persuade those same popular majorities that a new national government should be created that would be able to frustrate the desires those majorities had been expressing in the states? Second, and more important in the long run, how were the framers to guarantee that the same popular majorities would not unite to control the new, and newly powerful, national government? Then indeed they would have jumped from the frying pan into the fire; state governments could create bad policy within

their boundaries, while other states might still adopt good policies, but if the national government adopted bad policies everyone would suffer.

The framers were able to secure the adoption of the Constitution for a number of reasons. The adoption of the new Constitution was a much closer thing than most people now realize. The majorities in key states such as New York and Virginia were paper-thin. The proponents of the new Constitution were simply better politicians than its opponents. They were able to manipulate the timing of key votes, for example, and, perhaps more important, were better at manipulating the symbols of nationhood than the opponents of the Constitution. Finally, the nation did face serious difficulties, and the new Constitution was the only thing around that purported to be a solution to those difficulties. The framers knew, that is, how hard it is to beat something—their proposal—with nothing—the status quo that, it was widely agreed, was unsatisfactory.

The framers attempted to control popular majorities by combining several strategies that had the overall effect of making it extremely difficult for popular majorities to adopt effective policies to control the productive activities of the private sector. These strategies, still prominent in the contemporary constitutional system, were *federalism*—the allocation of substantial law-making power to state governments—and the *separation of powers*—the division of authority within a national government consisting of a president, a House of Representatives, a Senate, and an independent judiciary. The judiciary, in turn, was to have the power of *judicial review*, enabling it to overturn legislation that, in the view of the judges, violated the Constitution. The national government could act aggressively, through Congress and the courts, against local legislation that impaired the goals of national economic development, but federalism and the separation of powers would make it difficult for the national government itself to regulate the economy.

The framers were almost forced to build federalism into their system. Local attachments to state governments were too strong to overcome, so any successful restructuring of the national government would have to have important federalistic elements. Nonetheless, once the more powerful national government was created, federalism had a new role. State governments could not adopt regulations of commerce that interfered with economic development. They could, however, adopt what came to be known as “police power” regulations. These were laws designed to promote the health, safety, and general welfare of the state’s population. A good example in modern times is provided by legislation aimed at reducing the adverse social impact of plant closings. The existence of many states in itself places a limit on the kinds of police power regulations states can adopt, at least once economic development reaches the point where there is a large national market for

capital. The limit arises because, if the owners of capital are unhappy with the police power regulations one state adopts, they can relocate to another state with more favorable regulations. The mere threat of relocation constrains states from adopting police power regulations that substantially interfere with the decisions the owners of capital wish to make. In the past, this threat limited the ability of states to adopt effective programs of social insurance and even wages-and-hours limitations, and more recently it inhibited the adoption of effective local plant-closing legislation. The general effect of federalism in a developed economy, then, is to make it difficult for local majorities to adopt substantial social welfare programs.

What about the powerful national government? Even if federalism makes it difficult for individual states to adopt social welfare programs through the exercise of their police powers, the national government can adopt even more substantial programs applicable throughout the country. The fact that the social welfare system of the United States is significantly narrower in scope than similar systems in other advanced economies, and the much more limited scope of legislation dealing with plant closings in the United States compared to legislation in Western Europe, suggests that there is something about the structure of the national government that makes it hard to get such programs enacted. Constitutional structures are not the only source of the difference, of course, but the existence of a system of separation of powers on the national level is one part of the explanation. Another is the well-established practice, not itself required by the Constitution, of choosing members of Congress by plurality votes in single districts.

The different elements in the national government are selected in different ways, giving them different constituencies. For example, members of the House of Representatives are elected for the relatively short period of two years, and they represent the smallest units or districts in the national system. For this reason, the framers thought, the House of Representatives would be the branch most often dominated by popular majorities of the sort that had caused difficulties in the states. Somehow, the House had to be kept under control. The Senate and the presidency were the means of control. In the original Constitution, senators were elected indirectly, chosen by state legislatures. The thought was that, in order to obtain the support of a state legislature, a senator would have to be a relatively elite member of the state’s governing class, and such people, the framers hoped, would be able to take a broader view than the members of the House of Representatives. Even after the Seventeenth Amendment replaced indirect election of senators with their direct election by the people in the states, the fact that senators serve for six rather than two years provides some check on popular control of Congress. In addition, of course, the cost of running a statewide campaign

is so great, even compared to the extremely high cost of running for the House of Representatives, that few populist candidates can afford to run for the Senate.

The president, too, is elected indirectly. The framers' hope that the Electoral College would actually play a serious role in selecting the president was defeated almost from the outset. Once again, however, the fact that the president is selected by the largest constituency, the nation as a whole, for a longer period than the House of Representatives imposes some limits on the development of a national popular program.

Plurality elections in single districts lead directly to the creation of a two-party system, whose effect is to make it more difficult for dissident voices to receive serious political consideration. In a plurality system, a vote cast for a third party is almost always "wasted," in the sense that the third-party candidate rarely has a real chance of winning the election. In other democratic systems, the existence of many parties has been a source of important social initiatives (not all of them progressive, of course). In the United States, third parties have been indirectly influential, as when socialists in the early years of the twentieth century forced the major parties to develop programs responsive to the needs of workers in the new highly industrialized economy. This sort of indirect influence, however, while important, operates more slowly than direct participation in the formation of governments.

Another limit on the power of the national government arises from the separate constituencies of the president and Congress. Because they have different bases of political support, the president and members of Congress are under no real political pressure to develop a coordinated national party program. If a member of Congress "delivers" to his or her constituency, by securing defense contracts or other subsidies for locally important industries, the member can almost completely ignore the president's desires on other issues. Popular forces cannot just work within a national party structure, as they can in parliamentary systems; they must assemble majorities both nationwide and in many local districts as well, a task that has been beyond the limited financial resources available to most popular movements in the history of the United States.

To see the effect of this scheme of separation of powers, consider the problem of plant closings. Each plant closing has an impact on a particular community, and eventually there may be enough plant closings for people throughout the country to believe that some sort of legislative response is required. What do they have to do to get such a program adopted by the national government? They must persuade majorities in the House and Senate, and they must make sure that the president is sympathetic to their concerns. Because the entire House of Representatives is elected every two

years, in theory at least a nationwide popular majority can elect a sympathetic House in one election. Only one-third of the Senate is elected in each national election; to gain control over the Senate, then, the popular majority must hold together for at least four years. Similarly, because the president's term is four years, the same majority must be in place for that period. Given the advantages incumbents have in elections, creating a majority in all the branches of the government for a new program is likely to be, and indeed has proven to be, quite difficult.

Experience has shown that new coalitions, such as Franklin Delano Roosevelt's New Deal coalition, can be assembled only over a period of eight to ten years at the quickest. In this way the separation of powers serves the goal of obstructing the ability of popular majorities to gain control of the powerful national government.

And even after popular majorities do gain control, there is another hurdle: judicial review of the legislation they manage to enact. Judicial review is, among other things, the power to declare statutes unconstitutional and thereby to place a legal obstacle in the path of implementing the program embodied in the statutes. The judges of the federal courts, including the Supreme Court, are formally independent of the control of political majorities, at least in the sense that the judges cannot be removed from office if popular majorities disagree with their actions (as majorities can remove elected officials, by voting for their opponents in the next election). The judiciary is, however, indirectly dependent upon popular majorities, because federal judges are nominated by the president and must be confirmed by the Senate before they can take office. As judges retire, resign, or die, they are replaced by new judges who are in tune with the political forces then in control. The effect of life tenure for judges, then, is analogous to the longer terms for senators: It means that a political majority must hold together for a long enough time to gain control, not only of the Congress and the presidency, but also the courts, if it is to implement its program without obstruction. Historically, it takes about a decade for a political majority to get control of the courts; if a new coalition cannot hold together for that long, it will be unable to take over the government as a whole.

The structure of the Constitution, including federalism, the separation of powers, and judicial review, makes it difficult, though not impossible, for new political majorities to replace old coalitions. Judicial review in particular is, in the overall scheme of the Constitution, not really a mechanism for vindicating some predetermined set of individual rights—and in particular not the rights advanced by progressive forces at any particular time—but is rather either a way to block the programs of new majorities that are not strong enough to sustain themselves for more than a decade or a means of

smoothing out the period of transition from one political majority to another. The constitutional history of the United States confirms this interpretation of the constitutional structure.

A BRIEF CONSTITUTIONAL HISTORY OF THE UNITED STATES

We have already seen how the Constitution was designed to unify the nation behind a program of economic development. For about a generation after the framing, roughly until 1835, the political coalition that had supported the original Constitution continued to dominate the national political process. Congress was content to let economic development occur in a relatively unguided way, and the states, under the influence of the philosophy of the Constitution, rarely attempted to interfere with interstate or international trade. The Supreme Court endorsed the nationalist economic program by upholding the constitutionality of the government's primary instrument of economic control, the Bank of the United States, in an opinion that also cast doubt on the constitutionality of state efforts to interfere with commerce.³

By the 1830s the original nationalist coalition was coming under strain. Throughout the nation, popular majorities supported the programs of Jacksonian Democracy, which sought, in a modest way, to displace the entrenched economic elites and to replace them with a more dynamic entrepreneurial element. Here, too, the Supreme Court came to the aid of the newly dominant political coalition, by allowing states to eliminate monopolies they had granted in earlier years, in favor of unrestricted competition.⁴ (As might be expected, given the dynamics of the constitutional structure described earlier, the Court was divided over this and other issues implicated in the Jacksonian program, because not all of the justices who were part of the prior generation's politically dominant coalition had been replaced by the time the Jacksonians became dominant elsewhere in the government.)

In addition, and more important in the long run, the issue of slavery began to fracture the nation. The framers of the Constitution knew that the problem of slavery was likely to be divisive; it had, among other things, caused enormous difficulties in the design of the details of representation at the constitutional convention. The framers believed that they had developed a system of government in which the interests of states—especially the southern states—would be permanently protected. The growth of abolitionist sentiment in the North made southerners extremely nervous and, although in fact they continued to control the national government—including the Supreme Court—up to the election of Abraham Lincoln in 1860, they became more and more dissatisfied with the constitutional system. Somewhat iron-

ically, one important branch of the abolitionist movement, led by William Lloyd Garrison, also found the Constitution unsatisfactory, calling it a "covenant with death" because, as the Garrisonians understood, the structure of the Constitution did indeed provide substantial protection for the continued existence of slavery.

The Civil War must be understood, in constitutional terms, as a demonstration of the failure of the Constitution. The carefully designed balance of powers, through federalism and separation of powers, turned out to be unable to manage the conflict over slavery. The Supreme Court used its power of judicial review in a futile effort to take the issue of slavery out of national politics by holding, in the notorious *Dred Scott* case, that Congress had no power to regulate slavery.

Once the North defeated the Southern rebels, they returned to the original Constitution, modifying it in order to eliminate, as best they could, the legacy of slavery in the Southern and national political systems. The Thirteenth Amendment abolished slavery, the Fourteenth Amendment provided a charter of national liberty to be protected against encroachment by the states, and the Fifteenth Amendment guaranteed blacks the right to vote. These amendments demonstrate that the constitutional system can incorporate sustained popular pressures, yet, coming as they did only after a bloody war, they also show how difficult it is for progressives majorities to have their way. For about a decade, the so-called Reconstruction of the South promised to restructure power in the South and, therefore, in the nation. The national commitment to the elimination of the legacy of slavery waned and, after 1876, neither Congress nor the courts were terribly interested in using the three Civil War amendments to continue to protect the interests of blacks.

The Fourteenth Amendment soon became the vehicle for protecting a new set of individual rights—not the rights of blacks to be free of terrorism or white domination, but the rights of corporate investors to be free of interference from political majorities who wished to control their investments. The Fourteenth Amendment provides that states shall not "deprive any person of life, liberty, or property, without due process of law." In a series of decisions culminating in *Lochner v. New York*,⁵ the Supreme Court held that the due process clause limited not only the procedures states could use but also their substantive power to regulate corporations, finding that certain kinds of regulations unconstitutionally interfered with capital's "liberty" to enter into contracts freely. Although the Court upheld regulations of wages and hours in situations where it believed there to be a real possibility of an imbalance of bargaining power—in cases involving miners and women workers—in *Lochner* it invalidated a wages-and-hours law that applied to what it took to be ordinary male workers because, as the Court saw it, such a law was simply an effort to reallocate power from capital to labor.

The Court's abandonment of the cause of blacks after 1876 was consistent with the political tenor of the nation, as the structure of the Constitution suggests it would be. And, for a time, the exuberant economic growth of the nation in the last quarter of the nineteenth century made the Court's support of capital consistent with what politically dominant elites desired, even in the face of substantial opposition from working people.⁶ By the turn of the century, though, the Progressive movement had begun to support a more modern form of governmental regulation of capital to promote the long-term interests of capital against the shortsightedness of individual capitalists. Progressives, in gradually taking control of state legislatures and influencing Congress and several presidents, came to see the Supreme Court as a serious obstacle to their political programs.

Until the New Deal, the Supreme Court's course was one of erratic opposition to Progressive reforms, a course that mirrored the inability of Progressives to sustain a political coalition that controlled the other branches of the national government. With the onset of the Depression, though, and the creation of Roosevelt's New Deal coalition, the Court's opposition to reform caused a constitutional crisis. The Court invalidated central elements of the New Deal program—elements, to be sure, that almost certainly did little to alleviate the economic causes or effects of the Depression—and Roosevelt attacked both the Court's decisions and the Court itself. Roosevelt proposed to "pack" the Supreme Court by appointing several new justices who he assumed would support his programs. The Court-packing plan failed, at least in the sense that it was not enacted, but the Court itself came around to support New Deal programs, first by a strategic change in vote by Justice Owen Roberts and then, again as the constitutional structure would suggest, by timely retirements from the Court.

After the New Deal, the distinctive form the welfare state had in the United States was in place, and the Court retreated from its opposition to governmental regulation of capital. It withdrew from the supervision of what it came to call "economic and social legislation." Almost at the same time, though, the Court began to develop a new constituency. The capitalists who had been the Court's supporters had lost the battle, and it made little political or structural sense for the Court to continue to fight on behalf of their interests. Because a new coalition was in place, one that included blacks and political liberals, the Court developed a constitutional theory that made the protection of the members of the newly dominant coalition the Court's primary task. As Justice Harlan Fiske Stone put it in what has become the most famous footnote in the Court's history, the Court would be especially alert to legislation that adversely affected the interests of "discrete and insular minorities."⁷

The New Deal coalition continued to dominate national politics through the 1950s and early 1960s, and the Court continued to play its appointed role. Most dramatically, of course, the Court invalidated the system of racial segregation in the South. Yet, despite the opposition that the desegregation decisions generated in the South, eliminating segregation was, first of all, consistent with Stone's theory of constitutional protection of New Deal interests, and, second, eliminated a regional source of embarrassment to a nation engaged in a worldwide ideological struggle over "democracy" with the Soviet Union. When the very same Court confronted basic challenges to the constitutional order that, it believed, were posed by American Communists, it firmly upheld most of the efforts to suppress domestic communism. Strikingly, in a series of parallel cases involving on the one hand efforts by Congress and state legislatures throughout the nation to suppress the Communist party and on the other hand otherwise barely distinguishable efforts by southern legislatures to suppress the black movement, the Court issued a series of decisions whose bottom line was, as Professor Harry Kalven put it, that the Communists always lost and the NAACP never did.⁸

The picture changed a bit during the 1960s. The Court became less suspicious of domestic dissent, largely because, to the extent that dissent was linked to international communism it was a failure and, to the extent that dissent was linked to black protest, it seemed consistent with the full development of the New Deal program. More important, the Court continued to promote the program of the New Deal coalition, particularly in its Great Society version of a more robust welfare state, when that coalition was in the process of disintegration.

The election of Richard Nixon and his appointment of Warren Burger as chief justice, and subsequent appointments of three other conservative justices, effectively terminated the alliance that the Court had struck with the increasingly devitalized New Deal coalition. Yet, until the late 1980s, no new political coalition replaced the New Deal coalition, as the continued domination of Congress by the Democratic party showed. Not surprisingly, then, with no clear direction forthcoming from the elected branches of government, the Supreme Court limped along, on the whole taking a moderately conservative line but occasionally making some progressive decisions, as in the abortion cases of 1973.

By the end of the 1980s the Supreme Court appeared to have taken a definitive turn in the conservative direction. In one sense this too was to be expected, for the Democratic party came to reflect, as the Republicans already did, the domination of the political system as a whole by increasingly conservative elites. And yet, the political situation may be sufficiently fluid to make it possible for progressive forces to recapture the Supreme Court for

their programs if they succeed in capturing the elected branches of the government, and even in the absence of a large-scale political transformation, to find the Court an occasional ally in political struggles.

The history of the Supreme Court, and of constitutional law, shows that the structure the framers put in place actually worked in the way they hoped it would. The Supreme Court has acted as a brake on overly quick political change, and so has been largely a conservative force in the society. But it has also come around to support and even advance progressive programs when the other branches of the government supported such programs consistently enough. The rhythm of politics in the Supreme Court and constitutional law is somewhat more sedate than that of politics elsewhere in the government, but in the end constitutional law is, and always has been, a reflex of politics.

CONSTITUTIONAL RIGHTS IN PROGRESSIVE POLITICS

The structure and history of the Constitution, as recounted above, suggest that progressives ought to be skeptical about their ability to utilize constitutional law as a means of advancing their programs. Skepticism, though, may seem inappropriate in light of the relatively recent—though apparently now abandoned—role of the Supreme Court in supporting first the black civil rights movement and then, somewhat less forcefully but crucially on the central issue of the right to procreative choice, the women's movement. And, for several reasons, progressives are right in refusing to write off the appeal to constitutional rights as one of their modes of political action. Yet, there are also reasons to be quite self-conscious about the risks of that appeal.

As the brief history of constitutional law suggested, the Supreme Court's support for the civil rights and women's movements reflected the array of political forces in the political system generally. In the long view, the Warren Court was an unusual and brief instance in which the Court happened to come under control of progressive interests to a somewhat greater extent than those forces sustained elsewhere in the political system. One lesson of the brevity of the Warren Court—conservatives have now dominated the Supreme Court for a longer period than Earl Warren was chief justice—is that progressive advance through the use of the courts cannot be sustained in the absence of progressive advance through other forms of politics. Another lesson of the Warren Court experience, though, is that there are times when the political system as a whole is sufficiently open to progressive change that appeals to constitutional rights can be effective not only in politics but in the courts as well. Of course, those times of relative openness may themselves be brief, in which case the opportunity for progressive use of the courts

may be quite limited, or they may be fairly sustained, in which case more might be accomplished in the courts.

In addition, appeals to constitutional rights can sometimes work quite effectively in the rhetoric of political discourse. As a general matter, popular respect for the ideas of rights means that an argument phrased as an appeal to constitutional right has at least a little greater initial force than an argument phrased solely in terms of what is a good thing for the society to do. People get indignant, or at least understand others' being indignant, when they feel that their rights have been infringed, in a way that they don't when they are told merely that there are better ways to do things. And, from the relatively narrow point of view of progressive lawyers, there's not much else they can contribute to progressive political activity than arguments premised on the possibility that the legal system will recognize rights: That's just about the only argument that lawyers, as distinct from other political activists, can make.

Appeals to rights can be effective beyond rhetoric. As the example of desegregation litigation indicates, sometimes they can be used to produce concrete victories for progressive forces. The victories can be won in court directly, or small victories in court can be used as a focus for organizing a progressive constituency for further action seeking more extensive changes, both in additional court cases and through legislative action brought on by pressure from the mobilized community. Indeed, sometimes *defeats* in court can effectively mobilize a group, by demonstrating to them that they can't rely on any government institution, as those institutions are currently composed, to advance their interests so they better organize to change the government. Consistent with the general propositions I have presented about the role of the courts in the government, the desegregation example shows that the beneficial effects of court victories by invoking rights depend on a particular array of political forces—there a South whose political elites were out of step with the national political elites to which the Supreme Court was responding. (The related point about the occasional usefulness of court defeats should be clear.)

Appeals to the Constitution, then, are an appropriate part of the repertoire of progressive politics. Their limitations, though, deserve attention, too. First, conservatives can appeal to rights just as well as progressives can. The Supreme Court over the course of its history has been quite sensitive to claims by capital that progressive legislation infringes the right to private property, for example, and the Supreme Court has recently found in the Constitution a right, held by white men, to be protected against racial discrimination in the form of affirmative action.⁹ Preserving the possibility of progressive invocations of constitutional rights has, probably, in the long run contributed to the effectiveness of progressive movements, but the practical

ability of conservatives to get the courts to help them, over the course of constitutional history, makes the question substantially closer than a nostalgic reverence for the Warren Court sometimes leads progressives to think.

Second, not all appeals to the Constitution are equally effective. Progressives have tried to argue that there is a constitutional right to a minimum standard of living, or to minimal provision of shelter. Not only have these arguments had extremely limited success in the courts; even more, the rhetoric of rights doesn't seem to have been particularly effective in the general political domain either. Where "rights" to food and shelter are involved, appeals to individual and collective responsibility seem to have worked somewhat better than appeals to rights *per se*, though as the conditions in the cities of the United States attest nothing has worked very well for the victims of United States capitalism in decline. Of course there are many reasons for the ineffectiveness of appeals to such rights; for example, the array of political forces is not hospitable to the basic claims, no matter how they are phrased, and were the political forces to change, the rhetoric of rights might then become more effective.

Yet, without attributing too much to the defects of an appeal to rights as a general matter, we may note that, in an important way, appeals to rights are inherently limited. Such appeals operate within the legal system, or at least within a rhetorical structure shaped in large measure by what the legal system has already done. The precedents, which do of course recognize some rights and provide the basis for arguing that additional rights should be recognized, also help to define the limits of permissible extensions of existing rights. Some things, such as a right to shelter, simply "go too far" in light of what the legal system has already done. What exactly "too far" means is determined in specific contexts, but in general it will be strongly affected by the sound common sense of the community of professional lawyers. Because of the social origins and affiliations of most of its members, and because of who pays its bills, the legal community is on the whole a rather conservative group, in the sense that it always thinks that the limits of "responsible" reform are much closer to existing arrangements than many progressives do. Thus, because the effectiveness of appeals to rights will be substantially affected by the views of a relatively conservative community of professional lawyers, such appeals will almost inevitably be effective only within fairly narrow limits.

The role of rights and court victories in political organizing is also more complex than it might seem at first. For, although victories in courts can mobilize constituencies to further action, they can sometimes demobilize constituencies, in essence making the victory too easy or premature in terms of the overall development of political support for progressive programs. Here the abortion controversy may provide a simplified example. In 1973, when the Supreme Court found that a woman's right to choose to have or not

have an abortion was protected against substantial state regulation by the Constitution, the women's movement was not fully formed. The Court, and the segments of the political elite to which it was responsive, may have seen the women's movement as a potential source of support, worth encouraging by giving it a victory on a crucially important issue. Yet, among the consequences of the Court's decision was, perhaps ironically, a relative weakening of the women's movement. The abortion decision generated a counterrights movement, invoking the language of rights to call itself the "right to life" movement. And, because pro-choice forces could rely on the courts to invalidate legislation that the antichoice forces pushed through legislatures, they had relatively less need to sustain the kind of organizing pressure that leads legislatures to act—in short, they had relatively less need to continue to mobilize their constituency for political action. By 1989, when the Court appeared ready to reconsider the premises of the 1973 abortion decisions, the pro-choice movement had to gear up and use forms of political action that it had not entirely abandoned but had played down in recent years. In the short run, this placed it at a disadvantage in the legislative arena, though the ultimate outcome remains uncertain.

A final problematic dimension of appeals to ideas of rights arises precisely from the fact that appealing to rights comes quite naturally to lawyers, including progressive lawyers. Of course there is no particular reason why a progressive political movement should involve lawyers at all, but to the extent that it does, the lawyers' contribution may be to shift the language of the movement in the direction of appeals to rights. That may not always be to the good, as the conservative appropriation of the language of rights to attack affirmative action shows. That is, to the extent that a movement's rhetoric relies on appeals to rights, it becomes vulnerable to redefinitions of the rights that are at stake. And, once again, the structural fact that the courts, as part of the political system, most often reflect existing arrays of power, means that redefinitions to the disadvantage of progressive movements are rather likely to occur. Appealing to rights may be all that lawyers can contribute to progressive movements, but sometimes the movements should reject the contribution.

The Supreme Court's decision finding it unconstitutional for the government to punish flag desecration, which occurred as part of a political protest, illustrates in a particular setting some of the difficulties I have described above in general terms. Gregory Johnson, who describes himself as a revolutionary Communist, burned a flag during a demonstration against the policies of the Reagan administration. The Supreme Court held that the First Amendment's protection of free speech meant that Johnson could not be punished for his actions.

Even on the surface, the Court's decision is somewhat ironic. As the

Court's analysis demonstrated, governments make flag burning illegal only because so many people are offended by the message of contempt for the existing government that flag burning conveys to them.¹⁰ Yet, if Johnson can assert a free speech defense to his prosecution, it becomes harder for him to convey that message. "After all," viewers may think, "because he can't go to jail for burning the flag, nothing much is really at stake here—including his protest against the government and its policies." Although the flag-burning case may present an extreme example, the dynamic I have described has almost certainly affected the development of protest activity in the United States. Once the courts defended the rights of protestors to hold marches on city streets and the like, "ordinary" marches became less effective as methods of attracting uncommitted people to the protest movement; protest marches became routine, almost not worth noticing, and therefore not that effective. As a result, marches have to be massive before people pay attention to them, and a march that attracts a fair number of people can be a failure because it doesn't attract as many people as its predecessor. Or, protestors have to develop novel ways of attracting attention, through street theater such as "sleep-ins" in parks to bring the problem of homelessness to the attention of policymakers and the public. As a result, either protest becomes routinized and thereby domesticated—something that the political system puts up with precisely because it is ineffective—or it becomes so out of the ordinary that it is not protected by the right of free speech and so is made ineffective by being suppressed.

Justice Brennan's opinion for the Court in the flag-burning case moved the use of free speech to discredit protest to an even deeper level. He suggested, as the argument so far has also done, that the Court's vindication of Johnson's free speech claim in itself demonstrated the invalidity of his criticism of the United States. The message is something like this: "After all, if the Constitution protects Johnson from prosecution for doing something so offensive to almost everyone in the country as burning the flag, that shows what a great country this is—and therefore shows that Johnson is wrong."¹¹ Justice Brennan went further. He suggested that people should use, not the vindication of Johnson's claim in the Supreme Court, but the very moment when he burned the flag as an occasion for celebrating the nation's strength. Observers should have saluted the flag as Johnson burned it, Justice Brennan said, and then given it a respectful burial. Obviously, were people to respond to Johnson's action in that way, it would completely lose its effectiveness as an act of criticism of the government and its policies.

Justice Brennan is a liberal, and, as a member of the Supreme Court, he is a part of the nation's political elite. His opinion in the flag-burning case shows that he has a quite subtle understanding of the role that the vindication of rights has in maintaining the existing political system against those who

would disrupt or replace it. Others, like Chief Justice Rehnquist, would simply suppress the flag burning. We might fairly ask, "Which course is more likely to serve the long-term interests of political elites?" I have suggested that the vindication of rights, as illustrated in the flag-burning decision, does so. That, of course, would once again be consistent with the overall role of the Constitution and the Supreme Court in stabilizing the political system.

CONCLUSION

The skepticism about the Constitution suggested by the structure and history of the Constitution should be overcome in some situations, as when the political situation is fluid enough that progressives can reasonably expect their interests to be advanced by appeals to constitutional rights. That might not happen very often, and progressives should always be aware of the risks, such as the possibility of a conservative assertion of counterrights, that attend the reinforcement of the rhetoric of rights. Even more, they should be aware that when they "succeed" in the courts, they may lead the courts to generate formulations about rights that, in the long run, may stand in the way of progressive political advance.

Of course one also takes one's political victories where one finds them. I suspect that in the next decade progressives are going to find few victories in constitutional law, in which case the skepticism I have described, while appropriate, will hardly be worth worrying about.

NOTES

1. *Texas v. Johnson*, 109 S.Ct. 2533 (1989).
2. The most subtle elaboration of the views of the framers of the Constitution is *The Federalist Papers*, particularly the classic numbers 10 and 51. The general perspective developed in this section is strongly influenced by Charles Beard, *An Economic Interpretation of the Constitution* (New York: Macmillan, 1913), a classic work which remains valuable even though its particular thesis about the origins of the Constitution has been discredited. The most important modern work for students of the origins of the Constitution is Gordon Wood, *The Creation of the American Republic* (Chapel Hill: University of North Carolina Press, 1969).
3. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).
4. See *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge Co.*, 36 U.S. (11 Pet.) 420 (1837); James Willard Hurst, *Law and the Conditions of Freedom in Nineteenth Century America* (Madison: University of Wis-

- consin Press, 1956); Stanley Kutler, *Privilege and Creative Destruction* (Philadelphia: J. B. Lippincott Co., 1971).
5. 198 U.S. 45 (1905).
 6. *E.g.*, the Court creatively—a critic might even say lawlessly—construed the Constitution to allow the government to penalize the labor leader Eugene Debs for leading a strike against the Pullman railroads. In re Debs, 158 U.S. 564 (1894).
 7. *United States v. Carolene Products, Inc.*, 304 U.S. 144, 152 n. 4 (1938).
 8. Harry Kalven, *A Worthy Tradition* (New York: Harper and Row, 1988), p. 259.
 9. Not to mention the invocation of the rights of the fetus in the antichoice literature.
 10. It's probably worth noting, too, that in an important sense Johnson shares with the people he offended exactly the same sense, that the flag is an extremely important symbol of the government and policies of the United States.
 11. This suggests that (putting the personal impact on him aside—which an outsider to his political decision can't do) Johnson may have made a political error in asserting, up to the Supreme Court, a free speech defense of what he did. An alternative view of the fact that Johnson did assert such a defense is that it shows the deformations progressive movements face when they rely on lawyers whose only professional tool is the invocation of rights.