THE YALE LAW JOURNAL

JUSTIN DRIVER

Reactionary Rhetoric and Liberal Legal Academia

ABSTRACT. As celebrations mark the fiftieth anniversary of the Civil Rights Act of 1964, it is essential to recover the arguments mainstream critics made in opposing what has become a sacrosanct piece of legislation. Prominent legal scholarship now appears to misapprehend the nature of that mainstream opposition, contending it assumed more aggressive forms than it actually did. Upon examining the actual arguments respected figures wielded against the Civil Rights Act during the 1960s, certain patterns of argumentation become almost immediately apparent. Mainstream critics consistently opposed the legislation not by challenging it head on, but instead by employing three standard arguments that Professor Albert O. Hirschman's *The Rhetoric of Reaction* identified as sounding variously in perversity, futility, and jeopardy. In addition to demonstrating how Hirschman's taxonomy illuminates mainstream opposition to the Civil Rights Act, this essay proceeds to argue that modern legal academia accords *The Rhetoric of Reaction* inadequate attention. That is so because the forms of argument Hirschman explored now frequently appear in what would initially seem an improbable place: the scholarship of liberal constitutional law professors. Left-leaning legal scholars often propose revised assessments of high-profile Supreme Court opinions, asserting that—properly understood—those opinions have had perverse effects, ended up being futile, or jeopardized some larger achievement. Legal scholars also deploy such reactionary rhetoric prospectively, warning about the dangers that they assert will accompany future efforts to issue progressive judicial decisions. Given the prevalence of reactionary rhetoric among liberal law professors, it is crucial both to grapple with the reasons that may explain its current ascendance and to identify some of the undesirable consequences that could flow from its common usage.

AUTHOR. Professor, University of Texas School of Law. I am grateful to the editors of the *Yale Law Journal* for organizing this Symposium to honor the fiftieth anniversary of the Civil Rights Act of 1964 and the publication of Bruce Ackerman's *We the People, Volume 3: The Civil Rights Revolution* (2014). In addition, I owe gratitude to Laura Ferry, Jacob Gersen, Pratheepan Gulasekaram, Sanford Levinson, and Lucas Powe for helpful comments on previous drafts. David Friedman, Katie Kinsey, Kyle Kreshover, Patrick Leahy, Kelsey Pfleger, Jim Powers, Tyler Runge, and Steven Seybold provided unusually valuable research assistance. I completed this essay while I was the Herman Phleger Visiting Professor at Stanford Law School.



ESSAY CONTENTS

INTRODUCTION 2618

I. SKETCHING REACTIONARY RHETORIC 2622

II. APPLYING REACTIONARY RHETORIC 2625

III. EXPLORING REACTIONARY RHETORIC IN LIBERAL LEGAL ACADEMIA 2630

A. Illustrations 2631

B. Explanations 2634

C. Implications 2637

CONCLUSION 2641

INTRODUCTION

Today, as the Civil Rights Act of 1964 approaches its fiftieth anniversary, it occupies an exalted position in the nation's legal consciousness.[1] Perhaps none of the Act's provisions is held in higher esteem than Title II, the public accommodations measure that prohibits owners of hotels, motels, and restaurants from excluding black patrons.[2] Senator Rand Paul of Kentucky received an object lesson in Title II's sacrosanct status four years ago when he expressed skepticism about the wisdom of requiring businesses to serve customers without regard to race.[3] Although Paul emphasized that he loathed racism, he nevertheless speculated that protecting individual freedom might require protecting even the freedom of business owners who wish to practice racial discrimination.[4] Predictably, the comments generated a firestorm.[5] Among his many critics from across the political spectrum, White House Press Secretary Robert Gibbs flatly asserted that such musings had become unfit for polite society: "I think the issues that many fought for in the '50s and the '60s were settled a long time ago in landmark [civil rights] legislation. And a discussion about whether or not you support those [measures] . . . shouldn't have a place in our political dialogue in 2010."[6] Paul himself would soon appear to share Gibbs's assessment, as he sought to end the conflict by issuing a statement indicating he would not support any effort to repeal the Civil Rights Act of 1964.[7] To question Title II's legitimacy in the modern era, it seems unmistakably clear, is to adopt a position well outside the mainstream. Opposing Title II these days is a little like opposing motherhood, apple pie, or fireworks on the Fourth of July.

---

1. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C. (2006)).

2. *Id.* §§ 201-07 (codified as amended at 42 U.S.C. §§ 2000a (2006)).

3. *See* Sam Tanenhaus, *Rand Paul and the Perils of Textbook Libertarianism*, N.Y. TIMES, May 23, 2010, http://www.nytimes.com/2010/05/23/weekinreview/23tanenhaus.html.

4. *See id.*

5. *See id.*

6. Press Briefing by Robert Gibbs, White House Press Sec'y (May 20, 2010), http://www.whitehouse.gov/photos-and-video/video/press-briefing-20100520#transcript.

7. *See* Susan Davis, *Rand Paul Taking Heat for Civil Rights Act Comments*, WALL ST. J. (May 20, 2010, 8:44 AM), http://blogs.wsj.com/washwire/2010/05/20/rand-paul-taking-heat-for-civil-rights-act-comments. Senator Paul's efforts in 2010 to extinguish the Title II controversy have not put the matter wholly to rest. *See* Sam Tanenhaus & Jim Rutenberg, *Rand Paul's Mixed Inheritance*, N.Y. TIMES, Jan. 26, 2014, http://www.nytimes.com/2014/01/26/us/politics/rand-pauls-mixed-inheritance.html (noting that Paul recently assured an audience that he had "never wavered" in supporting Title II).

Yet it was not always so. When the nation was actively contemplating whether to include a public accommodations provision in the Civil Rights Act of 1964, many people who were squarely part of the nation's mainstream culture opposed the measure. Now that Title II has become almost universally celebrated, it may be tempting to believe that the only contemporaneous opposition arrived in the form of relatively unvarnished appeals to racial bigotry and open suggestions of black inferiority. To be clear, such statements do appear intermittently in the public record from the 1960s. Among elected officials, for instance, Congressman John Bell Williams of Mississippi condemned Title II from the floor of the House of Representatives, and in so doing descended into patently objectionable racial oratory. Rather than pushing for equal access to public accommodations, Williams contended, civil rights organizations should instead "devote their talents to the upgrading of morality among the members of the Negro race, [which] could make a significant contribution to the good of all mankind."[8] Williams asserted that if the organizations successfully rechanneled their energy into improving black morality then "they would discover a perceptible change in the attitude of white people, and their economic condition would be improved."[9] Williams's speech also linked the struggle for racial equality in public accommodations to the black community's supposed propensity for illegitimacy and criminality, two issues that segregationists frequently invoked dating back to at least the mid-1950s.[10] Yet, Williams's charged racial language is conspicuous within public debates about the Civil Rights Act of 1964 precisely because Title II's opponents typically eschewed such language.

If mainstream opponents of Title II did not—for whatever reasons—generally avail themselves of racially derogatory modes of argumentation, the question becomes: what sorts of arguments did they typically advance in opposing racial equality in public accommodations? Five decades after President Lyndon Johnson signed the Civil Rights Act of 1964 into law, it is illuminating to recover the actual, rather than the putative, nature of mainstream opposition to Title II in the terms that opposition was articulated contemporaneously. This exercise in historical recovery is urgent because even some of our most sophisticated scholars of constitutional law now seem to

8. 110 CONG. REC. 2786 (1963) (statement of Rep. Williams).

9. *Id.*

10. *Id. See also* Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053, 1084 (2014) (observing that during the post-*Brown* era even sophisticated opponents of school integration bolstered their arguments by citing allegedly high rates of illegitimacy and crime among black citizens).

misapprehend that opposition, assuming it found articulation in more aggressive forms than it actually did.[11]

Upon examining the arguments widely respected figures deployed in attacking Title II, certain patterns of argumentation become almost immediately apparent—at least when viewed through modern spectacles. During the mid-1960s, mainstream critics of public accommodations legislation consistently expressed their opposition in formulations that will appear familiar to readers of Professor Albert O. Hirschman's magnificent volume from 1991, *The Rhetoric of Reaction*.[12] Hirschman contended that opponents of progressive reforms have, for more than two centuries, availed themselves of three standard types of counterarguments, which he classifies as sounding variously in perversity, futility, and jeopardy.[13] When liberals propose ideas for social improvement, Hirschman observed, opponents frequently react to the proposal by asserting it will: intensify the very problem it attempts to remedy, and thus prove perverse; fail to achieve the desired reform, and thus prove futile; and/or threaten to undermine a more fundamental value, and thus jeopardize some earlier, hard-earned societal accomplishment.[14] Although Hirschman did not address the debate over public accommodations legislation, mainstream opponents of that legislation—including such figures as Robert Bork, Barry Goldwater, and William Rehnquist—repeatedly employed Hirschman's modes of reactionary rhetoric during the mid-1960s. Tracing the prevalence of reactionary rhetoric among notable opponents of public accommodations legislation should highlight the significance of Hirschman's insights for law professors—a group that, despite demonstrating considerable familiarity with part of Hirschman's oeuvre, has paid insufficient attention to *The Rhetoric of Reaction*.[15]

---

11. *See* 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 6 (2014) (asserting that Senator Barry Goldwater launched a "frontal assault on the Civil Rights Act of 1964"). But, as will become apparent, Senator Goldwater's opposition was considerably more indirect than the "frontal assault" metaphor connotes.

12. ALBERT O. HIRSCHMAN, THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY (1991). For an incisive biography of Hirschman's fascinating life, see JEREMY ADELMAN, WORLDLY PHILOSOPHER: THE ODYSSEY OF ALBERT O. HIRSCHMAN (2013).

13. HIRSCHMAN, *supra* note 12, at 7.

14. *Id.*

15. Law professors, particularly scholars of democratic politics, often cite Hirschman's best known book, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States*. *See, e.g.*, Heather K. Gerken, *Exit, Voice, and Disloyalty*, 62 DUKE L.J. 1349, 1349 (2013) (referring to "Hirschman's famous work"). I do not suggest, of course, that law professors know nothing at all of Hirschman's examination of reactionary rhetoric. *See, e.g.*, James E. Fleming, *The Incredible Shrinking Constitutional Theory: From the Partial Constitution to the*

Legal academia's relative inattention to *The Rhetoric of Reaction* is regrettable not least because those forms of argument today appear with great frequency in what would seem to be an unlikely place: the scholarship of liberal law professors. Prominent left-leaning law professors often criticize widely celebrated Supreme Court opinions that sought to vindicate the rights of marginalized groups as fruitless, because they have had perverse effects, ended up being futile, or jeopardized some larger achievement. Liberal law professors do not, moreover, limit the application of such reactionary rhetoric to Supreme Court opinions that were decided many years earlier. Instead, they also apply such rhetoric prospectively, warning about the dangers they contend will accompany future judicial interventions to protect minority rights. The legal left's reactionary rhetoric toward the Supreme Court has played a substantial role in shaping what might be termed the Age of Judicial Skepticism, a time when legal academia views the possibilities of social reform by the judiciary less with twinkling eyes than with jaundiced ones. Given the prominence of reactionary rhetoric among liberal law professors, it seems imperative to grapple with the reasons that may account for its current ascendance in such a seemingly improbable location. In addition, it is crucial to identify the costs that may result from liberal legal academia's excessive invocation of reactionary rhetoric in scholarship about the judiciary.

The balance of this essay proceeds as follows. Part I briefly sketches Hirschman's taxonomy of reactionary rhetoric. Part II maps Hirschman's taxonomy onto contemporaneous mainstream opposition to public accommodations measures. Part III, the heart of the essay, widens the frame to chronicle the prevalence of reactionary rhetoric in present-day liberal legal academia, offer some potential explanations for its prominence in such an improbable place, and identify some of the undesirable consequences that may stem from reactionary rhetoric's stronghold among liberal law professors. A short conclusion follows.

Minimal Constitution, 75 FORDHAM L. REV. 2885, 2913-16 (2007); Adriaan Lanni & Adrian Vermeule, *Precautionary Constitutionalism in Ancient Athens*, 34 CARDOZO L. REV. 893, 904-09 (2013); Sanford Levinson, *Still Complacent After All These Years: Some Rumination on the Continuing Need for a "New Political Science,"* 89 B.U. L. REV. 409, 415-17 (2009); Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1611-12 (1999); Adrian Vermeule, *Does Commerce Clause Review Have Perverse Effects?*, 46 VILL. L. REV. 1325, 1325-28 (2001); Samuel R. Bagenstos, *Has the Americans with Disabilities Act Reduced Employment for People with Disabilities?*, 25 BERKELEY J. EMP. & LAB. L. 527, 559 (2004) (book review). I suggest merely that law professors draw upon *The Rhetoric of Reaction* too infrequently. A Westlaw search suggests legal academics cite *Exit, Voice, and Loyalty* about eleven times more frequently than they cite *The Rhetoric of Reaction*.

At the outset, it is essential to make clear that liberal law professors' reactionary rhetoric appears in a severely circumscribed location, and in no way extends to their entire worldview. While legal liberals express deep skepticism about the judiciary's capacity to issue significant progressive opinions, they do not doubt that meaningful social progress can occur through other mechanisms. Instead of relying on the judiciary, they suggest that elected officials, at the state or federal levels, must undertake significant social reforms themselves if those reforms are ultimately to prove successful. In this critical sense, then, liberal law professors who use reactionary rhetoric in analyzing progressive Supreme Court opinions (either actual or hypothetical) strike a fundamentally different pose toward the possibility of reform than do the more expansive critics Hirschman explored in *The Rhetoric of Reaction*. Despite this important difference, liberal legal academia's fascination with reactionary rhetoric demands investigation because such an undertaking yields valuable insight into the modern American constitutional order.

I. SKETCHING REACTIONARY RHETORIC

Toward the beginning of *The Rhetoric of Reaction*, Albert Hirschman observed that the modern world is often temperamentally and intellectually receptive to the ultimate goals of proposed progressive measures.[16] Accordingly, when progressives advance ideas for social reform, opponents seldom launch frontal assaults on the overarching objective.[17] Instead, Hirschman contended, opponents frequently react to progressive proposals and enactments by embracing the reform's theoretical aims, but simultaneously raising any of three common rhetorical counterthrusts designed to defeat the measures.[18] These three modes of reactionary rhetoric, according to Hirschman, stretch back at least to the French Revolution and have carried right through the Reagan Revolution.[19]

First, the perversity thesis – which Hirschman regarded as the most widely used and most effective reactionary trope[20] – argues that the proposed reform would exacerbate the very condition that it aims to alleviate. Under the perversity view, measures are bound to succeed in making matters worse. As

16. HIRSCHMAN, *supra* note 12, at 11.

17. *Id.* ("Given this state of public opinion, reactionaries are not likely to launch an all-out attack on that objective.").

18. *Id.* at 3-8, 11.

19. *Id.* at 4.

20. *Id.* at 140.

Hirschman put the point in his elegant prose: "[T]he attempt to push society in a certain direction will result in its moving all right, but in the opposite direction."[21] Opponents of reform who emphasize perverse effects are, as Hirschman recognized, deploying an extreme variant of an unintended consequences argument.[22] In the extraordinarily volatile conception of the world in which perversity thrives, society ought to be careful about what problems it sets in its sights because: "*Everything backfires.*"[23] Charles Murray's *Losing Ground*, which offers a critique of welfare benefits, may contain the single most evocative encapsulation of the perversity thesis: "We tried to provide for the poor and produced more poor instead. We tried to remove the barriers to escape from poverty and inadvertently built a trap."[24]

Second, the futility thesis, which is almost diametrically opposed to the perversity thesis, contends that efforts to reform society will fail to produce change altogether, or produce only superficial change, because of deep-seated societal foundations that simply cannot be altered.[25] Where perversity rhetoric assumes a world brimming with uncertainty, futility rhetoric sees a world of intractability.[26] "In [the futility] scenario," Hirschman explained, "human actions or intentions are frustrated, not because they unleash a series of side effects, but because they pretend to change the unchangeable, because they ignore the basic structures of society."[27] Mere mortals are powerless to transform ironclad laws. Under the futility view, the status quo is king, and he cannot be dethroned.[28] The futility argument's patron saint is Edmund Burke, the French Revolution skeptic who famously warned would-be reformers to recall "the eternal constitution of things."[29] Indeed, it is no accident, in

---

21. *Id.* at 11 (emphasis omitted).

22. *Id.* at 36.

23. *Id.* at 12; *see id.* at 76 (arguing that advocates of the perversity claim do not blame the reformers whose actions yield undesired consequences, but instead characterize them as "lacking . . . in elementary understanding of the complex interactions of social and economic forces").

24. *Id.* at 29 (quoting CHARLES MURRAY, LOSING GROUND: AMERICA'S SOCIAL POLICY, 1950-1980, at 9 (1984)).

25. *See id.* at 7, 43.

26. *See id.* at 76, 154.

27. *Id.* at 72.

28. *See id.* at 44.

29. *See id.* at 154 (internal quotation marks omitted); EDMUND BURKE, LETTER TO A MEMBER OF THE NATIONAL ASSEMBLY (1791), *reprinted in* 8 THE WRITINGS AND SPEECHES OF EDMUND BURKE: THE FRENCH REVOLUTION 1790-1794, at 332 (L.G. Mitchell ed., 1989).

Hirschman's estimation, that the futility thesis received its classic articulation in the French Revolution's aftermath: *Plus ça change, plus c'est la même chose.*[30]

Third, the jeopardy thesis, while allowing that the proposed policy may well be desirable when viewed in isolation, asserts that implementing the reform would be too costly because it would threaten prior, more valuable societal achievements.[31] If we adopt policy *Y*, the jeopardy view asserts, then we necessarily endanger accomplishment *X*. According to Hirschman, opponents of reform typically suggest that progressive policies will jeopardize liberty, democracy, or perhaps even both at the same time.[32] Adherents of jeopardy rhetoric frequently suggest that the contested policy is merely the opening salvo in what will become a barrage of reform. The jeopardy thesis communicates this idea of escalation, Hirschman noted, with a variety of metaphors that pervade popular discourse: the thin edge of the wedge, a foot in the door, the tip of the iceberg, the camel's nose under the tent, and, inevitably, the slippery slope.[33] "The wealth of metaphors testifies to the popularity of arguing against an action on the ground that, even though unobjectionable in itself, it will have unhappy consequences," Hirschman wrote. Under the jeopardy view, it would seem that nearly all roads lead to serfdom.[34]

Hirschman included several caveats in *The Rhetoric of Reaction*, but only a couple warrant addressing here. As an initial matter, Hirschman allowed that reactionary rhetoric is not the exclusive province of reactionaries. To the contrary, non-reactionaries can, under particular circumstances, feel moved to advance such arguments. "Whenever conservatives or reactionaries find themselves in power and are able to propose and carry out their programs and policies, they may in turn be attacked by liberals or progressives along the lines of the perversity, futility, and jeopardy theses," Hirschman wrote.[35] Still, Hirschman insisted, even if reactionary rhetoric does not appear exclusively on the right, such rhetoric predominantly arises from that end of the political

30. For those few readers who possess an even poorer grasp of French than I have, the translation runs: The more things change, the more they stay the same.

31. *See* HIRSCHMAN, *supra* note 12, at 7, 84.

32. *See id.* at 84.

33. *See id.* at 83. For legal scholarship examining slippery slope arguments, see Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985); and Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

34. *See* HIRSCHMAN, *supra* note 12, at 110-13. *Cf.* FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM (1944).

35. HIRSCHMAN, *supra* note 12, at 7.

spectrum.[36] In addition, Hirschman noted that his examination was primarily concerned with classifying and exploring recurrent rhetorical tropes, not assessing the underlying validity of those arguments within discrete historical contexts. Hirschman understood that simply because "an argument is used repeatedly is no proof, to be sure, that it is wrong in any particular instance."[37] Despite this qualification, Hirschman maintained that his analysis demonstrated that the three reactionary theses are frequently trotted out in instances where dire warnings about the dangers of reform were ultimately revealed to be unfounded.[38]

II. APPLYING REACTIONARY RHETORIC

It seems difficult to imagine a historical context that more vividly demonstrates reactionary rhetoric's overuse than the resistance to public accommodations legislation that was articulated during the mid-1960s. During that era, Barry Goldwater, William Rehnquist, and—most dazzlingly of all—Robert Bork criticized public accommodations laws with the aid of reactionary rhetoric. Despite their dire warnings to the contrary fifty years ago, we now know very well that eliminating racial discrimination in public accommodations did not cause the heavens to fall. What may be somewhat surprising, though, is how quickly that lesson became virtually unassailable.

In June 1964, Senator Barry Goldwater of Arizona delivered perhaps the most high-profile speech opposing Title II, only one month before he would officially become the Republican Party's presidential nominee.[39] Goldwater's speech, delivered from the Senate floor, did not frontally attack the ideal of racial equality; to the contrary, Goldwater assured listeners he personally opposed racial discrimination and noted that he had supported earlier civil

36. *See id.* at 7-8 ("Nevertheless, the arguments are most typical of conservative attacks on existing or proposed progressive polices and their major protagonists have been conservative thinkers . . . .").

37. *Id.* at 166.

38. *See id.* (observing that "the arguments I have identified and reviewed are intellectually *suspect* on several counts").

39. For contemporary newspaper coverage of Goldwater's speech opposing Title II, see Anthony Lewis, *The Courts Spurn Goldwater View*, N.Y. TIMES, June 19, 1964, at 18 (contending that "[t]he constitutional argument made by Senator Barry Goldwater today in opposing the civil rights bill is one that stopped winning cases in the courts in the late nineteen-thirties"); and Charles Mohr, *Goldwater Says He'll Vote 'No' on the Rights Measure*, N.Y. TIMES, June 19, 1964, at 1.

rights measures.[40] Despite this avowed aversion to racial prejudice, Goldwater opposed Title II because he contended that enacting the measure would jeopardize other, essential accomplishments that made the United States a great nation. Predictably, the overarching value that Goldwater identified Title II as threatening was the country's commitment to individual liberty. Goldwater opposed Title II, he said, because "[t]his is the time to attend to the liberties of all," and attributed his vote to concern "for the entire Nation, for the freedom of all who live in it and for all who will be born into it."[41] Elaborating upon his claim that Title II imperiled liberty, Goldwater provided some specific illustrations. Monitoring compliance with Title II, Goldwater declared, would demand "a Federal police force of mammoth proportions," effectively necessitating "the creation of a police state," and helping lead to "the destruction of a free society."[42] On a related note, Goldwater suggested that authorizing Title II permitted what he called "the Central or Federal Government" to usurp authority that the Constitution assigned to the states, often deemed better protectors of individual autonomy than Congress.[43] In a variation on these relatively straightforward jeopardy arguments, Goldwater added a perversity angle by contending that some of the citizens whose liberty could be deprived by governmental overreach were the same black people that Title II aimed to help. Validating the public accommodations measure, Goldwater argued, would authorize congressional action "which could ultimately destroy the freedom of all American citizens, including the freedoms of the very persons whose feelings and whose liberties are the major subject of this legislation."[44]

William Rehnquist, then an Arizona lawyer in private practice who was active in Republican circles, played a role in shaping Goldwater's approach to the 1964 Civil Rights Act.[45] But Rehnquist's opposition to public accommodations measures exceeded even that of Goldwater. Where Goldwater had supported public accommodations legislation in Phoenix, Arizona,

40. 110 CONG. REC. 14,318-19 (1964) (statement of Sen. Goldwater) ("I am unalterably opposed to discrimination or segregation on the basis of race, color, or creed, or on any other basis . . . .").

41. *Id.* at 14,319.

42. *Id.*

43. *Id.* Goldwater's federalism argument may have been somewhat sincere, as he supported Arizona's public accommodations legislation.

44. *Id.*

45. *See* RICK PERLSTEIN, BEFORE THE STORM: BARRY GOLDWATER AND THE UNMAKING OF THE AMERICAN CONSENSUS 363 (Nation Books 2009) (2001).

Rehnquist fought that legislation aggressively.[46] Rehnquist not only appeared before the Phoenix City Council to oppose the measure, but he also wrote a letter to the *Arizona Republic* articulating his concerns after the City Council voted unanimously to adopt the ordinance.[47] Rehnquist began his City Council testimony with a textbook formulation of the jeopardy thesis. "I would like to speak in opposition to the proposed ordinance because I believe that the values that it sacrifices are greater than the values which it gives," he said.[48] By Rehnquist's calculations, the ordinance's tax on "our historic individual freedom" could not possibly be offset by any benefits: "To the extent that we substitute, for the decision of each businessman as to how he shall select his customers, the command of the government telling him how he must select them, we give up a measure of our traditional freedom."[49] Rehnquist supplemented his jeopardy argument with an argument based on futility, claiming that Phoenix's public accommodations law was powerless to affect the fundamental issue it sought to address: "The ordanance [sic], of course, does not and cannot remove the basic indignity to the Negro which results from refusing to serve him; that indignity stems from the state of mind of the proprietor who refuses to treat each potential customer on his own merits."[50] For Rehnquist, racial prejudice was too resilient, too deep-seated of a force to be tamed with mere legislation. "Unable to correct the source of the indignity to the Negro, it redresses the situation by placing a separate indignity on the proprietor," Rehnquist explained. "It is as barren of accomplishment in what it gives to the Negro as in what it takes from the proprietor. The unwanted customer and the disliked proprietor are left glowering at one another across the lunch counter."[51]

Although Goldwater and Rehnquist formidably deployed reactionary language in opposing public accommodations legislation, the virtuoso of reactionary rhetoric in this realm was surely Robert H. Bork, then a professor at Yale Law School. Bork's well-known *New Republic* essay from 1963 included a few, fleeting invocations of reactionary tropes as he condemned the measure

46. *Id.*

47. William H. Rehnquist, *Public Accommodations Law Passage Is Called "Mistake,"* ARIZ. REP. (Phoenix), June 4, 1964, *reprinted in Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the S. Comm. on the Judiciary*, 92d Cong. 307 (1971) [hereinafter *Rehnquist and Powell Nominations*].

48. *Id.* at 305.

49. *Id.* at 307.

50. *Id.*

51. *Id.*

that ultimately became Title II.[52] But Bork's true masterpiece of reactionary rhetoric did not appear until the following year, in a *Chicago Tribune* article that law professors today seem to have virtually forgotten.[53] Where Goldwater and Rehnquist contented themselves with using two of Hirschman's three tropes, Bork's *Chicago Tribune* article completed a relatively rare trifecta of reactionary rhetoric.

Bork opened his article by conceding that "private racial prejudice is unjust," but quickly insisted that this allowance could not be conflated with resolving the question of whether the federal government should enact Title II.[54] In pursuing his jeopardy claim, Bork did not so much diminish the importance of racial equality as he did elevate the importance of liberty: "[F]reedom is a value of such high priority and may so easily slip away that a very heavy burden of proof rests upon those who ask us to sacrifice it to other ends."[55] In addition to auguring ill for personal freedom, Bork also contended that enacting Title II spelled doom for federalism: "If Congress can dictate the selection of customers in a remote Georgia diner because the canned soup once crossed a state line, federalism . . . is dead."[56] Implementing Title II would, according to Bork, necessarily require federal judges to confront a wide array of line-drawing problems in distinguishing among various types of businesses, threatening "government by judiciary."[57] Applying a hallmark of jeopardy argumentation, Bork insisted that Title II must be understood as merely the wedge's thin end. "The accommodations . . . provision[] of the civil rights bill cannot be viewed in isolation," Bork wrote, "but must be assessed as only a modest first step in a broad program of coerced social change."[58] Although Bork's jeopardy moves certainly demonstrate competence, standing alone, they would fall well short of the spectacular.

---

52. *See* Robert Bork, *Civil Rights—A Challenge*, NEW REPUBLIC, Aug. 31, 1963, at 21, 22 (invoking the jeopardy thesis by contending proponents of public accommodations legislation elided the "cost in freedom" and the "loss in a vital area of personal liberty").

53. Robert H. Bork, *Against the Bill*, CHI. TRIB., Mar. 1, 1964, at 1. A search of Westlaw's law review database turned up exactly one article that has cited Bork's *Chicago Tribune* piece. *See* William N. Eskridge, Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 675 n.92 (2011).

54. Bork, *supra* note 53, at 1.

55. *Id.* at 8.

56. *Id.*

57. *Id.*

58. *Id.*; *see id.* ("How could a court decide that the new constitutional requirement applies to a motion picture theater but not to a bowling alley, to a restaurant but not to a private club, to an inn-keeper or gas station operator but not to an accountant, a lawyer, or a doctor?").

Where Bork distinguished himself from his contemporaries, though, was in his willingness to claim that enacting Title II simultaneously courted both perversity *and* futility. Hirschman identified the high degree of difficulty that traditionally accompanies using these arguments in tandem:

> It is of course difficult to argue at one and the same time that a certain movement for social change will be sharply counterproductive, in line with the perversity thesis, and that it will have no effect at all, in line with the futility thesis. For this reason the two arguments are ordinarily made by different critics – though not always.[59]

Difficult, but not impossible. If it is true, as Hirschman suggested, that combining the perversity and the futility theses "requires special gifts of sophistry,"[60] then there can be no question that Bork was an unusually gifted sophist. As to perversity, Bork claimed Title II could "worsen rather than improve the relationships of racial . . . groups in American society," and the consequent rise in "racial . . . tensions may be quite the opposite of what its advocates intended."[61] Title II may hurt racial relations, Bork averred, because the measure sent the message that race was an appropriate topic for overt legislation, and ensuing litigation would pit citizens of different races against one other. "Political struggle will increasingly take place between groups bearing racial . . . identifications," Bork wrote. "Alliances will be sought and enmities formed on such lines. The process has begun already, and its implications for the future of our society are nothing short of appalling."[62] As to futility, Bork contended that, if Title II were enacted, enforcement of the measure would almost certainly prove impossible. "There are tens of thousands of commercial establishments covered by this law in the South alone," Bork wrote. "If the law is to mean anything, it must be enforced not only when a Negro is turned away from a lunch counter but also when he is treated in a way that amounts to an effective denial of service."[63] Such complications would inevitably overwhelm Title II's enforcement mechanisms; and if the measure went unenforced, disrespect for the law would follow – a prospect that led Bork to label nonenforcement "the most dangerous alternative before us."[64] In one particularly spellbinding sentence, Bork managed to combine the futility and

59. HIRSCHMAN, *supra* note 12, at 45.

60. *Id.* at 62.

61. Bork, *supra* note 53, at 1.

62. *Id.* at 8.

63. *Id.*

64. *Id.*

perversity arguments into a potent cocktail of caution. Title II, Bork warned, would "[p]rove impossible to enforce effectively, and so have deleterious effects both upon law observance generally and prospects for peaceful solutions to racial problems in particular."[65] As befitting a Yale Law School professor, Bork's was a bravura performance—even if it was in the service of a cause few of his colleagues would have cheered.

Examining these invocations of reactionary rhetoric some five decades later, it is jarring to encounter mainstream figures condemning legislation that is now beyond reproach. Today, reasonable minds simply cannot differ on the legitimacy and the desirability of racial equality in public accommodations. What is perhaps most remarkable about this general state of affairs is how quickly it emerged. As soon as the early 1970s, any lawyer who hoped to win Senate confirmation needed to pledge allegiance to public accommodations laws. In 1971, a mere seven years after Title II's debut, Bork renounced his earlier position in his confirmation hearings to become Solicitor General.[66] That same year, Rehnquist renounced his earlier opposition to public accommodations measures in his confirmation hearings to become an Associate Justice of the Supreme Court.[67] In the course of history, seven years amounts to the blink of an eye. But it is long enough to carry views that were part of the mainstream into the backwaters.

III. EXPLORING REACTIONARY RHETORIC IN LIBERAL LEGAL ACADEMIA

Within the corridors of law schools today, liberal scholars frequently invoke reactionary rhetoric to warn about the dangers of Supreme Court Justices seeking to vindicate the rights of marginalized groups. Left-leaning legal scholars, with seemingly evermore frequency and urgency, instruct individuals who are genuinely interested in aiding society's outcasts to turn away from the courthouse and instead to turn toward the statehouse. Although liberal law professors generally applaud the quest for a more egalitarian society, many of them harbor deep reservations about the judiciary's ability to play a significant role in delivering such a society. When Supreme Court Justices undertake significant egalitarian missions, many liberal law professors suggest, history demonstrates that the outcome is likely to be an unhappy one because

65. *Id.* at 1.

66. *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 152-54 (1987).

67. *Rehnquist and Powell Nominations*, *supra* note 47, at 76-77, 156.

they will injure the cause they intend to aid, fail to achieve the underlying goal, and/or endanger some deeper value. The rhetoric of perversity, futility, and jeopardy now so suffuses liberal legal academia that cataloguing every prominent scholarly invocation would itself constitute an exercise in futility. Accordingly, the following high-profile examples should be understood as merely illustrative, not exhaustive.

A. Illustrations

Liberal legal scholars frequently suggest that some of the Supreme Court's most well-known opinions have caused perverse outcomes. Professor Cass Sunstein has underscored the dangers of judicial perversity—or what he calls "unintended adverse consequences"[68]—and also has provided the classic formulation: "[J]udicial involvement may well undermine the very causes that it purports to help."[69] How might judicial involvement in a social cause become counterproductive? Sunstein has explained: "The Court's decision may activate opposing forces and demobilize the political actors that it favors. It may produce an intense social backlash, in the process delegitimating itself as well as the goal it seeks to promote."[70] In this same vein, Professor Jeffrey Rosen has cautioned that Supreme Court opinions that resist majority preferences "have tended to provoke backlashes that often undermine the very causes the judges are attempting to advance."[71] Liberal scholars cite the Court's ill-fated attempt to eliminate capital punishment during the 1970s as a chief instance of the perversity thesis in action.[72] On this account, the Justices observed dwindling use of the death penalty throughout the nation, and they sought in *Furman v. Georgia*[73] to abolish the practice once and for all. But in response to *Furman*, many state legislatures enacted new capital punishment statutes. Thus, in their effort to kill the death penalty, these narratives suggest, the Justices unwittingly revived the death penalty. Liberal scholars offer a

68. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 59 (1999).

69. Cass R. Sunstein, *What Judge Bork Should Have Said*, 23 CONN. L. REV. 205, 206 (1991).

70. SUNSTEIN, *supra* note 68, at 59.

71. JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA, at xii (2006).

72. *See, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 287 (2009); Corinna Barrett Lain, Furman *Fundamentals*, 82 WASH. L. REV. 1, 46-55 (2007).

73. 408 U.S. 238 (1972).

somewhat similar account of the Court's involvement with abortion.[74] Under this view, the nation was already in the process of adopting less restrictive laws on abortion when the Court issued its far-reaching opinion in *Roe v. Wade*.[75] Many legal liberals contend that the opinion, however well-intentioned, imprudently elevated abortion's social salience and created the modern pro-life movement. Thus, in seeking to mute the abortion issue, the Justices inadvertently amplified the abortion issue. If liberally-inclined Justices want society to advance on divisive social issues, adherents of the perversity thesis would suggest that the wisest move is frequently for them to remain on the sidelines.[76]

Liberal legal scholars also have suggested that when the Supreme Court has undertaken major attempts at social reform, those efforts have often proven futile. Professor Sunstein has offered particularly fluent odes to the hazards of judicial futility: "[E]ven for those sympathetic to many of the Warren Court's decisions, there are good reasons to be ambivalent about social reform through the judiciary. Judges are likely to be ineffectual in promoting social reform; their methods and procedures are best suited to compensatory justice."[77] Sunstein has also suggested that "[t]he Court may not produce appropriate social reform even if it seeks to do so."[78] Professor Barry Friedman has offered perhaps the most extensive and exuberant account of what he regards as the Supreme Court's sheer inability to issue durable opinions that clash with majoritarian preferences: "[T]he expressions of both the hope and the threat of judicial review rest on a common supposition: that the judiciary even has the

---

74. *See, e.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 379-82 (1985); William N. Eskridge, Jr., Symposium, *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1312-13 (2005).

75. 410 U.S. 113 (1973).

76. Declining to mention Professor Michael Klarman's backlash thesis in the context of perversity arguments may seem like a glaring omission here. *See* Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994). Yet, his argument is an imperfect fit for the standard perversity narrative. Klarman certainly contends that *Brown* eliminated the space for racially moderate politicians in the South (the backlash portion of his argument). But he also contends that the charged atmosphere created by *Brown* led to violent racial confrontations during the 1960s, and that those confrontations, in turn, mobilized northern support for racially egalitarian legislation (the counter-backlash portion of the argument). *See id.* at 82. For Klarman, then, *Brown* did advance the struggle for racial equality, even if it did so indirectly.

77. Sunstein, *supra* note 69, at 206.

78. SUNSTEIN, *supra* note 68, at 59; *see also* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 146 (1993) ("Judicial decisions are often surprisingly ineffective in bringing about social change.").

capacity of running contrary to the will of the majority."[79] On this score, Friedman asserts, the Supreme Court is plainly incapacitated.[80] Liberal scholars often point to *Brown v. Board of Education* as a case that reveals the futility of the Supreme Court's efforts to achieve meaningful social reform throughout the country.[81] Professor Gerald Rosenberg has influentially contended that *Brown* proved ineffectual in desegregating public schools in the South: "[S]tatistics from the southern states are truly amazing. For ten years, 1954-1964, virtually *nothing happened.* Ten years after Brown only 1.2 percent of black schoolchildren in the South attended school with whites."[82] Rosenberg suggests that only after Congress gave *Brown* some teeth with important legislation in the mid-1960s—Title VI of the Civil Rights Act of 1964, and the Elementary and Secondary Education Act of 1965—did nontrivial amounts of desegregation actually occur.[83] Liberal academics view the Supreme Court's invalidation of school-sponsored prayer in *Engel v. Vitale* through a similar lens.[84] Despite the Court's clear commands on the subject, scholars contend, school-sponsored prayer continues to exist in certain regions of the country until this very day. A mere judicial opinion, even one from the Supreme Court, is powerless to counteract deeply held religious practices. Advocates of the futility thesis suggest that when the Court attempts to go it alone on a contested social issue, the Justices' efforts go nowhere.

Although the perversity and futility arguments account for the most striking instances of reactionary rhetoric in liberal legal academia, left-leaning scholars also gesture toward jeopardy-based arguments in their assessments of the Supreme Court. Here, the scholarly claims tend to be connected less to particular judicial opinions, and more to the outsized role the Court plays on the American legal landscape. As is generally the case with the jeopardy thesis, legal scholars identify democracy and liberty as the paramount values that the

---

79. FRIEDMAN, *supra* note 72, at 370.

80. *See id.* ("As must be certainly clear by now, this underlying assumption . . . is deeply problematic.").

81. 347 U.S. 483 (1954); *see* GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 50-51 (1991) (contending that *Brown* achieved little desegregation); L. A. Powe, Jr., *The Supreme Court, Social Change, and Legal Scholarship*, 44 STAN. L. REV. 1615, 1620-21 (1992) (same).

82. ROSENBERG, *supra* note 81, at 52.

83. *Id.* at 52-54.

84. 370 U.S. 421 (1962); *see* FRIEDMAN, *supra* note 72, at 266-67 (noting that many southern schools featured school-sponsored prayer even after the Court sought to invalidate such practices); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 15-16 (1996) (same).

judiciary threatens. In its purer strands, popular constitutionalism can be understood as claiming that, even if judges issue opinions that liberals applaud, those opinions nevertheless jeopardize democratic norms.[85] Viewed in that light, popular constitutionalism can be construed as extending, elaborating, and responding to the phenomenon Alexander Bickel labeled the "countermajoritarian difficulty."[86] In addition, Professor Friedman, whose work is expressly framed in response to Bickel, has appeared to suggest other revered social values that the Supreme Court jeopardizes, particularly when it issues opinions that contradict majority sentiment.[87] The nation's respect for judicial review and judicial authority, Friedman has posited, may be compromised by unpopular opinions:

> The most telling reason why the justices might care about public opinion . . . is simply that they do not have much of a choice. At least, that is, if they care about preserving the Court's institutional power, about having their decisions enforced, about not being disciplined by politics. Americans have abolished courts, impeached one justice, regularly defied Court orders, packed the Court, and stripped its jurisdiction. If the preceding history shows anything, it is that when judicial decisions wander far from what the public will tolerate, bad things happen to the Court and the justices.[88]

Although popular constitutionalism's strong normative commitments render it distinguishable from Friedman's avowedly descriptive undertaking,[89] the projects are linked in highlighting that judicial opinions potentially impair other values.

B. Explanations

It seems unmistakable that liberal law professors often employ reactionary rhetoric in discussing the Supreme Court's ability to deliver progressive

---

85. *See, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

86. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 18 (2d ed. 1986) (calling judicial review a "deviant institution in the American democracy").

87. *See, e.g.*, Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002).

88. FRIEDMAN, *supra* note 72, at 375.

89. For a contention that Friedman's book is best understood as containing normative lessons, see Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755, 792-93 (2011).

victories. The question is: Why? Why have left-leaning academics become so enamored of casting skepticism and doubt on the notion of judicial efficacy during the last few decades? Answering that question necessarily raises questions about why academics write what they write, taking us into the realm of speculation. That is, of course, hazardous terrain, especially when one's motivations can sometimes be mysterious even to one's own self. Nevertheless, to avoid speculating about the sources that account for such a conspicuous trend in legal academia would, at least in this particular instance, constitute an intellectual defalcation.

The first, and most obvious, explanation seems unlikely to generate much in the way of controversy: Liberal law professors actually believe what they write about the Supreme Court. On this straightforward account, when left-leaning academics survey the Supreme Court's efforts to advance progressive causes in truly contested arenas, they detect little reason for optimism. Here, academics are simply calling them as they see them. Progressive interventions have, as Hirschman recognized, at least occasionally in fact led to perversity, futility, and jeopardy.[90] If that statement holds in the world of elected politics, there is no compelling reason to believe that it would not also hold in the judicial world.

A second explanation for the trend in liberal academia's usage of reactionary rhetoric stems from the nature of the academic enterprise. Professors often establish their own scholarly agendas at least partially in response to the generation of scholars who preceded them. If the generation of liberal scholars who came of age during the Warren Court and in its immediate wake heralded the Supreme Court's ability to refashion society, it is not especially surprising that subsequent liberal scholars would dedicate themselves to revising that received wisdom.[91] As the scholarly pendulum regarding the Supreme Court's efficacy began to swing in the opposite direction, reactionary rhetoric fairly cried out for usage. The perversity argument, in particular, seems almost irresistible for those possessing the

90. *See supra* text accompanying notes 16-38.

91. Lucas A. Powe, Jr., has written insightfully about the generational component of scholarly views on the Warren Court. *See* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 500-01 (2000). Some of my own scholarship, I hasten to add, can be understood as participating in an intergenerational dialogue. *See, e.g.*, Driver, *supra* note 89; Justin Driver, *The Constitutional Conservatism of the Warren Court*, 100 CALIF. L. REV. 1101 (2012); Justin Driver, *The Significance of the Frontier in American Constitutional Law*, 2011 SUP. CT. REV. 345 [hereinafter Driver, *Significance of the Frontier*].

sensibilities of a legal academic.[92] Although Hirschman did not portray the perversity thesis in these terms, his explanation of its mechanics helps to capture some of perversity's appeal for academic audiences: "This is, at first blush, a daring intellectual maneuver. The structure of the argument is admirably simple, whereas the claim being made is rather extreme."[93] Later, Hirschman described the perversity thesis as "[s]imple, intriguing, and devastating."[94] It seems difficult to imagine any three adjectives to describe an academic article that would more readily grab law review editors by their lapels.

A third explanation would attribute reactionary rhetoric's ascent among liberal law professors to the changing composition of the federal judiciary. By the early 1990s, it had become apparent that, as Professor Sunstein expressed the point, the Warren Court was dead.[95] And Sunstein, along with many other legal liberals, believed that the Warren Court—or even a simulacrum thereof—was not going to return anytime soon, if ever.[96] From the standpoint of one who is interested in achieving progressive substantive victories and who is also resigned to a conservative federal judiciary for the foreseeable future, it may make little sense to highlight the Supreme Court's ability to achieve its desired ends. Emboldening a conservative Supreme Court could end in misery for legal liberals, as it could encourage the institution to invalidate pieces of progressive legislation. In this context, reactionary rhetoric—by emphasizing the judiciary's difficulty in accomplishing its desired ends—becomes legal liberalism's best friend.[97] Such language, even when directed in retrospect at liberal landmark opinions, serves in the present day to warn the conservative judiciary to avoid becoming too ambitious with its plans for society. I take pains to re-emphasize here that the scholar need not be conscious of attempting to bring about a subdued conservative judiciary. I am not, in any way, making accusations of academic bad faith. It hardly seems extravagant to maintain, though, that

92. I arrived at this point due to a helpful exchange that I had with Professor Rachel Harmon long before this piece was conceived.

93. HIRSCHMAN, *supra* note 12, at 11.

94. *Id.* at 11-12.

95. Sunstein, *supra* note 69, at 205 ("The Warren Court is dead.").

96. *See, e.g.*, Cass R. Sunstein, *The Spirit of the Laws*, NEW REPUBLIC, Mar. 11, 1991, at 32, 36 ("From the standpoint of the 1990s, the [Warren] Court increasingly appears to be a historical anomaly, indeed an unprecedented exception to American political traditions: it was an adjudicative body willing to use the Constitution as an engine of social reform in the interest of civil rights and civil liberties.").

97. *Cf.* Driver, *Significance of the Frontier*, *supra* note 91, at 396-98 (suggesting the liberal academic veneration of precedent may be partially owed to strategic considerations).

constitutional law professors are engaged with the work of Supreme Court Justices and that the effects of this engagement may appear in legal scholarship. A related, more cynical assessment would suggest, perhaps with Hirschman,[98] that because conservatives control the Supreme Court, liberal law professors consciously hurl reactionary rhetoric in the hopes of forestalling a rightward lurch, using the only weapon they have at their disposal.

C. Implications

Whatever the precise explanations for reactionary rhetoric's rise among liberal law professors, its prevalence may produce undesirable consequences. As an initial matter, the ascent of reactionary rhetoric seems likely to instill an unduly anemic understanding of the Supreme Court's capacity to promote social change. In addition, the easy readiness of such language—and the accompanying narratives—could diminish Supreme Court Justices' willingness to issue opinions that protect marginalized groups, even if those opinions would in fact realize their intended effects.

The leading scholarly invocations of reactionary rhetoric should not necessarily be accepted as perfectly illustrating the phenomena that some academics assert. In the death penalty context, for example, Professor Carol Steiker has questioned the notion that the Supreme Court's intervention in *Furman* needed to have caused perversity, suggesting that the Court abandoned its efforts to eliminate capital punishment not because it lacked judicial capacity, but because it lacked judicial will.[99] In the abortion context, similarly, Dean Robert Post and Professor Reva Siegel have suggested *Roe* may not have inspired the backlash with which it is so often associated, as the conflict over abortion had begun simmering well before the opinion was issued, and did not boil over until well afterward.[100] With respect to *Brown*'s supposed futility, many scholars have criticized assessing the opinion's effectiveness primarily by measuring the amount of desegregation it immediately achieved because doing so ignores its motivational contributions, both to the civil rights movement and the landmark civil rights legislation of

---

98. *See* HIRSCHMAN, *supra* note 12, at 7 (noting conditions for liberal usage of reactionary rhetoric).

99. *See* Carol S. Steiker, *Capital Punishment and Contingency*, 125 HARV. L. REV. 760 (2012) (reviewing DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION (2010)).

100. *See* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007); *see also* Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028 (2011).

the 1960s.[101] With respect to *Engel*'s supposed futility, scholarship suggests that, while the opinion certainly did not eradicate every trace of school-sponsored prayer throughout the entire nation, many school jurisdictions in particular regions did in fact abolish the practice after the Court's opinion.[102] In both *Brown* and *Engel*, of course, assertions of judicial futility disregard the symbolic significance of Supreme Court opinions invalidating practices. And symbols matter.[103] Finally, regarding the amorphous, jeopardy-based assertions that judicial invalidations of legislation diminish democracy, it is imperative to recall that judicial opinions can serve to enhance democracy—at least if that term is not conflated with mere majority rule.[104]

But even if one were to concede that reactionary rhetoric accurately applied in some or all of these instances, it is important to appreciate that liberal law professors sometimes overemploy the tropes, invoking them when the situation does not warrant it. Although this occasion is not the time to catalogue a litany of misplaced incantations of reactionary rhetoric, allow me to detail one particularly telling example. Professor Jeffrey Rosen, writing only months before the Court decided *Romer v. Evans*,[105] invoked a classic perversity

---

101. *See, e.g.*, 3 ACKERMAN, *supra* note 11, at 229-56 (contending that *Brown* defined the terms of the debate for the landmark civil rights statutes of the 1960s); David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of* Brown v. Board of Education, 80 VA. L. REV. 151, 152-55 (1994) (contending *Brown* boosted the civil rights movement).

It may be tempting to conceive of Professor Bruce Ackerman's multivolume project *We the People* as part of the larger academic embrace of judicial skepticism. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998); 3 ACKERMAN, *supra* note 11. After all, a major ambition of the project is to motivate constitutional law scholars to abandon the traditional court-centric mode of analysis. But whatever its periodic affinities with judicial skepticism, Ackerman's project cannot be placed squarely in that camp—something that the *Civil Rights Revolution*'s depiction of *Brown* makes abundantly clear. Instead of portraying *Brown* as a relatively inconsequential step in the nation's march toward racial equality, Professor Ackerman imbues the opinion with tremendous significance. *See* 3 ACKERMAN, *supra* note 11, at 229-56. For an argument that Ackerman's account of *Brown* rather overstates its significance, see Randall L. Kennedy, *Ackerman's* Brown, 123 YALE L.J. 3064 (2014).

102. *See* FRANK J. SORAUF, THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE 297-99 (1976) (noting varying levels of compliance with *Engel* across the nation).

103. *See* OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 270 (1920) ("We live by symbols . . . .").

104. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.").

105. 517 U.S. 620 (1996).

argument, suggesting that a Supreme Court opinion invalidating Colorado's antigay referendum could retard the movement toward gay equality.[106] A loss in *Romer* should not overly concern advocates of gay equality, Rosen contended, because judicial victories have a penchant for turning into judicial defeats: "[A]s the pro-life movement can attest in the wake of *Roe v. Wade*, there are worse things to be endured than a dramatic defeat by the Supreme Court."[107] Further arguing against invalidating the referendum in *Romer* by appealing to jeopardy, Rosen contended such a decision would threaten democracy: "This transitional debate is unlikely to be resolved by judicial fiat, nor should it be. It should be resolved by reasoned cultural and political argument."[108] Even after the Court issued its decision in *Romer*, some commentary appearing in a (slightly) left-of-center popular publication appealed to the futility thesis, suggesting the opinion changed just about nothing. An article in *Newsweek* asserted: "[S]ymbolism only goes so far. It doesn't guarantee housing, medical care or a job—all of which can still be denied homosexuals simply because they're gay. In virtually every state and municipality, that kind of discrimination remains legal and is unaffected by *Romer*."[109] *Newsweek* even speculated that Coloradans might successfully reenact the invalidated referendum without violating *Romer*.[110] The more *Romer* changed things, the more they remained the same. Despite these cautions, however, the Court in *Romer* successfully invalidated Colorado's antigay referendum, and struck an early, important blow in the constitutional quest for equality on the basis of sexual orientation.

The misapplication of reactionary rhetoric in *Romer* suggests that its prevalence has the potential to distort the Supreme Court's constitutional jurisprudence in an ongoing fashion. Supreme Court Justices who thought Colorado's referendum was unconstitutional, but who also took reactionary rhetoric seriously in that case, may well have declined to join *Romer*. Those Justices could have reasoned the opinion would retard rather than advance the cause of gay equality, prove ineffectual in realizing its fundamental aims,

---

106. Jeffrey Rosen, *Disoriented*, NEW REPUBLIC, Oct. 23, 1995, at 24, 26.

107. *Id.* On the question of perversity, it is worth noting that there is no reason to believe Congress passed the Defense of Marriage of Act in response to *Romer*. Instead, the inciting incident for DOMA appears to have been the Hawaii Supreme Court's decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). *See* Jane S. Schacter, *The Other Same-Sex Marriage Debate*, 84 CHI.-KENT L. REV. 379, 386 (2009) (linking DOMA's passage to the Hawaii opinion).

108. Rosen, *supra* note 106, at 26.

109. David A. Kaplan & Daniel Klaidman, *A Battle, Not the War*, NEWSWEEK, June 3, 1996, at 24, 26.

110. *See id.* (suggesting a technique to sidestep *Romer*).

and/or threaten democratic norms. For Justices who have reactionary rhetoric in the forefront of their minds, the wisest course on divisive social questions will almost invariably be to stay their hands, at least until the matter becomes relatively noncontroversial.[111] That mentality would have deprived the nation of *West Virginia State Board of Education v. Barnette*, *Brown v. Board of Education*, *Miranda v. Arizona*, *Loving v. Virginia*, *Texas v. Johnson*, and many other luminous achievements in our constitutional universe.[112]

There seems little doubt that at least some of the Justices have internalized reactionary rhetoric in high-profile, potentially equality-enhancing contexts. To take only the most obvious example, one way of understanding the Supreme Court's recent refusal to invalidate all state prohibitions of same-sex marriage is that it stemmed from a desire on the part of some Justices to avoid a potentially perverse outcome.[113] Even in the unlikely event that the Justices themselves are inured to reactionary rhetoric, it is important to appreciate that such language may still shape–and perhaps misshape–constitutional doctrine. Advocates themselves may independently decline to file lawsuits seeking constitutional change because they fear any judicial victory would prove ephemeral. The mainstream gay rights legal community in 2009, for example, so feared filing a federal law suit seeking same-sex marriage that several organizations collectively released a press release called: "Make Change, Not Lawsuits."[114] This remarkable document can be understood as a paean to perversity, warning that "[m]ost lawsuits will likely set us all back."[115] Maybe. But it is also possible, of course, that the federal lawsuit filed by David Boies

---

111. *See* Alexander M. Bickel, *The Supreme Court 1960 Term–Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961). *But see* Gerald Gunther, *The Subtle Vices of the "Passive Virtues"–A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

112. Texas v. Johnson, 491 U.S. 397 (1989); Loving v. Virginia, 388 U.S. 1 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Brown v. Bd. of Educ., 347 U.S. 483 (1954); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). For an argument (with particular attention to *Brown* and *Loving*) that the Supreme Court does not merely interpret the Constitution to impose consensus values on American society, but instead can effectively issue egalitarian opinions on divisive social matters, see Driver, *supra* note 89, at 758-59.

113. *See* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013). Although the Court dodged *Hollingsworth* on standing grounds, the standing argument (for reasons too intricate to explain here) actually seems to have held more force in *United States v. Windsor*, 133 S. Ct. 2675 (2013), where the Court invalidated the Defense of Marriage Act. I discount, but do not wholly dismiss, the notion that jeopardy-based arguments drove the Court's non-decision in *Hollingsworth* because DOMA enjoyed a similar democratic imprimatur to the state prohibitions that exist throughout the country.

114. Press Release, ACLU et al., Make Change, Not Lawsuits 3 (May 27, 2009), http://www.aclu.org/files/pdfs/lgbt/make_change_20090527.pdf.

115. *Id.*

and Ted Olson in May 2009, over the vociferous objections of many within the gay rights community, played a meaningful role in elevating the same-sex marriage issue to new levels of salience among the public, including among federal judges.[116] Advocates who take an overly jaded approach to questions of judicial capacity may, thus, end up fulfilling their own prophecies.[117]

Some critics would surely respond that the Justices, human beings that they are, will lack the knowledge at the time of issuing a decision to assess whether an egalitarian opinion will in fact give rise to perversity, futility, or jeopardy. Given that uncertainty, a host of difficult questions arise. How do we want Justices to err when adjudicating the rights of marginalized citizens? When the Justices believe that a minority group's constitutional rights have been infringed, do we want the Supreme Court to risk overprotection (that is, issue opinions that do not achieve their intended effect) or to risk underprotection (that is, decline to issue opinions that would have achieved their intended effect) of those groups? Important as these questions are, they do not lend themselves to a systematic, universal answer precisely because they involve so many moving parts. Nevertheless, it is important to remember that any satisfying answer to those questions must account for the predominant inclinations of the current Justices and of those Justices who will win Supreme Court confirmation in the future. In my own view, it seems highly unlikely that Supreme Court Justices will soon become wide-eyed radicals who repeatedly issue equality-enhancing opinions that clash violently with overwhelming portions of society. Instead, it seems far more probable that Justices are temperamentally predisposed to make mistakes in the opposite direction, demonstrating excessive caution before bringing new groups into the constitutional fold. If that intuition is correct, Supreme Court Justices may be precisely the sorts of people who are already most receptive—and most vulnerable—to the wages of reactionary rhetoric.

CONCLUSION

During the last few decades, liberal law professors have increasingly invoked reactionary rhetoric in assessing the Supreme Court's capacity to promote change on divisive social issues. This essay does not call on left-leaning academics to purge such language from their vocabularies; some

116. *See* MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 208 (2013) (acknowledging the importance of lawsuits in raising awareness of same-sex marriage).

117. *See* HIRSCHMAN, *supra* note 12, at 78.

instances surely exist when using that language is warranted. Yet, the prevalence with which reactionary rhetoric appears in contemporary academic discourse suggests that law professors might do well to demonstrate greater selectivity in marshaling that language. The Supreme Court possesses significantly greater capacity to engender progressive social change than reactionary rhetoric's suffusion of academic discourse would suggest. If liberally-inclined Supreme Court Justices were to internalize academia's reactionary rhetoric, they may decline to issue opinions that would protect marginalized members of society—even if their sincere constitutional commitments indicated such opinions were appropriate, and even if those opinions would have ultimately proven successful in realizing their intended aims. The absence of those opinions could have catastrophic consequences for society's most vulnerable members.[118] In order to decrease the likelihood of these non-decisions, liberal law professors should contemplate expending greater intellectual energy on identifying instances that underscore the Supreme Court's ability to promote social change in highly contested arenas.[119] All of this is to insist, in other words, that liberal legal academia's zeal for reactionary rhetoric demands a reaction.

118. Here, I am exhibiting the hallmark liberal penchant for concentrating on the negative consequences of inaction. *See* HIRSCHMAN, *supra* note 12, at 152 ("Not that progressives would never advert to any problems. But they typically perceive the dangers of *inaction*, rather than those of action.").

119. For some of my own efforts on this front, see Driver, *supra* note 89, at 794-801; Justin Driver, *Constitutional Outliers*, 81 U. CHI. L. REV. (forthcoming 2014); Justin Driver, *Why Law Should Lead*, NEW REPUBLIC, Apr. 8, 2010, at 28-32, http://www.newrepublic.com/article/books-and-arts/why-law-should-lead.

